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10 Joinder of parties and causes of action

(1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.

(2) A plaintiff may join several causes of action in the same action.

(3) Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.

(4) In any action in which any causes of action or parties have been joined in accordance with this rule, the court at the conclusion of the trial shall give such judgment in favour of such of the parties as shall be entitled to relief or grant absolution from the instance, and shall make such order as to costs as shall to it seem to be just, provided that without limiting the discretion of the court in any way —

(a) the court may order that any plaintiff who is unsuccessful shall be liable to any other party, whether plaintiff or defendant, for any costs occasioned by his joining in the action as plaintiff;

(b) if judgment is given in favour of any defendant or if any defendant is absolved from the instance, the court may order:

(i) the plaintiff to pay such defendant's costs, or

(ii) the unsuccessful defendants to pay the costs of the successful defendant jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his *pro rata* share of the costs of the successful defendant, he shall be entitled to recover from the other unsuccessful defendants their *pro rata* share of such excess, and the court may further order that, if the successful defendant is unable to recover the whole or any part of his costs from the unsuccessful defendants, he shall be entitled to recover from the plaintiff such part of his costs as he cannot recover from the unsuccessful defendants;

(c) if judgment is given in favour of the plaintiff against more than one of the defendants, the court may order those defendants against whom it gives judgment to pay the plaintiff's costs jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful defendants pays more than his *pro rata* share of the costs of the plaintiff he shall be entitled to recover from the other unsuccessful defendants their *pro rata* share of such excess.

(5) Where there has been a joinder of causes of action or of parties, the court may on the application of any party at any time order that separate trials be held either in respect of some or all of the causes of action or some or all of the parties; and the court may on such application make such order as to it seems meet.

General. The provisions of this rule are applicable to applications by virtue of the provisions of rule 6(14).

The rule does not deal with, nor does its provisions affect, the common-law rules relating to the obligatory joinder of parties and, in this regard, non-joinder and misjoinder. The position under the common law is discussed in the notes that follow.

NON-JOINDER AND MISJOINDER

Non-joinder is the failure of a plaintiff to join a particular defendant with another whom he is suing, in circumstances in which the law requires that both should be sued together, or the failure by a plaintiff to join with himself as co-plaintiff another person whom the law requires should be joined when suing a particular defendant or defendants.

Misjoinder is the joining of several plaintiffs or defendants in one action in circumstances which the law does not sanction; ie the objection is that the wrong plaintiffs are suing or the wrong defendants are being sued. The general principles applicable to non-joinder are applicable to misjoinder as well.[1]

The general principles upon which a plea of non-joinder will be upheld are the same whether in respect of plaintiffs or defendants. If a necessary party who should be a co-plaintiff refuses to join the plaintiff(s) already in the field, the latter must join him as a co-defendant.[2]

Though it was said in *Morgan v Salisbury Municipality*[3] that the right of a defendant to demand the joinder of another party is limited to the cases of joint owners, joint contractors and partners, the question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court's order may affect the interests of third parties.[4] The test is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.[5] A mere financial interest is an indirect interest

[1] *Van der Lith v Alberts* 1944 TPD 17 at 22. See also *YB v SB* 2016 (1) SA 47 (WCC) at 53G–H.

[2] *Bezuidenhout v Goldberg* 1905 TS 127; *Loxton v Turner* 1912 CPD 176; *Amos Legane v Webb* 1917 TPD 650; *Dawson v Rossouw* 1918 CPD 490; *Berger v Law Union & Rock Insurance Co Ltd* 1927 CPD 157; *Hopewell NO v Kajee* 1942 NPD 126; *Mahomed v Lockhat Bros & Co Ltd* 1944 AD 230 at 240.

[3] 1935 AD 167 at 171; and see *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at 366H; *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) at 33A–B. See also, in general, the notes to s 42 sv 'Non-joinder and misjoinder' in Jones & Buckle *Civil Practice* vol I.

[4] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657. See also *Collin v Toffie* 1944 AD 456 at 464; *Tshandu v Swan* 1946 AD 10 at 24–5; *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) at 521; *Benson v Joelson* 1985 (3) SA 566 (C) at 569F–570B; *Segal v Segil* 1992 (3) SA 136 (C) at 141A–C; *New Garden Cities Incorporated Association Not for Gain v Adhikarie* 1998 (3) SA 626 (C) at 631C; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) at 226F–227F; *Davids v Van Straaten* 2005 (4) SA 468 (C) at 487B–C; *Sikutshwa v MEC for Social Development, Eastern Cape* 2009 (3) SA 47 (TkHC) at 56I–57A.

[5] *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 168–70. This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions. See, for example, *Brauer v Cape Liquor Licensing Board* 1953 (3) SA 752 (C) at 760; *Abrahamse v Cape Town City Council* 1953 (3) SA 855 (C); *Chase & Sons (Pty) Ltd v Tecklenburg* 1957 (3) SA 51 (T) at 54; *Anderson v Gordik Organisation* 1962 (2) SA 68 (N) at 71–2; *Vrystaatse Lewende Hawe Koöp Bpk v Oldewage* 1965 (4) SA 16 (O); *Ex parte Pearson and Hutton NNO* 1967 (1) SA 103 (E) at 107C; *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 415H; *Ex parte Moosa: In re Hassim v Harrop-Allin* 1974 (4) SA 412 (T) at 414B; *Wassung v Simmons* 1980 (4) SA 753 (N) at 759E–H; *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 804B–E; *Standard General Insurance Co Ltd v Gutman NO* 1981 (2) SA 426 (C) at 434D; *Agriplas (Pty) Ltd v Andrag & Sons (Pty) Ltd* 1981 (4) SA 873 (C) at 890A; *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C) at 863H–864B; *South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O) at 103I–104A; *Wistyn Enterprises (Pty) Ltd v Levi Strauss & Co* 1986 (4) SA 796 (T) at 802B–D and 804E; *Aquatur (Pty) Ltd v Sacks* 1989 (1) SA 56 (A) at 62A–E; *Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N); *Aucamp v Nel NO* 1991 (1) SA

and may not require joinder of a person having such interest.[1] The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea.[2] The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined.[3] The failure to join a necessary party may also be cured if an informal notice asking such party whether it wished to intervene is met by an unequivocal response that it would abide by the decision of the court.[4]

Divergent views have been expressed as to whether or not the court has a discretion once it is shown that a party is a necessary party in this sense. In *Marais v Pongola Sugar Milling Co Ltd*[5] it was held that once this has been shown, the court proceeds to determine the matter of joinder 'in accordance with the requirements of convenience and common sense'. This view was explicitly rejected in *Khumalo v Wilkins*,[6] it being held that 'no question of discretion nor

220 (O) at 234E; *Minister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 677 (Tk) at 679B; *Segal v Segil* 1992 (3) SA 136 (C) at 141D–E; *Ex parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1993 (2) SA 737 (Nm) at 741I–742D; *Nonkenge v Gwiji* 1993 (4) SA 393 (TkGD) at 395C–G; *Steel and Engineering Industries Federation v National Union of Metalworkers of South Africa* (1) 1993 (4) SA 190 (T) at 194D–G; *Congress of Traditional Leaders of South Africa v Minister of the Executive Council for Local Government and Housing, Eastern Cape Province, and Others* 1996 (2) SA 898 (TkS) at 904A–905D; *Jenkins v Government of the Republic of South Africa* 1996 (3) SA 1083 (TkSC) at 1088D–E; *Melamed NO v Munnikhuis* 1996 (4) SA 126 (W) at 132B–C; *Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk* 1997 (4) SA 635 (O) at 641J–642C; *Pick 'n Pay Stores Ltd v Teazers Comedy and Revue CC* 2000 (3) SA 645 (W) at 651C–D; *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK* 2002 (3) SA 653 (NC) at 663F–G; *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at 371A–373D; *Old Mutual Life Assurance Co (SA) Ltd v Swemmer* 2004 (5) SA 373 (SCA) at 381C–D; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) at 226F–227F; *Davids v Van Straaten* 2005 (4) SA 468 (C) at 487B–C; *Roeloffze NO v Bothma NO* 2007 (2) SA 257 (C) at 268H–269A; *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) at 529C–F; *Sikutshwa v MEC for Social Development, Eastern Cape* 2009 (3) SA 47 (TkHC) at 57B; *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ) at 278A–F; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA) at 359D; *Standard Bank of SA Ltd v Swartland Municipality* 2011 (5) SA 257 (SCA) at 259E–260A; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 317A; *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at 176H–I; *In re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) at 241H–I; *YB v SB* 2016 (1) SA 47 (WCC) at 53D–G.

[1] *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK* 2002 (3) SA 653 (NC) at 663E–H; *Standard Bank of South Africa Ltd v Swartland Municipality* 2010 (5) SA 479 (WCC) at 482F–483A.

[2] *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) at 176I–177A.

[3] *Kethel v Kethel's Estate* 1949 (3) SA 598 (A) at 610; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659; *City Deep Ltd v Silicosis Board* 1950 (1) SA 696 (A) at 709A; *Associated Manganese Mines of SA Ltd v Claassens* 1954 (3) SA 768 (A) at 776G; *Kock & Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 308 (A) at 318F; *Pillay v Harry* 1966 (1) SA 801 (D) at 804D; *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 265A; *Selborne Furniture Store (Pty) Ltd v Steyn NO* 1970 (3) SA 774 (A) at 779G and 1970 (4) SA 422 (A); *Toekies Butchery (Edms) Bpk v Stassen* 1974 (4) SA 771 (T) at 774; *Moleko v Minister of Plural Relations and Development* 1979 (1) SA 125 (T) at 130; *Aramugam v Johannesburg City Council* 1979 (1) SA 972 (W) at 974D; *Fisheries Development Corporation of SA Ltd v Jorgensen* 1979 (3) SA 1331 (W) at 1336H–1337C; *Smith v Conelect* 1987 (3) SA 689 (W) at 690E–691D; *Wholesale Provision Supplies CC v Exim International CC* 1995 (1) SA 150 (T) at 157H–158I; *Harding v Basson* 1995 (4) SA 499 (C) at 501H–I; *Chairman of the Board of the Sanlam Pensioenfonds (Kantoorpersoneel) v Registrar of Pension Funds* 2007 (3) SA 41 (T) at 49A; *University of Pretoria v South Africans for Abolition of Vivisection* 2007 (3) SA 395 (O) at 399I–J; *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) at 529E–F; *Sikutshwa v MEC for Social Development, Eastern Cape* 2009 (3) SA 47 (TkHC) at 56I–57A; *Standard Bank of South Africa Ltd v Swartland Municipality* 2010 (5) SA 479 (WCC) at 482F–H, 2011 (5) SA 257 (SCA) at 259F–G; *Fluxmans Incorporated v Lithos Corporation of South Africa (Pty) Ltd and Another (No 2)* 2015 (2) SA 322 (GJ) at 328F–G.

[4] *In re BOE Trust Ltd and Others NNO* 2013 (3) SA 236 (SCA) at 242A–C.

[5] 1961 (2) SA 698 (N) at 702F.

[6] 1972 (4) SA 470 (N) at 475A.

of convenience arises'. In the Transvaal a full court has held, without reference to the aforegoing cases, that the rule is not a mechanical or technical one which 'must be ritualistically applied', regardless of the circumstances of the case.[1] It is submitted that the preferable view is that the court has a discretion.[2]

Apart from the obligatory joinder of a party who has a direct and substantial interest in the subject matter of the litigation, a defendant may be joined under the common law on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity of actions.[3] Under the common law the court has the inherent power to order the joinder of further parties in an action which has already begun in order to ensure that persons interested in the subject matter of the dispute and whose rights may be affected by the judgment are before the court.[4] A court, including a court of appeal, is entitled *mero motu* to raise the question of non-joinder to safeguard the interests of third parties.[5] It is, however, important to distinguish between necessary joinder, where the failure to join a party amounted to a non-joinder, on the one hand, and joinder as a matter of convenience, where the joinder of the party was permissible and would not give rise to misjoinder, on the other hand. In cases of joinder of necessity a court could, even on appeal, *mero motu* raise the question of joinder to safeguard the interests of third parties and decline to hear a matter until such joinder had been effected or the court was satisfied that the third parties had consented to be bound by the judgment or waived their right to be joined.[6] A court of appeal has held[7] in circumstances where a party had not been joined and it would be inappropriate to make inferences as to its rights without giving such party an opportunity of being heard, that the appeal should be postponed in order to afford such party the opportunity of stating its position.

The fact that the two parties before court desire the case to proceed in the absence of a third party cannot relieve the court from inquiring into the question whether the order it is asked to make may affect the third party.[8]

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[1] *Wholesale Provision Supplies CC v Exim International CC* 1995 (1) SA 150 (T) at 158D–E. See also *Leibowitz v Schwartz* 1974 (2) SA 661 (T).

[2] See *Harding v Basson* 1995 (4) SA 499 (C) at 501H–I.

[3] *Ettling v Schiff* (1887) 5 SC 131 at 133; *Morgan v Salisbury Municipality* 1935 AD 167 at 171; *Van der Lith v Alberts* 1944 TPD 17 at 22; *Sheshe v Vereeniging Municipality* 1951 (3) SA 661 (A) at 666H; *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W) at 308H–309A; *Marais v Pongola Sugar Milling Co Ltd* 1961 (2) SA 698 (N) at 702D; *Vitorakis v Wolf* 1973 (3) SA 928 (W) at 932E; *Gemeenskapontwikkelingsraad v Williams (2)* 1977 (3) SA 955 (W) at 971H; *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd* 1980 (3) SA 415 (W) at 419E; *Ploughman NO v Pauw* 2006 (6) SA 334 (C) at 341E–F. The decision in *Fluxmans Incorporated v Lithos Corporation of South Afica (Pty) Ltd and Another (No 2)* 2015 (2) SA 322 (GJ) at 324C, that parties may only be joined as a matter of necessity and not convenience appears to be based on an incorrect reading of *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA).

[4] *SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd* 1951 (4) SA 167 (T) at 172F–H; *Harding v Basson* 1995 (4) SA 499 (C) at 501C; *Ploughman NO v Pauw* 2006 (6) SA 334 (C) at 341E–F.

[5] *Blake v Commissioner of Mines* 1903 TS 784; *Aaron v Johannesburg Municipality* 1904 TS 696 at 701; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 649 and 653; *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W) at 308; *Selborne Furniture Store (Pty) Ltd v Steyn NO* 1970 (3) SA 774 (A); *Koen v Goosen* 1971 (3) SA 501 (C) at 509G; *Toekies Butchery (Edms) Bpk v Stassen* 1974 (4) SA 771 (T) at 774G–H; *Ngcawashe v Terblanche* 1977 (3) SA 796 (A) at 806H; *Aramugam v Johannesburg City Council* 1979 (1) SA 972 (W) at 974D; *Esquire Electronics Ltd v Executive Video* 1986 (2) SA 576 (A) at 590J–591C; *Acar v Pierce and Other Like Applications* 1986 (2) SA 827 (W) at 831H; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 39I–40B; *Harding v Basson* 1995 (4) SA 499 (C) at 501C–I; *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at 366B–D.

[6] *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at 366B–D.

[7] *Pretorius v Slabbert* 2000 (4) SA 935 (SCA) at 939E.

[8] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 649; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 39I–40A.

The usual procedure by which to raise a question of joinder, whether it be misjoinder or non-joinder, is by way of plea in abatement,[1] though an exception is competent when the declaration discloses *ex facie* that another party should have been joined.[2] The objection on the ground of misjoinder should be taken *in limine* and if not then taken it cannot be ordinarily raised subsequently.[3] It is competent to raise misjoinder by way of exception where separate plaintiffs have instituted actions against the same defendant and where the actions are in no way related to each other.[4]

A notice of joinder, issued in terms of rule 10(3), is not a process as intended in s 15(1) of the Prescription Act 68 of 1969, and its service will not interrupt the running of prescription against the party in question.[5]

As to class actions, see *Children's Resource Centre Trust v Pioneer Food (Pty) Ltd*,[6] *Mukaddam v Pioneer Food (Pty) Ltd*,[7] and, in general, s 38 of the Constitution of the Republic of South Africa, 1996, and the notes thereto in Volume 1, Part A1.

Subrule (1): 'Any number of persons ... may join as plaintiffs in one action.' At common law a number of plaintiffs with distinct and separate causes of action were not in general permitted to join in one summons against the same defendant.[8] In *Vitorakis v Wolf*[9] it was pointed out that the subrule, which constitutes 'a radical departure from the common law', is so explicit that there is 'hardly anything left of the basic common-law approach to joinder and intervention'. However, in *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd*[10] it was held that as regards the joinder of defendants, the common law has been preserved notwithstanding subrule (3) of this rule. In pursuance of this judgment the question whether the common law has also been preserved in respect of the joinder of plaintiffs was raised, but not decided, in *Dreyer v Tuckers Land and Development Corporation (Pty) Ltd*.[11] In *Ex parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd*[12] it is said, in the context of an application for leave to intervene under rule 12, that the rules have widened the scope of the common-law principles but have not abolished them: if a matter cannot be resolved by recourse to the rules, resort can be made to common-law principles.

[1] *Peacock v Marley* 1934 AD 1; *Anderson v Gordik Organisation* 1960 (4) SA 244 (N) at 247D; *Skyline Hotel v Nickloes* 1973 (4) SA 170 (W) at 171H. As appears from the latter two cases, the objection may also be raised under rule 30.

[2] *Estate Vom Dorp v Scott* 1915 CPD 739; *Amos Legane v Webb* 1917 TPD 650; *Collin v Toffie* 1944 AD 456 at 467; *Anderson v Gordik Organisation* 1960 (4) SA 244 (N) at 247D; *Smith v Conelect* 1987 (3) SA 689 (W); *Royce Shoes (Pty) Ltd v McIndoe and Others NNO* 2000 (2) SA 514 (W) at 516D–517D. See also *Feldman NO v EMI Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA) at 4H–5A. In such instance the non-joinder should be specifically raised in the exception (*Feldman NO v EMI Music SA (Pty) Ltd; Feldman NO v EMI Music Publishing SA (Pty) Ltd* 2010 (1) SA 1 (SCA) at 5A).

[3] *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd* 1980 (3) SA 415 (W) at 419E.

[4] *Royce Shoes (Pty) Ltd v McIndoe and Others NNO* 2000 (2) SA 514 (W) at 518D–E.

[5] *Peter Taylor & Associates v Bell Estates (Pty) Ltd* 2014 (2) SA 312 (SCA), reversing *Bell Estates (Pty) Ltd v Renasa Insurance Co Ltd* 2012 (3) SA 296 (KZD) and criticizing *Waverley Blankets Ltd v Shoprite Checkers (Pty) Ltd* 2002 (4) SA 166 (C). See also *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C) and *Naidoo v Lane* 1997 (2) SA 913 (D).

[6] 2013 (2) SA 213 (SCA).

[7] 2013 (5) SA 89 (CC), reversing *Mukkaddam v Pioneer Food (Pty) Ltd* 2013 (2) SA 254 (SCA).

[8] *Estate De Beer v Botha* 1927 CPD 140. In *Sieff v Wilhelmina* 1911 OPD 24 it suggested that such joinder may be allowed if it is founded upon considerations of convenience, which is a matter for the court to decide.

[9] 1973 (3) SA 928 (W) at 930G–H.

[10] 1980 (3) SA 415 (W) at 419E.

[11] 1981 (1) SA 1219 (T) at 1226D–F.

[12] 1993 (2) SA 737 (Nm) at 741E–F.

'Or in the alternative.' The fact that the rule allows more than one plaintiff to sue a defendant in the alternative shows that a situation where the identity of the person who is entitled to the proceeds of the claim was uncertain, was contemplated.[1] The subrule therefore contemplates a joinder of a plaintiff who has a claim which is conditional on the failure of the claim of a co-plaintiff.[2] It does not contemplate a joinder in the alternative where judgment has already been given against the party with whom it is sought to join.[3]

'Depends upon the determination of substantially the same question of law or fact.' Joinder as plaintiffs under the subrule is permissible where each of the proposed plaintiffs has the right to bring a separate action against the defendant or defendants, provided that in such separate action substantially the same question of law or fact would arise as will arise in an action in which the proposed plaintiffs join.

The use of the word 'substantially' seems to indicate that the subrule is concerned with the essential features of the right to relief that the joint plaintiffs claim. The questions of law and fact must, 'in the main' or in their 'principal essentials' be essentially the same.[4] The fact that a defendant may have special defences that he can raise against certain of the plaintiffs is not a bar to the joinder of plaintiffs in one action.[5]

Subrule (2): 'May join several causes of action in the same action.' This subrule must be read with subrules (1) and (3). For example, where there is a joinder of defendants, it would not be permissible under subrule (3) to claim relief A, B and C from the first and second defendants and relief X and Y (having nothing to do with A, B and C) from the second defendant as well.

If the several causes of action sought to be joined in the same action are inconsistent, they must be pleaded in the alternative.[6]

Subrule (3): 'Several defendants may be sued in one action.' Under the common law a number of defendants may be joined on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity of actions.[7] In *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd*[8] it was held that as regards the joinder of defendants, the common law has been preserved notwithstanding the provisions of this subrule.[9] The subrule permits the joinder of parties in the same proceedings but it does not direct the hearing of evidence as between all defendants, so that the extent of liability is determined between the parties.[10]

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[1] *Sackstein v Du Preez* 2004 (2) SA 459 (SE) at 462C–D.
[2] *Kinekor Films (Pty) Ltd v Drive-in Home Movies* 1976 (2) SA 87 (O) at 94B.
[3] *Kinekor Films (Pty) Ltd v Drive-in Home Movies* 1976 (2) SA 87 (O) at 94C; *Sackstein v Du Preez* 2004 (2) SA 459 (SE) at 462C–D.
[4] *Dreyer v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (1) SA 1219 (T) at 1224F–1225B; *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) at 386D–E.
[5] *Dreyer v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (1) SA 1219 (T) at 1225B.
[6] See, for example, *Middeldorf v Zipper NO* 1947 (1) SA 545 (SR); *United Dominions Corporation (Rhodesia) Ltd v Van Eyssen* 1961 (1) SA 53 (SR); *Pillay v Pillay* 1962 (3) SA 867 (D) at 870C; *Credit Corporation of SA Ltd v Brown* 1970 (1) SA 18 (C); *Barclays National Bank Ltd v Pretorius* 1978 (3) SA 885 (O); *Marney v Watson* 1978 (4) SA 140 (C) at 144H.
[7] *Ettling v Schiff* (1887) 5 SC 131 at 133; *Morgan v Salisbury Municipality* 1935 AD 167 at 171; *Van der Lith v Alberts* 1944 TPD 17 at 22; *Sheshe v Vereeniging Municipality* 1951 (3) SA 661 (A) at 666H; *Roberts Construction Co Ltd v Verhoef* 1952 (2) SA 300 (W) at 308–9; *Marais v Pongola Sugar Milling Co Ltd* 1961 (2) SA 698 (N) at 702D; *Vitorakis v Wolf* 1973 (3) SA 928 (W) at 932E; *Gemeenskapontwikkelingsraad v Williams (2)* 1977 (3) SA 955 (W) at 971H; *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd* 1980 (3) SA 415 (W) at 419E; *Ploughman NO v Pauw* 2006 (6) SA 334 (C) at 341E–F.
[8] 1980 (3) SA 415 (W) at 419E.
[9] See also the notes to subrule (1) sv 'Any number of persons ... may join as plaintiffs in one action' above.
[10] *K & S Dry Cleaning Equipment (Pty) Ltd v South African Eagle Insurance Co Ltd* 1998 (4) SA 456 (W) at 462C–D.

'Substantially the same question of law or fact.' This means that the questions of law and fact must 'in the main' or in their 'principal essentials' be 'essentially' the same.[1]

Under the subrule a bank may join the drawer and the payee of a cheque where the bank is not in a position to know which of the drawer or the payee has been unjustifiably enriched at the expense of the banker as a result of the mistaken payment to the payee of the amount of a cheque after the drawer had stopped payment.[2]

It is in principle undesirable that two or more persons, whether natural or juristic, should be joined in an application for their sequestration or liquidation, as the case may be, as respondents in one application. Such joinder cannot, therefore, be allowed, except possibly by the consent of all interested persons, or in a case where there is a complete identity of interests.[3]

Subrule (4): 'Grant absolution from the instance.' On the grant of absolution in a case with multiple defendants, see the notes to rule 39(6) sv 'Apply for absolution from the instance' below.

'Without limiting the discretion of the court.' This subrule makes it clear that its provisions are not designed to limit in any way the overall discretion which a court has in the matter of costs.[4] The court's discretion extends to its decision whether or not to make a special order as to costs under paragraphs *(a)* and *(b)* of the subrule.[5]

Subrule (4)*(b)*(i): 'The plaintiff to pay such defendant's costs.' If there are more plaintiffs than one, they may be ordered to pay the costs of the successful defendant jointly and severally.[6]

Subrule (4)*(b)*(ii): 'The unsuccesful defendants to pay the costs of the successful defendant.' The principle embodied in this subrule has long been recognized by our courts.[7] In exercising its discretion under the subrule the court should have regard both to the reasonableness of the plaintiff in having joined the successful defendant in the action and to the reasonableness, in the light of the particular circumstances of the case, of directing the unsuccessful defendant to pay the whole, or any portion, of the successful defendant's costs.[8] It is submitted that in the event of the court directing more than one unsuccessful defendant to pay the costs of the successful defendant jointly and severally, the one paying the other(s) to be absolved, the court should, as a matter of course, make an order that if one of the unsuccessful defendants pays more than his pro rata share of the costs of the successful defendant, the unsuccessful defendant making payment shall be entitled to recover from the other unsuccessful defendants their pro rata share of such excess.

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[1] *Dreyer v Tuckers Land and Development Corporation (Pty) Ltd* 1981 (1) SA 1219 (T) at 1224F–1225B; *Dendy v University of the Witwatersrand* 2005 (5) SA 357 (W) at 386D–E.

[2] *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A) at 295H.

[3] *Breetveld v Van Zyl* 1972 (1) SA 304 (T); *Ferela (Pty) Ltd v Craigie* 1980 (3) SA 167 (W); *Main Industries (Pty) Ltd v Serfontein* 1991 (2) SA 604 (N); *Caltex Oil (SA) (Pty) Ltd v Govender's Fuel Distributors (Pty) Ltd* 1996 (2) SA 552 (N).

[4] *Minister of Agriculture v Estate Randeree* 1979 (1) SA 145 (A) at 160E.

[5] *Parity Insurance Co Ltd v Van den Bergh* 1966 (4) SA 463 (A) at 481G.

[6] *Minister of Agriculture v Estate Randeree* 1979 (1) SA 145 (A) at 160D–G.

[7] See *Johnson v SAR & H and Pietermaritzburg Corporation* 1933 NPD 762; *Ophanides v Stratton* 1953 (1) SA 152 (SR); *Olivier v Botha* 1960 (1) SA 678 (O) at 687F; *Felton v Lewis* 1960 (2) SA 383 (SR) at 394B; *Parity Insurance Co Ltd v Van den Bergh* 1966 (4) SA 463 (A) at 481C; *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd* 1980 (3) SA 415 (W) at 418G; *Faiga v Body Corporate of Dumbarton Oaks* 1997 (2) SA 651 (W) at 670A–F; *Harrington NO v Transnet Ltd t/a Metrorail* 2010 (2) SA 479 (SCA) at 496G–497B.

[8] *Parity Insurance Co Ltd v Van den Bergh* 1966 (4) SA 463 (A) at 481G; *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd* 1980 (3) SA 415 (W) at 418H; *Harrington NO v Transnet Ltd t/a Metrorail* 2010 (2) SA 479 (SCA) at 496H–497B.

Subrule (4)(c): 'To pay the plaintiff's costs jointly and severally.' In *Standard Credit Corporation Ltd v Strydom*,[1] where actions had been consolidated by consent, the court in the exercise of its discretion in terms of this subrule ordered the unsuccessful defendants to pay the costs of the successful plaintiff jointly and severally. It is submitted that if the court orders more than one of the defendants against whom it gives judgment to pay the plaintiff's costs jointly and severally, the one paying the other(s) to be absolved, the court should, as a matter of course, order that if one of the unsuccessful defendants pays more than his pro rata share of the costs of the plaintiff, such defendant shall be entitled to recover from the other unsuccessful defendants their pro rata share of such excess.

Subrule (5): 'Order that separate trials be held.' This subrule confers a discretion, the exercise of which will vary from case to case and depend in a large measure on the circumstances of the case and the matter in respect of which a discretion is to be judicially exercised.[2] Factors that may be taken into consideration in the exercise of the discretion include:[3]

(i) the interests of the applicant in seeking to enforce his remedy;
(ii) the prejudice to the opposite party if a separation of trials is ordered;
(iii) the possibility of lengthy delay if the separation is refused, compared with the probable minimal delay if a separation is ordered;
(iv) the question of costs, including the salvage of costs already incurred in the matter, as well as the additional costs that may be occasioned by a separation of trials;
(v) the conduct of the parties, including the bona fides of the applicant;
(vi) the balance of convenience (although this may already be covered by other items in the preceding catalogue).

[1] 1991 (3) SA 644 (W) at 653I–654A and 654F.
[2] *De Polo v Dreyer* 1990 (2) SA 290 (W) at 295H.
[3] *De Polo v Dreyer* 1990 (2) SA 290 (W) at 295H–296B. See also *Caltex Oil (SA) (Pty) Ltd v Govender's Fuel Distributors (Pty) Ltd* 1996 (2) SA 552 (N) at 556H–557D.

AMALGAMATED ENGINEERING UNION v MINISTER OF LABOUR 1949 (3) SA 637 (A)

Citation	1949 (3) SA 637 (A)
Court	Appellate Division
Judge	Watermeyer CJ, Centlivres JA, Schreiner JA, Van Den Heever JA and Fagan AJA
Heard	May 17, 1949
Judgment	June 21, 1949
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Practice - Joinder of parties - When required - Effect of non-intervention - Necessary parties - Master and servant - Industrial Conciliation Act, 1937 - Application for order on Minister to appoint arbitrator - Other party to dispute should be joined - Appeal - Appeal Court taking point of non-joinder *mero motu* - Form of order.

Headnote : Kopnota

The fact that, when there are two parties before the Court, both of them desire it to deal with an application asking it to make a certain order, cannot relieve the Court from inquiring into the question whether the order it is asked to make may affect a third party not before the Court and, if so, whether the Court should make the order without having the third party before it.

If a party has a direct and substantial interest in any order the Court might make in proceedings or if such order could not be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the Court is satisfied that he has waived his right to be joined.

Mere non-intervention by an interested party who has knowledge of the proceedings does not make a judgment in such proceedings binding on him as *res judicata*, nor can such non-intervention after receipt of a notice short of citation be treated as a representation that the party concerned will submit to and be bound by any judgment that may be given, so as to set up an estoppel.

At appellant's request respondent had appointed an arbitrator to consider and determine a dispute in regard to working conditions between appellant and the D. City Council, but subsequently on representations from the Council

'nullified' the appointment on the ground that the dispute was not one to which compulsory arbitration could be applied under section 46 of the Industrial Conciliation Act. Appellant unsuccessfully applied to a Provincial Division for an order declaring that the appointment of the arbitrator was valid or alternatively ordering respondent to appoint an arbitrator. Copies of the papers in the application were sent to the Town Clerk, who subsequently informed the respondent that he did not propose to recommend to the Council that it should intervene. On appeal from the decision of the Provincial Division, the Appellate Division *mero motu* raised the question whether it was competent to make an order without joining the Council, and both parties contended that the Council was not a necessary party and desired the Court to hear argument and give judgment without having the Council before it as a party.

Held, that the Council should have been cited as a party to the proceedings.
Held, further, that the non-intervention of the Council after notification of the proceedings did not entitle the Court to decide the issue in the expectation that the Council would consider itself to be bound or would in fact or law be bound by the judgment.
Held, therefore, that final judgment on the merits of the appeal should stand over to enable the Council to file with the Court through its own attorneys a consent to be bound by the judgment.

Case Information

Appeal from a decision in the Natal Provincial Division [BROOME, J., and DE WET, J.]. See 1948 (4), S.A.L.R. 876. The facts appear from the judgment of FAGAN, A.J.A.

G. Findlay, K.C., (with him *E. R. Browne)*, for the appellant: As to the kind of representation that characterises the position of appellant, which involves interpretation of the phrase in sec. 35, Act 36 of 1937, 'sufficiently representative of the employees involved in the dispute', the representation for which the Act has regard is merely such influence and spokesmanship as will make conciliation with the representative effective to prevent industrial unrest and not legal representation as of principal and agent: the word 'sufficiently' rules out legal agency; it is not absolute representation in the legal sense in which the voice of the agent is, at law the voice of the principal but statutory representation analogous to that of members of Parliament or of town councillors who represent constituencies or the Society of Advocates representing the Bar, in none of which there is legal agency. Such statutory industrial representatives have legal procedural rights under the Act; appellant can therefore require the statutory procedure in which it functions to be carried through; see *Bakers, Ltd v National Union of Operative Biscuit Makers & Bakers of SA and Presmeg* (1946 NPD 10); *S.A. Municipal Employees Association*

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v. *City of Cape Town and Another* (1933 CPD 585 at p. 591). It is submitted that *City Council of Durban v Minister of Labour and Another* (1948 (1), S.A.L.R. 220), was incorrectly decided on the second issue relating to the 'Provident Fund'; the learned Judge overlooked the fact that the dispute was being defined in sec. 46 not by reference to the statutory spokesman or 'formal' parties, involved in it but by the actual parties materially or substantially involved in it; see *S.A. Association of Municipal Employees v Schoeman, N.O. and Others* (1949 (2), S.A.L.R. 287). Disputes can be identified in three ways, *(a)* by their content, e.g. as to conditions of employment, as to wages, etc., *(b)* by the parties involved (1) formally, i.e. the 'A.E.U.' dispute, the 'B.W.I.U.' dispute or (2) substantially, i.e. the essential-service men's dispute, the Firemen's dispute, etc.; where the aim of sec. 46 is to prescribe the parties who may appear as spokesmen, as in sec. 35, it refers to the dispute between the 'formal' parties; where the aim is to make special provision for essential municipal services, it must identify the dispute by referring to the parties substantially interested in it. For the purposes of sec. 46 it is quite irrelevant who happens to be conducting the dispute as spokesman; it is not the formal disputant, but the substantial disputant, whose relationship constitutes an essential service; it is necessary therefore to refer to the persons substantially involved; to do so, however, does not rule out the formal representation; it merely identifies the particular kind of dispute more directly. The use of the words 'the parties to the Council or the employees and employers represented on the Board' in sec. 45 (1) suggests that, whoever might be such 'parties', the intention of the Legislature was that, except in the case of services referred to in sec. 46, the dispute might, by agreement, be submitted to arbitration and, where the dispute related to the case of services referred to in sec. 46, the dispute must go to arbitration. The aim of sec. 46 must be gathered from its place in the Act as a whole; compulsory arbitration appears to have a two-fold purpose, viz., *(a)* it gives the parties concerned a compensatory privilege in view of the deprivation of their right to strike or to lock-out, and *(b)* it gives an additional safety valve against illegal striking and locking-out and so reinforces the prohibition. In saying, in *Town Council of Benoni v*

Minister of Labour and Another (1930 TPD 324 at p. 328), that compulsory arbitration was an inroad upon civil

rights and must therefore be restrictively construed, TINDALL, A.J.P. (as he then was), overlooked its character as a compensatory privilege and as a statutory safety valve; compulsory arbitration is provided not because the parties choose to be represented in a certain way but because vital services in cities must be kept going. The contrary view would lead to gross absurdities, e.g. a local authority would lose its right to insist on compulsory arbitration in order to change conditions of service if the employees insisted on being represented (as they have a right to be) by a trade union. Similarly, the essential-service men would lose their right if the Council insisted on being represented by an Association of Municipalities. Compulsory arbitration involves reciprocal rights, intended to be enforced from both sides to relieve an *impasse*. Further. it would be grossly inconvenient if the procedure up to the board stage, lawfully taken by a trade union, then became abortive and if the individual employee then had to commence *de novo;* that would be contrary to the policy of the Act which encourages and protects trade unionism and collective, as against private, bargaining; see secs. 66. 78, 79, 80. It is more important to conciliate unions, the inevitable instruments of upheaval, than individuals; it is futile to conciliate the wrong people. The person conciliated should be 'sufficiently' represented in terms of sec. 35. Sec. 46 (10) and its history shows that the Legislature intended trade unions to conduct compulsory arbitrations for essential services men; see sec. 11, Act 11 of 1924, *Town Council of Benoni* case *(supra);* hence sec. 9, Act 24 of 1930 and sec. 46 (10), Act 36 of 1937. Any alternative view of sec. 46 (10) presupposes that although the Union had some say as to the scope of the arbitration it would ordinarily disqualify itself from representing any of its members. The *Town Council of Benoni* case *(supra)* indicated the inconvenient position where two procedures availed for what was one dispute and the amendments introduced by the subsequent legislation *(supra)* gave the Union as statutory representative in both voluntary and compulsory procedures the option of amalgamating procedure; the *Town Council of Benoni* case *(supra)* virtually approves the *locus standi* of the Union, even though it is not substantially concerned on its own behalf and is not registered under the Act. The 1937 Act has the *Town Council of Benoni* case *(supra)* in mind because it adopts the suggestion of TINDALL, A.J.P., as to 'engaged'. The case does not make any point of registration or non-registration

and strictly the point is irrelevant. It is significant that in sec. 49 mention of the formal disputants does not oust the substantial disputants, the two classes being lumped together; it is not necessary or reasonable to suppose that this is the case in sec. 46. *Durban Municipal Employees Society v Durban Corporation* (1941 NPD 184), illustrates, what is implied by sec. 35, that the real dispute and the formulated dispute are separable; similarly the parties to the real dispute need not be the parties to the formulation and conduct of it. *O.K. Bazaars* (1929) *Ltd v Madeley, N.O. and Another* (1943 TPD 392), is distinguishable; there may be good grounds for confining the 'freezing provisions' of sec. 64 to the actual worker or the actual council; in any event, so to do, does not oust the trade union which can still act under sec. 35. The detailed reasoning of the learned Judge in the *City Council of Durban* case *(supra)* is not supportable. As to the suggestion of the Court *a quo* that some sort of *onus* is on a trades union, which makes application for a conciliation board, to show from the papers that it, the union, is not on a frolic of its own, unless the trades union is able to satisfy the Minister that it is representative of employees involved in the dispute, the Minister would decline to appoint a conciliation board. *Cf. SA Association of Municipal Employees v Minister of Labour* (1948 (1), S.A.L.R. at p. 537). It is suggested that the Minister, having appointed the conciliation board must show that, in fact, the present dispute is not one with the Durban City Council; see judgment of HOEXTER, J.P., in *S.A. Association of Municipal Employees v Schoeman, N.O. and Others (supra).*

J. J. L. Sisson, K.C. (with him *A. S. Hathorn)*, for the respondent: The word 'employees' in sec. 46, Act 36 of 1937, means employees as defined in sec. 1 and

cannot be extended to include trade unions. For appellant to succeed it must show that the parties disputant were the local authority on the one hand and the employees on the other; in fact the parties disputant were the local authority on the one hand and appellant on the other; if in the circumstances of the present case appellant was not a party disputant, it would be impossible to conceive circumstances in which a trade union could ever be such a party, whereas the Act throughout contemplates (except under sec. 46) that trade unions, as opposed to employees, may be such parties. If appellant, which was sufficiently representative of the employees was not such a party, it could not have asked for a conciliation board, since only

parties disputant may do so; if it was such a party, it could not validly ask for a board since such a board would be a *brutum fulmen*, as it would have no right under sec. 46 to consider a dispute to which a trade union was a party. As to appellant's contention that the change of language in sec. 46 (1) from that used in sec. 45 (1) was made without any reason or purpose, it is submitted that sec. 45 (1) removes the essential services out of sec. 45 altogether, while sec. 46 (1) makes completely fresh provisions regarding essential services disputes; the meaning of sec. 46 (1) must be ascertained from that sub-section itself; sec. 46 (6) does not, as contended by appellant, incorporate sec. 45 (1); nor, as contended further by appellant, can the word 'employees' in sec. 46 (1) be equated with words such as 'employees represented on the Board who are engaged in essential services' Words in a Statute must be given their natural meaning, unless this leads to an absurdity so glaring that it could never have been contemplated by the Legislature; see *Shenker v The Master* (1936 AD 136 at pp. 142 - 3). The Court is not concerned with the propriety of the legislation or the policy of the Legislature where the words of the Statute are clear; see *Builders, Ltd v Union Government* (1928 AD 46 at p. 56). *A fortiori* is this the case when the words in question are actually defined in the Statute; see *Union Government v de Jager* (1946 AD 235). A provision similar to that in sec. 46 providing for compulsory arbitration has been restrictively construed; see *Benoni Town Council v Minister of Labour* (1930 TPD 324 at pp. 327 - 8, judgment of TINDALL, A.J.P., concurred in (as *per addenda et corrigenda* to Juta's Report) by GREENBERG, J.) As to the words 'if the Minister deems the applicant to be sufficiently representative of the said employees involved in the dispute' in sec. 35 (1), the words 'sufficiently representative' as opposed to 'a sufficient representative', do not connote any sort of authority, even of the kind held by Members of Parliament, from the 'said employees', the words being used in the sense that a particular person is representative of the class or race, or society, or religion to which he belongs. In any event the deeming by the Minister can have no effect as a definition and in particular as to the meaning of sec. 46, but is solely intended for the purpose of getting the board established; the words in question are only applicable when there are more than one party disputant on the same side. The section distinguishes between parties 'represented', i.e. the

'said parties' and parties both 'represented' and 'involved', the last mentioned word connoting parties consisting of employees actively concerned in the dispute, the effect of the section being thus that a party who applies must be 'sufficiently representative' of other parties who are personally and directly concerned; appellant has no 'procedural rights' in the present case whatever it may have been in other cases; the judgment appealed against is supported by O.K. Bazaars (1929) Ltd v Madeley, N.O. and Another (1943 TPD 392 at pp. 396, 401 - 3) and by City Council of Durban v Minister of Labour and Another (1948 (1), S.A.L.R. 220); the Benoni Town Council case (supra) carries the matter no further as far as the question of *locus standi* or representation is concerned because there the legislation was different. It follows that as the dispute was not between the Durban City Council and its employees there could not be compulsory arbitration under sec. 46. Alternatively, if, contrary to the immediately foregoing submission, the employees were in fact a party disputant and that they were entitled to be represented by appellant, either in the establishment of the board or at it proceedings, then it could only be upon a proper legal mandate,

since that is the method of representation recognised in law; see O.K. Bazaars' case (supra, at pp. 402 - 3). Again alternatively, if there could validly be such representation and if it could consist in the degree of representation contended for by appellant, then the record does not disclose even that degree of representation. As to S.A. Association of Municipal Employees v Schoeman, N.O. and Others (1949 (2), S.A.L.R. 287), the legal issue as to the competency of representation of the employees by a registered trade union was not raised in that case and it is distinguishable on the facts. The Act nowhere makes a distinction between 'formal parties' and 'substantial parties' as contended for by appellant. The fallacy of the attempted reduction to absurdity by appellant is the false assumption that representation could be by a trade union or employers' association. As to appellant's contention that it would be grossly inconvenient if the procedure up to the board stage, lawfully taken by a trade union, could then become abortive, the fallacy here is the false assumption that the trade union can validly take the procedure up to the board stage. The only effect of sec. 46 (10) is to provide for an expansion of the services specified in sec. 46 (1); it in no way brings trade unions into the proceedings; the sub-section moreover emphasises

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the antithesis between trade unions and employees. The reason for the 'lumping together' in sec. 49 is to cover cases under sec. 45 and 46. If *Durban Municipal Employees Society v Durban Corporation* (1941 NPD 184) is an authority for the contention of appellant advanced in regard to it, it was wrongly decided.

Findlay, K.C., in reply.

Cur. adv. vult.

Postea (June 21st).

Judgment

FAGAN, A.J.A.: This matter has come before us by way of an appeal from a judgment given in the Natal Provincial Division. In the proceedings in that Division the present appellant was the applicant, and the Minister of Labour was cited as the respondent. The applicant (the present appellant) prayed for an order in the following terms:

> 'That the appointment of W. H. Windsor by the respondent on 9th December, 1947, to settle and determine the dispute between the Amalgamated Engineering Union and the Durban City Council in respect of the latter's failure to grant to engineering artisans and other members of the Amalgamated Engineering Union employed in the Transport Department of the Durban City Council a five-day working week, be and the same is hereby declared to be a valid appointment and that the purported withdrawal thereof by the respondent dated 23rd January, 1948, is of no force or effect.
>
> Alternatively: That the respondent be and he is hereby ordered, in terms of sec. 46 of Act 36 of 1937, to appoint an arbitrator to settle and determine the dispute between the Amalgamated Engineering Union and the Durban City Council in respect of the latter's failure to grant to engineering artisans and other members of the Amalgamated Engineering Union employed in the Transport Department of the Durban City Council a five-day working week.'

The application was supported by an affidavit made by the secretary of the Natal District Committee of the Amalgamated Engineering Union, a trade union registered in terms of sec. 4 of Act 36 of 1937 (the Industrial Conciliation Act, 1937). It appears from the affidavit that in December, 1946, the Union had applied to the Minister, in the form prescribed by the Regulations to the said Act,

> 'for the appointment of a Conciliation Board for the consideration and determination of a dispute which exists in the Transport Department of the Durban City Council in respect of its failure to grant to engineering artisans, etc., members of the A.E.U. employed in the Transport Department a five-day working week.'

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The application to the Minister stated further:

> '*(a)* The number of employees who are members of the trade union is 225;

(b) the number of employees of the class(es) catered for by the Union involved in the dispute is 270 of whom 225 are members.'

The Minister complied with the application and appointed a conciliation board consisting of four representatives of each of the two parties to the dispute, to wit, the Union and the City Council. The board met in August, 1947, and discussed the matter, but on the 22nd October wrote to the Minister to:

'report in terms of sec. 46 of the Act, that: *(a)* We are satisfied that further deliberation will not result in a settlement of the dispute; *(b)* We agree that the dispute shall be referred to a single arbitrator for decision; *(c)* We agree that the arbitrator be appointed by the Minister.'

In December, 1947, the Minister appointed Mr. W. H. Windsor as arbitrator to determine the dispute. The arbitrator sat on the 7th January, 1948, but on the point being taken that his appointment was invalid, he adjourned the inquiry until the 28th of that month. On the 23rd January, the Divisional Inspector of Labour wrote to the attorneys of the City Council:

'Arbitration: Amalgamated Engineering Union and Durban Corporation re five-day week - With reference to your letter of the 7th January, 1948, I have to advise you that in view of the recent judgment in the case of the *City Council of Durban v the Minister of Labour and the Durban Indian Municipal Employees' Society* in which it was ruled that under sec. 46 (1) of the Industrial Conciliation Act compulsory arbitration could only be applied to any dispute between a local authority and its employees, the Minister has nullified the appointment of Mr. W. H. Windsor as arbitrator in this matter.'

The Divisional Inspector sent a copy of the letter to the Union's attorneys. The case referred to in the letter is reported in 1948 (1), S.A.L.R. 220.

The applicant Union admitted that the employees involved in the dispute are engaged in the performance of work connected with passenger transportation. This amounts to an admission that sec. 46 of the Act is applicable to a dispute between those employees and the local authority.

The Union submitted that the Minister, having appointed Mr. Windsor, as aforesaid, was not entitled in law to nullify the appointment; alternatively that, if the purported nullification was valid, then the Minister was bound, in terms of sec. 46 of the Act, to appoint an arbitrator to settle the dispute and that he had failed in that duty.

A replying affidavit by the Minister showed that the objection

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to the validity of Mr. Windsor's appointment, when he sat as arbitrator on the 7th January, was taken on behalf of the Durban Corporation, whose attorneys on the same day wrote to the Union's attorneys (sending a copy of the letter to the Assistant Government Attorney) to draw attention to the decision of the Natal Court and to state that as soon as they had the requisite authority from the Corporation they would set the legal machinery in motion and would ask for costs against the Minister and the Union. The Minister admitted the facts set out in the Union's affidavit as I have shortly indicated them above, but disputed their legal submissions. He said that when Mr. Windsor was appointed as arbitrator, the Department of Labour had not yet received a copy of the Natal judgment of 31st October, 1947, and was unaware that the Court had held that sec. 46 of the Act did not apply to a dispute between a local authority and a trade union. A single arbitrator had been appointed under sec. 46 of the Act by agreement between the parties to the dispute on the assumption that the parties were obliged to go to arbitration in terms of the said section, the employees involved in the dispute being engaged in essential services. When, however, the Department were advised of the intention of the Durban City Council to apply to Court to have the arbitrator's appointment set aside as *ultra vires*, the Minister, in order to avoid unnecessary legal proceedings, approved, in the light of the abovementioned judgment, of Mr. Windsor's appointment being regarded as a nullity. The Minister submitted that in the light of the said judgment the appointment of Mr. Windsor was a nullity and that it is not competent to appoint an arbitrator in terms of sec. 46 of the Act to settle the dispute between the Durban City Council and the applicant Union. He therefore prayed that the application should be dismissed with costs.

BROOME, J., who heard the application in the Natal Provincial Division together with DE WET, J., and who delivered the judgment (in which DE WET, J., concurred) on the 26th October, 1948, considered himself bound by the earlier judgment of that Division referred to in the correspondence mentioned above, which had decided that the compulsory arbitration machinery of sec. 46 (1) could only be applied to a dispute between a local authority and its employees and not to a dispute between a local authority and a trade union. He dealt, however, with the contention, put forward by counsel for the applicant, that the present case was distinguishable from the earlier one on the ground that the dispute in this

case was in substance a dispute between the Durban City Council and individual members of applicant Union who were employees of the Council engaged upon essential services, and that the applicant Union was acting throughout as agent and not as principal. The learned Judge said:

> 'If the papers before us establish this proposition I have no doubt that the case would not be covered by the judgment in the *Durban City Council* case *supra*, for I do not regard the fact that it was the applicant Union that applied for a conciliation board and instituted the present proceedings as establishing conclusively that the dispute in question was one between the Durban City Council and the Union and not one between the Durban City Council and its employees. It is therefore necessary to examine the documents in order to ascertain who in truth are the parties to the dispute.'

His Lordship then discussed the affidavits and annexures in their bearing on this point, and came to the conclusion that:

> 'There is not sufficient material before me to enable me to come to a definite decision on the question in issue. The indications are that the dispute is one between the applicant Union and the Durban City Council but I am not satisfied that all relevant information is before me. If applicant Union desires to distinguish the *Durban City Council* case it must lay before the Court facts which will establish its contention that the dispute is in truth one between the Durban City Council and its employees. This applicant has failed to do. The application is therefore dismissed with costs.'

The applicant noted an appeal to this Court, and the matter was set down to be argued on the 17th May of this year. On the 13th May the Assistant Registrar of this Court informed the appellant's and the respondent's attorneys, first by telephone and then by confirming letter:

> 'That when the appeal in this matter is argued the Court will raise the question whether it is competent to make an order without joining the Durban Corporation, which appears to be vitally interested in the result of these proceedings.'

The respondent's attorneys replied, on the 14th May, to the effect that they had received the following telegram from the Assistant Government Attorney, Durban:

> 'My records disclose Durban Corporation served copy of application papers and notice of hearing before Provincial Division. Letter from Corporation Attorneys shows Corporation considered advisability intervening.'

The appellant's attorneys wrote on the 16th May to say:

> 'that a copy of the application was duly served on the Durban Corporation and that thereafter the respondent's attorneys advised appellant's attorneys that the Corporation was not intervening.'

They enclosed copies of the relevant correspondence, from which, they said:

> 'it is apparent that the Durban Corporation received notice and did not propose to intervene.'

This correspondence consisted of three short letters:

Firstly, a letter dated 24th August, 1948, from the Union's attorneys to the Town Clerk, City Hall, Durban, reading: '*Re* Amalgamated Engineering Union v Minister of Labour. We enclose herewith for your information a copy of the papers in the above application, which has been set down for hearing in the Natal Provincial Division on the 22nd day of October, 1948.'

Secondly, a reply from the Town Clerk, dated 28th August, saying: 'I duly received your letter of the 24th instant and beg to thank you for providing me with the papers enclosed therein.'

Thirdly, a letter (the copy supplied to us is undated) from the Corporation's attorneys to the Assistant Government Attorney, as follows: '*Re* Amalgamated Engineering Union v Minister of Labour. Your letter of the 11th September, 1948, herein. The Town Clerk has now informed us that he does not propose to recommend to the Council that it should intervene.'

When the matter came before us on the 17th May, Mr. *Findlay*, for the appellant, submitted that it was not necessary to join the City Council, as it was sufficient to cite the Minister who had purported to nullify the appointment of the arbitrator; that in any event the exception of non-joinder was a dilatory exception which should be taken *in initio* and should not be raised on appeal, where its effect would simply be to discard the proceedings that had already taken place in the trial Court; and that, though he could not say that the judgment would be binding on the Council as a judgment against them, there could not only be estoppel by *res judicata* but also estoppel by standing by and not intervening. Mr. *Sisson*, for the respondent (the Minister), said: 'We do not take any advantage at all of the non-joinder of the City Council.' He submitted that, as the Council had chosen not to appear, it could never be heard to say that it was not a party. The worst that could happen was that at a later date the Council might raise the question that it had not been a party in the case, and it could not be heard to say that. The risk was so slight that the matter might well proceed.

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Argument then followed on the merits of the application.

We thus have the position that the two parties before the Court both contended that the Durban City Council was not a necessary party to the suit; and that both of them desired this Court to hear

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argument and give judgment without having the Council before it as a party.

The fact, however, that, when there are two parties before the Court, both of them desire it to deal with an application asking it to make a certain order, cannot relieve the Court from inquiring into the question whether the order it is asked to make may affect a third party not before the Court, and, if so, whether the Court should make the order without having that third party before it. Indeed, I cannot see that in this respect the position of the two litigants would be any better than that of a single petitioner who applies *ex parte* for an order which may affect another party not before the Court. The third party's position cannot be prejudiced by the *consensus* of the two litigants that they do not wish that party to be joined.

Before proceeding with the inquiry, in respect of the case now before us, into the two questions I have indicated above, it may be well to review some authorities on the matter of joinder of parties.

Mr. *Findlay* referred us to the case of *Bekker v Meyring, Bekker's Executor* (2 Menzies 436). I shall have to deal with this case, decided in the year 1844, at some length, as the reasoning by which the Court arrived at its conclusions is instructive and cannot be crisply summarised, and as the case is an important one to which reference has more than once been made in later judgments.

The report of *Bekker's* case does not set out the facts very clearly but, reading the remarks made by the plaintiff's counsel (at p. 440 of the report), together with the rather scanty statement of facts at the beginning of the report (p. 437), I gather that the plaintiff's father had made a will leaving one half of his estate to his children (who would have received the whole estate on intestacy) and the other half to a stranger, P. J. Meyring, senior. One of the children succeeded in an action in the Circuit Court, in which he cited the executor (P. J. Meyring, junior) and the legatee P. J. Meyring, senior

as defendants, in having the will declared to be null, illegal and void on the ground that the testator was not in his sound and proper senses when he executed it On appeal the defendants took the point *inter alia*, that such a judgment could not rightly be given unless the remaining legatees under the will (to wit, in this case, the other children of the testator) were joined in the action. It is obvious from these facts that the objection, taken for the first time on appeal, was, under the circumstances, a purely technical one,

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taken for the purpose of causing delay and trouble and not from any real concern for the interests of the remaining legatees, who, as the plaintiff's counsel put it (at p. 440), were 'the plaintiff's brothers and sisters, and, as such, co-heirs with him of the deceased, *ab intestato*, having precisely the same interest as he had to set aside the will', inasmuch as they, too, would receive more *ab intestato* than they had received under the will. This makes it all the more noteworthy that the Court, while disallowing the objection, took meticulous pains, not only to stress the point that the judgment would not be *res judicata* against the legatees who were not parties to the suit, but also to put on the judgment an interpretation which would prevent it from operating to their prejudice in any way and would completely safeguard whatever rights they might have. I quote from the judgment (p. 440):

> 'The Court held that in so far as the defendants had any personal interest in objecting to the form or competency of the action, in respect that all the parties interested in the will had not been made parties to the cause, either as co-plaintiffs or as co-defendants, they could not now in this Court of Appeal plead, and could not even in the Circuit Court after issue joined on the merits have pleaded, this objection, which was of the nature of a dilatory exception, and therefore could only be pleaded *in initio litis*, and not afterwards, in the inferior Court, and not having been pleaded there, could not be pleaded at all in the Court of Appeal. (*Voet* 44.1.6; 49.1.2.) . . . The Court held that there were cases in which, although an otherwise valid objection fatal to the action had not been pleaded in the inferior Court - and, consequently, although the defendant was barred from pleading it in the Court of Appeal as part of his case - it would not only be competent, but sometimes would be the duty of the Court of Appeal, on discovering its existence, either by their own inspection of the record, or by having it pointed out to their notice by the defendant, to give effect to that objection, and reverse the judgment of the inferior Court on that ground.'

The Court gave examples of cases where it would be its duty to give effect to the objection, but considered the case before it to be totally different from those examples. The report proceeds to say that the Court postponed giving judgment until they had had an opportunity of inquiring whether there was any rule of Roman-Dutch Law requiring, under pain of nullity of the action, that all parties having any interest in or under a will should be made parties to an action for setting that will aside. They found, by referring to *Voet* (5.1.35 and 49.1.3), that, so far from there being any such rule, that law had allowed legatees to intervene to protect their interests in an action for setting aside a testament as *inofficiosum*, or themselves to appeal against an unfavourable judgment

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in such an action to which they had not been parties. The fact that this privilege existed in favour of the legatees was regarded by the Court as establishing that it was not competent for the original defendant to have objected to the validity of the action on the ground that all parties interested in the testament had not been made parties.

The Court said:

> 'Neither can it be maintained that the judgment in this case ought to be reversed, in whole or in part, or stayed because it cannot be sustained and carried into execution without necessarily prejudicing the interest of parties who have not had an opportunity of protecting their interest by reason of their not having been made parties to the cause.'

For, said they, the judgment, being *res inter alios acta*, could 'most assuredly' not be pleaded as *res judicata* against other parties.

'The judgment appealed against cannot have any effect against them which it would not have had if those words had been expressly added to the judgment which the effect of the law is to imply, viz. *that the will be set aside in so far as the interest of the two defendants under it is concerned, and no further.'*

The *ratio* of the judgment, if I read it correctly, is that, if the Court declares a will to be null and void without having all parties interested in the will before it, the judgment can apply to dispositions in the will only in so far as they concern the parties to the suit; and that therefore such a judgment may be given even if other parties interested in the will have not been cited, since their interests are not adjudicated upon. It was rather a subtle reasoning, which helped the Court to do what it no doubt regarded as substantial justice in the peculiar circumstances of that case, while at the same time enabling it to stand firm on the two essential principles of law that had to be borne in mind, viz. (1) that a judgment cannot be pleaded as *res judicata* against someone who was not a party to the suit in which it was given, and (2) that the Court should not make an order that may prejudice the rights of parties not before it.

We are not, of course, dealing with judgments *in rem*, such as decrees of divorce, or with cases in which the Court, by the publication of a rule *nisi*, gives all parties who may consider themselves interested an opportunity of appearing to oppose the granting of an order, with the implication that they should be bound by it if they fail to do so.

The references in the above judgment to *Voet* (44.1.6 and 49.1.2)

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need not detain us here, as those paragraphs in *Voet* deal merely with the propositions that dilatory exceptions should be taken before *litis contestatio* and that appeals cannot be brought by persons who have expressly or tacitly acquiesced in the judgment or who are not prejudicially affected by it. The other references to *Voet* (5.1.35 and 49.1.3) require some attention. The first of these two paragraphs (5.1.35) enunciates the principle that a third party may intervene in an action between two litigants if a judgment in the matter at issue may prejudice him. The second paragraph (49.1.3) contains the proposition that, just as a party to a suit cannot appeal if the judgment does not harm him, so conversely it may happen that someone who was not a party may be allowed to appeal because he can be injured by the *res inter alios judicata. Voet* gives a number of examples, based on situations where a third party may in some respect consider himself interested in a judgment *inter alios*. His example relating to the *querela inofficiosi testamenti*, specifically referred to in the *Bekker* case, is discussed in the judgment I am giving in the case of *Kethel v Estate Kethel* (1949 (3), S.A.L.R. 598), where I state that it does not alter my conclusions in the present case. Here are some of the other examples given by him in 49.1.3: the case of a surety, who may be allowed to appeal even if the principal debtor acquiesces in a judgment given against him; that of a principal appealing on a judgment given against his agent; the purchaser appealing if the seller loses a suit relating to the ownership of the thing sold, or, conversely, the seller appealing if the purchaser loses a similar suit; the creditor appealing if the debtor has lost a suit relating to the ownership of the property pledged or hypothecated; and he says that if one of several co-heirs has allowed judgment to be given against him to the prejudice of the remaining co-heirs, the latter may appeal, even though they are protected without an appeal (*quamvis et sine appellatione tuti sint)*, for although the judgment against the one is ineffective against the other (*licet enim res adversus unum judicata non noceat reliquis coheredibus)*, the one may have defended badly and it may be to their interest that the judgment should not remain standing. Similarly a judgment against a principal debtor is not effective against the surety, yet the latter may appeal, in *Voet's* opinion for no other reason (*non alia, ut opinor, ex causa)* than that a judgment against the principal debtor raises a presumption that, if the suretyship is proved, the surety is also liable for the amount of the judgment.

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These passages in *Voet* cannot, to my mind, be read as implying that the privilege which third parties have of intervening either in the Court of first instance or in the Court of Appeal when there is reason to fear that the judgment may prejudice them, entitles the Court to give a judgment which, in the words occurring in the judgment in the *Bekker* case (at p. 442), 'cannot be sustained and carried into execution without necessarily prejudicing the interest of parties who have not had an opportunity of protecting their interest by reason of their not having been made parties to the cause'. Nor do I think that in *Bekker's* case the Court meant to put such an implication into *Voet's* words. On the contrary we find, as I have already said, that the Court was meticulously careful to indicate that the judgment should be so interpreted as to avoid all possibility of prejudicing parties not before the Court. Moreover, one of the illustrative examples given by the Court - one relating to a deed of transfer in which a third party was found to be interested - showed that the Judges considered it the duty of the Court to decline, *mero motu*, to make an order that might prejudice a third party, or at any rate 'to stay proceedings until notice should be given to' the third party, 'in order that, if he thought fit, he might now intervene as a party to the action, and defend his interest' (p. 441).

It is, of course, a well-known practice of our Courts to issue a rule *nisi* in appropriate cases, calling upon parties not before the Court to show cause why an order which may affect them, should not be made. Would an informal notice, e.g. by one or both of the parties to the suit, informing the third person of the proceedings and asking him whether he wishes to intervene, be sufficient to estop him from subsequently disputing the judgment? I shall come back to this question when I have considered some further authorities.

In 1889, KOTZE, C.J., gave a judgment concurred in by ESSELEN and DE KORTE, JJ., in the case of *Paarl Pretoria Gold Mining Co v Donovan & Wolff, N.O.*, reported in 3 S.A.R. 56 at p. 93. The head-note reads:

> 'Where a seller has been warned by his purchaser that his title has been called in question by a third party and after due notice has failed to intervene, he cannot subsequently maintain a suit for trespass against such third party, and will be successfuly met by the plea of *res judicata.*'

At first glance this may appear to lay down the general proposition that a third party who has received extra-judicial notice of the proceedings and has failed to intervene, will be bound by the judgment.

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On looking at the judgment itself, however, one finds that it was based on *Voet* (44.2.5), where *Voet* gives a list of parties who are regarded in law as being the same for the purpose of the rule that *res judicata* can be pleaded only when the parties to the previous suit have been the same as in the present one. He mentions, *inter alios*, a deceased and his heir, principal and agent, a person under curatorship and his curator, a pupil and his tutor; creditor and debtor in respect of a pledged article if the debtor gave the article in pledge after he had lost a suit in which a third party had claimed it; purchaser and seller, if the seller has either won or lost the action; but not if it is the purchaser who has been sued and who has either won or lost, the *exceptio rei judicatae* passing from seller to purchaser but not from purchaser to seller, since the purchaser derives his right from the seller, not the seller from the purchaser; unless the seller has joined in the action commenced against the purchaser, or the seller has been notified by the purchaser of the action and the threat of eviction and has nevertheless, despite the notification, left the purchaser to fight the suit by himself, in which event the result of the suit would enure to the benefit or the loss of the seller as well, as he had not merely the opportunity, but also the duty of undertaking, along with the purchaser, the defence of the article which had been sold by him. The judgment of the Transvaal Court therefore stands merely as an application of *Voet's* proposition that in the circumstances the seller and the purchaser are, for the purposes of the *exceptio rei judicatae*, regarded as being the same party.

The *Paarl Pretoria Gold Mining Company* case did not help counsel for the plaintiffs when he quoted it in *Blake and Others v Commissioner of Mines* (1903, T.S. 784). The plaintiffs alleged that they had duly pegged certain claims, but that the Commissioner had refused to issue licences to them, and they asked that he should be ordered to renew the licences in their favour. It appeared that the ground in dispute was at the time of the action held under licence by other persons, to whom notice of the action had been given both by the plaintiffs and the defendant. The Court, however, declined to proceed with the hearing unless those persons were joined as co-defendants, and ordered the matter to stand over *sine die*, with leave to the plaintiffs to join the persons in whose names the claims were then registered as co-defendants and to amend their summons and declaration if desired.

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The case of *Aaron v Johannesburg Municipality* (1904, T.S. 696) turned on the payment of compensation for the plaintiff's rights as the holder of leases *in longum tempus* from the Government in respect of land expropriated by the Municipality. The defendant pleaded, *inter alia*, that the leases of certain portions of the land had been unlawfully granted and were *ultra vires* the powers of the Executive Council and therefore void and of no effect. The Court (INNES, C.J., SOLOMON and SMITH, JJ.) considered that this raised a question in which the Government had an interest, for if the land in question had not been properly granted, then the only person to whom it could belong was the Government.

> 'An opportunity,' said INNES, C.J., 'should be given to it (the Government) to intervene in the action if so advised. The Registrar will notify the Attorney-General that judgment will be withheld for a period of fourteen days, pending an intimation as to whether or not the Government desires to intervene. If the Government does not wish to do so, we shall proceed to prepare our judgment; if the Government does intervene, the plaintiff is to have an opportunity of filing a further replication to any plea which the Government may submit.'

The Government apparently did not intervene, for 21/2 months later judgment was given, the Court finding, *inter alia*, that these portions had been validly leased.

This, then, was a case in which the Court, while taking steps *mero motu* to safeguard the interests of the third party (the Government), did not require it to be formally joined as a party to the suit, but regarded its non-intervention after notice from the Registrar as sufficient to entitle the Court to deal with the matter in its absence. It may be noted, however, that, as the action related merely to the matter of compensation claimable by Aaron from the Municipality, there would be nothing in the order of the Court that would directly violate any rights the Government might have, though one may take it that, under all the circumstances of the case, complete passivity on the part of the Government after its receipt of the Registrar's notification would probably have estopped it from evicting the Municipality when once the latter, relying on that passivity, had paid, or become bound by the judgment to pay, compensation to Aaron.

The question of joinder of parties was considered by the Court (INNES, C.J., and MASON, J., the judgment of the Court being read by the latter) in *Muller's Executrix v Small Farms Ltd*. (1910, T.S. 189). The relevant portion of the head-note reads:

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> 'In an action by a lower against an upper riparian proprietor with reference to a servitude of *aquaeductus*, it is not necessary to join all intermediate riparian owners who might have common rights to the water.'

The head-note, however, gives a very poor idea of the judgment, which contains an interesting and very instructive survey of English procedure and Roman-Dutch authorities on the point (at pp. 198 - 9), and then proceeds:

> 'The cases involving the question of the joinder of parties seem to me to be divisible into two kinds, viz: those in which other parties have such an indivisible interest that the judgment must necessarily affect them notwithstanding the principle of *res inter alios acta*, and those in which other parties may

have similar rights depending on a similar title, but not necessarily affected by any judgment in an action in which they were not parties.

As an illustration of the former class the present case may be considered. The plaintiffs claim the removal of the dam; if there were other persons registered owners of the land on which the dam stood, who were not parties to the present suit, an order directing the destruction of the dam would necessarily destroy their property; they would, it appears to me, be absolutely necessary parties. On the other hand, if the various owners of the lots of this farm had a registered servitude authorising them to water their cattle at the dam, one owner might well bring an action to prevent an obstruction to his exercise of the servitude without necessarily affecting the rights of the others. The cases in which the exception or plea of non-joinder has been allowed have usually been those in which one of two co-owners or one of two joint contractors, or one of two partners were alone parties to the action . . ., but there are numerous cases in which these exceptions of non-joinder have not been allowed.'

The head-note to *Morgan and Another v Salisbury Municipality* (1935 AD 167) reads:

'The only cases in which a defendant has been allowed in the past to demand a joinder of a party as of right are the cases of joint owners and joint contractors and partners, in all of which cases there exists a joint financial or proprietary interest; in other cases a defendant, as a general rule, has not been allowed to demand such joinder.

Where, therefore, respondent municipality, who was acting on a Government Notice which extended its boundaries, had objected successfully to proceedings instituted by the appellants for an order restraining the respondent from continuing to act on the Notice on the ground that the Government should have been joined as a party.

Held, on appeal, that as the Government had no financial or proprietary interest in the proceedings and as there was no reason which should induce the Court to extend the existing practice in the present case, the appellants were entitled to proceed without joining the Government as a party.'

The first paragraph of the head-note is extracted from a passage in the judgment (delivered by DE VILLIERS, J.A., and concurred in by the rest of the Court) at p. 171, that passage itself being founded

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on *Muller's* case *(supra)*. Quoted without its context, however, it seems to me to lay too much stress on the classes of cases mentioned, as if, for practical purposes, they exhaust the list. *Muller's* case says that the cases in which the exception or plea of non-joinder has been allowed have 'usually' been cases falling under those heads; it does not suggest that the list is by any means exhaustive. And DE VILLIERS, J.A., seems to me to have mentioned those classes, not for the purpose of limiting the exception or plea of non-joinder to them, but to make his point that the interest which requires a party to be joined should be a financial or proprietary interest; and even on this point he adds:

'There may be other special cases in which a defendant may claim joinder of a third party as co-defendant, but none of them, as far as I know, affects the discussion in the present case.'

The question of joinder should surely not depend on the nature of the subject-matter of the suit, as some of the head-notes I have referred to would seem to imply, but - whether the suit relates to a will, an aqueduct, a partnership or anything else - on the manner in which, and the extent to which, the Court's order may affect the interests of third parties.

In this regard see also *Tshandu v Swan and Another* (1946 AD 10), an appeal in an action in which a native claimed that he was the lawful permit-holder in respect of certain stands in a location owned by the municipality. He had cited as defendants: (1) the manager of the Council's Non-European Department, who had authorised the location superintendent to transfer the stands to another native; (2) the superintendent who had transferred them; and (3) the transferee. Held: that it was not necessary to join the Council, as the disposal of the land, though it belonged to the Council, was regulated by statute and statutory regulations, and the Council therefore had 'no real interest' in the issue, 'no proprietary interest . . . which required to be protected by a joinder of the Council,' the order which the Court was asked to make being 'a matter of no moment to the Council.' (See judgment of TINDALL, J.A., at pp. 24/25).

Collin v Toffie (1944 AD 456), was a case in which a Cape Malay woman (entitled to own fixed property in the Transvaal) claimed a re-transfer of property sold by her to a woman who, she alleged, was an Indian (not entitled to own such property) but had expressly or impliedly misrepresented herself as not being one.

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The defendant excepted to the declaration as disclosing no cause of action, and relied in argument on Act 37 of 1919, sec. 2 (5), which provided that fixed property registered in favour of an Asiatic should become the property of the State, with a proviso that, if the Asiatic purported to transfer the property to a person who might lawfully hold it, the rights of the State should terminate on the expiration of one year after the registration. The Witwatersrand Court dismissed the exception, holding that the section relied on did not stand in the way of a claim by the plaintiff to compel the defendant to re-transfer the property. The Appellate Division, however, came to the conclusion that, because rights of the State might be affected by a cancellation of the transfer, the Government had 'a direct and substantial interest in the result of the action' (p. 464), and therefore, although the exception was taken on specified grounds which did not cover non-joinder of the State (p. 467), it was 'obviously not desirable that a decision should be given on the interpretation of section 2 (5) in the Court below or in this Court without an opportunity having been given to the Government to appear if it wishes to do so.' (p. 466). The order of the Court below, dismissing the exception with costs, was therefore altered to read:

> 'No order on the exception at this stage, the costs of the exception to be costs in the cause. The plaintiff is given leave to amend her declaration and the action is stayed until the plaintiff has joined the Union Government as a party to the action.'

A somewhat similar case was that of *Home Sites (Pty.) Ltd v Senekal* (1948 (3), S.A.L.R. 514 (A.D.)). The respondent, who was the plaintiff in the trial court (a Local Division), had sued the appellant company for specific performance of a deed of sale of portion of a farm situated in the Transvaal. The company had pleaded that it had notified the plaintiff at the time of the sale that it had verbally granted a servitude to one B, the purchaser of an adjoining portion, and that therefore the plaintiff was bound by the servitude and should be prepared to take transfer subject to it. The Local Division upheld an exception to the plea as disclosing no defence. It accepted the plaintiff's contention that, if the allegations in the plea were established, B would be entitled to have the servitude registered against the plaintiff's title, but that this did not affect the position between himself and the company, as the latter's obligation under the deed of sale was to give him unencumbered transfer. The Appellate Division considered, however, that it could

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not avoid a decision on a further argument put forward by plaintiff's counsel in support of the exception, to the effect that a servitude is 'fixed property' within sec. 30 of the Transvaal Transfer Duty Proclamation, and that consequently a verbal agreement to grant a servitude was of no effect. On this issue, said SCHREINER, J.A. (at p. 520),

> 'Mrs. Baumann's interest in the validity of her servitude invites the question whether she must not be given an opportunity of being heard on the point; and once the question is raised there can, I think, be only one answer to it.'

The order of the Local Division was therefore altered into one making no order on the exception, giving the parties leave to amend their pleadings, and staying the action until the plaintiff had joined B as a party.

The two cases last mentioned are both instances in which the question of non-joinder of a third party who was found to have 'a direct and substantial interest' in the decision of a point before the Court was taken by the Court *mero motu*. In *Collin v Toffie* the third party's interest only became apparent from a legal contention put forward by counsel for defendant in arguing in support of the exception to the declaration as

disclosing no cause of action. In the *Home Sites* case it was only facts disclosed in the plea, taken in conjunction with a legal argument based on them by counsel for the plaintiff, who here was the excipient, that showed a third party to have an interest. In both cases, too, it was the Court of Appeal that first raised the question of non-joinder. Yet in both cases, when once the Court realised that a third party might be affected, it set aside the lower Court's order and referred the case back to that Court to be dealt with afresh after the third party had been joined, and it ordered the *plaintiff* to join him.

Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests. There may also, of course, be cases in which the Court can be satisfied with the third party's waiver of his right to be joined, e.g. if the Court is prepared, under all the circumstances of the case, to accept an intimation from him that he disclaims any interest or that he submits to judgment. It must be borne in mind, however, that

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even on the allegation that a party has waived his rights, that party is entitled to be heard; for he may, if given the opportunity, dispute either the facts which are said to prove his waiver, or the conclusion of law to be drawn from them, or both.

Mere non-intervention by an interested party who has knowledge of the proceedings does not make the judgment binding on him as *res judicata*. There may be further circumstances present which would support an allegation of waiver or estoppel against him, but that is another matter. I shall have more to say on this point when I come back to the facts of the case now before us.

The principle that *res judicata* can be pleaded only when the parties between whom the plea is raised are the same as in the previous suit - or are deemed to be the same because certain persons are identified with one another for this purpose, as indicated in *Voet*, 44.2.5 (see reference above under the *Paarl Pretoria Gold Mining Company* case) - may sometimes give valuable guidance as to whether a third party should be joined or not. The Court will not, for instance, issue a decree which will be a *brutum fulmen* because some person who will have to co-operate in carrying it into effect, will not be bound by it. Or, again, the Court will not, in a suit between A and B, order B to do something that will affect C, if C, by reason of his not having been joined in the suit, will not be bound by the judgment and will therefore be able to resist any attempt by B to obey the order.

Some decisions on the question of joinder of parties in suits concerning the validity or the interpretation of wills, and the application of the principles of joinder to such cases, are discussed in the judgment in the *Kethel* case to which I have already referred.

Let me now turn to the facts of the case at present before us, and see how the principles I have tried to extract from the foregoing authorities should be applied to it. The Minister, purporting to exercise his powers in connection with compulsory arbitration under the Industrial Conciliation Act, appointed an arbitrator in a dispute between the appellant Union (or municipal employees who are members of the Union - for our present purpose we need not haggle over this point) and the Durban City Council. On an objection by the City Council, coupled with a threat of legal proceedings, he withdrew the appointment. The Union now prays for an order declaring the appointment to be valid and the withdrawal thereof to be of no force or effect, or, alternatively, that the Minister be ordered to appoint an arbitrator to settle and determine this dispute.

FAGAN AJA

Can it be said that the City Council is not 'directly and substantially interested' in the appointment on which we are asked to give a decision? To my mind the answer is clear; the Council can have no less an interest in it than the Union itself. In the prayer which we are asked to make an order of Court, both in its first and in its alternative form, the dispute is referred to as one 'between the Amalgamated Engineering Union and the Durban City Council'. It is solely because of its participation in the dispute that the Union has *locus standi* to make this application. Then surely the Council has an equal *locus standi* to be heard on it.

Let me apply another test. If we make the order prayed for, it will - subject to what I say below as to the effect of the Council's non-intervention after notice - not be binding on the Council as *res judicata* inasmuch as the Council is not a party to the proceedings. When the arbitrator was originally appointed, the Council objected and threatened recourse to law. It clearly had *locus standi* to come to Court - no less than the Union has to make this application. If it is not bound by the order we make, it can again take up exactly the same attitude: object to the arbitrator, and come to Court to have his appointment set aside. It may put additional facts before the Court. BROOME, J., said in the Court below, 'I am not satisfied that all relevant information is before me'. Its counsel may put forward arguments which will persuade the Court to put a different interpretation on the law. The effect would then be that there would be two perfectly valid, though totally irreconcilable, orders against the Minister; one, enforceable by the Union, ordering him to appoint an arbitrator; another enforceable by the Council, interdicting him from appointing an arbitrator.

I think I have said enough to make it clear that the Council is directly and substantially interested, and that a judgment as prayed - if I may again adopt words used by the Court in *Bekker v Meyring* - 'cannot be sustained and carried into effect without necessarily prejudicing the interest of' the Council.

Is the difficulty overcome by the notice which the Council is alleged to have had and its non-intervention despite that notice? A glance at the correspondence which is relied on in this regard will show the danger of regarding extra-judicial notice, put before the Court *ex parte*, as sufficient for this purpose. The letter of the 24th August, 1948, from the applicant's attorneys to the Town

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FAGAN AJA

Clerk, merely tells the latter that they are enclosing, for his information a copy of the papers in the application, which has been set down for hearing in the Natal Provincial Division on the 22nd October. Nothing even to warn him that he or the Council are expected to do anything about it, or that their failure to do something will be regarded as acquiescence. I am not saying that one party could by such a warning put the other side in default, but without it the letter is just a friendly communication of a piece of news. The Town Clerk acknowledges the receipt of the letter and thanks the senders for providing him with the papers. There the applicant leaves the matter. Then, in September (presumably), in reply to a letter from the Assistant Government Attorney of which a copy has not been submitted to us, the Council's attorneys say: 'The Town Clerk has now informed us that he does not propose to recommend to the Council that it should intervene.' Were the papers ever submitted to or considered by the Council? Maybe, but the letters do not say so. The correspondence as it stands leaves it open to the Council to say that, to the knowledge of the two parties before the Court, the matter got no further than an intimation by the Town Clerk to the respondent (not even to the applicant) that he did not propose to recommend to the Council that it should intervene.

If the Council had been cited as a party, the form and contents of the notice to it, and the manner and proof of service, would have had to comply with clear and definite rules of procedure, and the Council would have known that it had to defend the suit or suffer a judgment, by which it would be bound, to be given in its absence. This case is a good example of the uncertainties to which we would open the door if we were to

start allowing informal notifications to take the place of due and proper joinder of a party.

I am not implying that, if the Council did consider the notification and decide not to intervene, I should have construed its mere passivity as submission to the judgment or as creating an estoppel against it. There is a great difference between saying 'I am not intervening in that suit *inter alios*' and saying 'I undertake to be bound by the judgment in that suit *inter alios*, though it will not be *res judicata* against me.' Mere non-intervention, or even an intimation of non-intervention, with nothing more to it, after receipt of a notice of legal proceedings short of citation, cannot therefore, to my mind, be treated as if it were a representation,

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FAGAN AJA

express or tacit, that the party concerned will submit to, and be bound by, any judgment that may be given. I certainly do not feel able to say that the *ex parte* information placed before us in this case as to notification of the pending proceedings to the Town Clerk, and the non-intervention of the Council after that notification, entitles us to overlook the fact that the Council is not a party to the proceedings and to decide the issues before us in the expectation that the Council will consider itself to be bound, or will in fact or in law be bound, by our judgment.

It is clear to me that the Council should have been cited as a party in the first instance. The difficulty is to know what to do now that the matter has reached the appeal stage. One wishes to avoid, as far as it may be at all possible, the necessity of causing the parties unnecessary trouble, expense and delay. The furthest, however. that I think we are able to go to meet the parties is to let the final judgment in this matter stand over so as to give them an opportunity of ascertaining from the Council whether it is prepared to file with this Court, through its own attorneys, a consent to be bound by our judgment notwithstanding the fact that it has not been cited as a party. If such consent is filed, we shall give final judgment without hearing further argument, as the merits of the matter have been fully argued before us by counsel for the two parties who are appearing. If, however, no such consent is filed within two months of the delivery of this interim judgment, or if at any time before the expiry of the two months the appellant's attorneys intimate to the Registrar of the Court that no such consent can be obtained, we shall give directions as to the course the proceedings will then have to take.

WATERMEYER, C.J., CENTLIVRES, J.A., SCHREINER, J.A., and VAN DEN HEEVER, J.A., concurred.

Appellant's Attorneys: *E. R. Browne, Bonamour & Brodie*. Durban; *Goodrick & Franklin*, Bloemfontein. Respondent's Attorneys: *Government Attorney*, Durban; *Marais & de Villiers*, Bloemfontein.

PHEKO AND OTHERS v EKURHULENI CITY 2015 (5) SA 600 (CC) A

Citation	2015 (5) SA 600 (CC)
Case No	CCT 19/11 [2015] ZACC 10
Court	Constitutional Court
Judge	Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van Der Westhuizen J and Zondo J
Heard	August 12, 2014
Judgment	May 7, 2015
Counsel	*CR Jansen* (with *M Dewrance* and *N Muvangua*) for the applicants. *K Tsatsawane* for the respondent. *T Ngcukaitobi* for the amicus curiae.
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Attorney — Costs — Costs de bonis propriis — When to be awarded — Failing to notify registrar of change of address — Obliged to do so by Constitutional Court Rules and Uniform Rules of Court — Not doing so grossly negligent C — Punitive costs order awarded to mark court's displeasure — Constitutional Court Rules, rule 1(8); Uniform Rules of Court, rules 4, 4A and 16.

Contempt of court — Disobedience of court order — Attorney failing to communicate court order to client — Whether attorney in contempt — Requisites for contempt restated — Service of order on attorney not established.

D **Contempt of court** — Disobedience of court order — By organ of state — Municipality not complying with court order — Requisites for contempt restated — Service of order on municipality's attorney not established.

Local authority — Powers and duties — To comply with court orders — Joinder of specific parties ordered — Semble: Executive mayor and municipal E manager responsible for implementing court orders by virtue of their leadership roles.

Headnote : Kopnota

In *Pheko I*[*] a crucial part of the relief granted by the Constitutional Court to the applicants — who had their homes demolished pursuant to their unlawful F relocation at the instance of the Ekurhuleni Metropolitan Municipality — was to place an obligation on both parties to submit reports to the court for it to supervise progress made towards securing adequate housing for them. This case initially only concerned contempt proceedings set down against the Municipality for failing to comply with a court order (the order) G directing it to file a second such progress report by a certain deadline. Further issues were, however, introduced when (before the hearing) the amicus curiae sought to have the Municipality's executive mayor (mayor) and its manager (the municipal manager) joined in the proceedings; and by the Municipality's explanation (during the hearing) that it was not made aware of the order and directions by its attorneys of record. Accordingly, H after the hearing, further directions were issued (1) calling upon the attorneys to show cause why they should not be held

in contempt for failing to make the Municipality aware of the order and directions, and also why they should not be ordered, jointly and severally with the Municipality, to pay the costs of the applicants and the Municipality *de bonis propriis*; (2) calling upon the mayor and municipal manager to show cause why they I should not be joined in the contempt proceedings, and to indicate if there were any other responsible office bearers who should also be joined; and (3)

calling on the Member of the Executive Council, Gauteng Department of A Human Settlements (the MEC), based on his obligations under the Housing Act 107 of 1997, to show cause why he should not also be joined in the contempt proceedings.

Held

As to whether the Municipality and/or its attorney was in contempt B

While there could be no doubt that the Municipality had not complied with the court's directions and orders, the averments regarding the Municipality's non-receipt of the directions and order were not refuted, and accordingly service of the order upon the Municipality — an essential element to a finding of contempt — was wanting. In the circumstances, an inference of wilfulness and mala fides could not be drawn and, as a result, one cannot C safely conclude that the Municipality was in contempt of the order. It followed that the Municipality had shown good cause why it should not be held in contempt. (Paragraphs [39], [41] and [43] at 621E – F, 622C – D, and 622F – H.)

The attorney's undisputed evidence — that he did not inform the Municipality of D the directions and order because he did not receive them, since they were transmitted to a fax number that was no longer linked to his changed email address — dispelled any notion of wilfulness and mala fides on his part. While the existence of the order and non-compliance had been established, the requisite of service had not. It followed that no inference of wilfulness and mala fides could be drawn, and contempt on the part of the attorney E had not been established. (Paragraphs [48] and [50] at 624B and 624E – F.)

As to whether the attorney should pay the costs of the contempt proceedings de bonis propriis

While the evidence may not have established wilfulness or mala fides, it did establish gross disregard for his professional responsibilities. At the very least, the attorney had an obligation to notify the registrar of this court and F his clients of any change of address. This was plainly not done. This failure to notify the registrar constituted gross negligence on his part. Accordingly he must be ordered to pay the costs from his own pocket, to mark the court's displeasure at his gross negligence, particularly as an officer of the court. (Paragraphs [54] – [55] at 625D – F.)

As to whether the mayor, municipal manager and the MEC should be G ***joined in these contempt proceedings***

Given that contempt of this court's order on the part of the municipality had not been established, no purpose would be served by joining the mayor, municipal manager and MEC in these contempt proceedings. However, by virtue of their constitutional and statutory responsibilities, the joinder of the H mayor and municipal manager, in respect of this court's continuing supervision of the implementation of the orders in *Pheko I*, would be appropriate. The MEC's statutory obligations in relation to the provision of housing and his role in the implementation of the supervisory orders in *Pheko I* mean that he should also be joined as a party having substantial interest. (Paragraphs [57] – [58] and [60] at 626A – C and 626F – H.)

Semble I

It was precisely because of the leadership entrusted to the mayor and the municipal manager that they had a duty to undertake responsibility for implementing court orders. Disclaiming such responsibility on the basis they were not responsible for the 'day to day administrative functions' of the municipality was therefore highly inappropriate. (Paragraphs [62] – [63] at 627C – F.) J

Cases Considered

A **Annotations**

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Case law

Southern Africa

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A): B referred to

Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others 1956 (1) SA 105 (N): dictum at 106B – E applied

City of Cape Town v Rudolph and Others 2004 (5) SA 39 (C) (2003 (11) BCLR 1236): compared

Ex parte Body Corporate of Caroline Court 2001 (4) SA 1230 (SCA) ([2001] ZASCA 89): C referred to

Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) ([2006] ZASCA 54): applied

Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng 2002 (1) SA 660 (T): compared

Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA) ([2009] 1 All SA 39; D [2008] 11 BLLR 1023; [2008] ZASCA 99): referred to

Grobbelaar v Grobbelaar 1959 (4) SA 719 (A): referred to

International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC) (2010 (5) BCLR 457; [2010] ZACC 6): referred to

E *Jeebhai v Minister of Home Affairs and Another* 2007 (4) SA 294 (T): referred to

Kate v MEC for the Department of Welfare, Eastern Cape 2005 (1) SA 141 (SE) ([2005] 1 All SA 745): referred to

Machumela v Santam Insurance Co Ltd 1977 (1) SA 660 (A): referred to

MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA) ([2006] 2 All SA 455): referred to

F *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH): dictum at 456A – B applied

Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Inter- vening) 2001 (3) SA 893 (CC) (2001 (2) SACR 66; 2001 (7) BCLR 685; [2001] ZACC 18): referred to

G *N and Others v Government of the Republic of South Africa (No 3)* 2006 (6) SA 575 (D): compared

National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others 2015 (2) BCLR 182 (CC) ((2015) 36 *ILJ* 363; [2014] ZACC 35): referred to

H *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) (2008 (9) BCLR 865; [2008] ZACC 8): compared

Pheko and Others v Ekurhuleni Metropolitan Municipality (GNP case No 5394/11, 9 June 2011; [2011] ZAGPPHC 130): referred to

Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34): referred to

I *Pieter Bezuidenhout-Larochelle Boerdery (Edms) Bpk en Andere v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O): referred to

S v Beyers 1968 (3) SA 70 (A): referred to

S v Mkhize 1963 (3) SA 218 (N): referred to

South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others 2009 (1) SA 565 (CC) (2006 (8) BCLR 901; [2006] ZACC 7): J compared

York Timbers Ltd v Minister of Water Affairs and Forestry and Another A 2003 (4) SA 477 (T) ([2003] 2 All SA 710): dictum at 509D applied

Zalk v Inglestone 1961 (2) SA 788 (W): referred to.

Canada

R v UFAW [1967] 65 DLR (2d) 579 (BCCA): compared

TG Industries Ltd v Williams 2001 NSCA 105 ([2001] 196 NSR): compared. B

England

Attorney-General v Newspaper Publishing plc [1988] Ch 333 at 362 ([1987] 3 All ER 276): compared

Attorney-General v Times Newspapers Ltd [1991] 1 AC 191 ([1991] 2 All ER 398 (HL)): compared C

Churchman and others v Joint Shop Stewards' Committee of the Workers of the Port of London and others [1972] 3 All ER 603 (CA): referred to.

United States

International Union, United Mine Workers of America v Bagwell 512 US 821 (1994): compared D

Olmstead et al v United States 277 US 438 (1928): dictum at 485 applied

Young v United States ex rel Vuitton et Fils SA 481 US 787 (1987): compared.

Statutes Considered

Rules of court

The Constitutional Court Rules, rule 1(8): see *The Superior Courts Act and the Magistrates' Courts Act and Rules* (Juta 2014) at 174 E

The Uniform Rules of Court, rules 4, 4A and 16: see *The Superior Courts Act and the Magistrates' Courts Act and Rules* (Juta 2014) at 31-4 and 42-3.

Case Information

CR Jansen (with *M Dewrance* and *N Muvangua*) for the applicants.

K Tsatsawane for the respondent. F

T Ngcukaitobi for the amicus curiae.

Contempt of court proceedings.

Order

1. The Ekurhuleni Metropolitan Municipality (Municipality) and G Mr Bongani Khoza, the Municipality's attorney, are not held in contempt of this court's orders of 6 December 2011 and 12 March 2014.
2. The rule nisi issued on 28 August 2014, in respect of the executive mayor and the municipal manager, is discharged. H
3. The executive mayor and the municipal manager are joined as parties in the proceedings in relation to *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34) (*Pheko I*) for the purpose of implementing the supervisory order. I
4. The Member of the Executive Council for Human Settlements, Gauteng, is joined as a party in the proceedings in *Pheko I* for the purpose of implementing the supervisory order referred to in para 3 above.
5. Mr Devraj Chainee, the head of department for human settlements for the Municipality, is joined in his official capacity as a party in the J

A proceedings in *Pheko I* for the purpose of implementing the supervisory order referred to in para 3 above.

6. Mr Khoza and the Municipality are each ordered to pay 50% of the applicants' costs in the contempt proceedings. Mr Khoza is ordered to pay costs *de bonis propriis*.

Judgment

B **Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring):**

Introduction

C [1] The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the D functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

[2] Courts have the power to ensure that their decisions or orders are E complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt F of their own accord.

[3] These contempt proceedings are a sequel to the supervisory relief granted by this court on 6 December 2011. [1] The court decided that — (1) the respondent violated the applicants' rights under s 26 of the Constitution; (2) the respondent had a duty to provide the applicants G with suitable temporary accommodation; (3) the respondent must meaningfully engage with the applicants in identifying alternative land in the immediate vicinity of Bapsfontein, from which area the applicants had been unlawfully removed; and (4) this court should exercise its supervisory jurisdiction to enable the respondent to report to the court about 'whether land has been identified and designated to develop H housing for the applicants'. [2]

[4] The principal issue is whether the respondent, its attorneys and certain functionaries performing public functions or exercising public

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power in terms of the Constitution or any legislation have shown good A cause why they should not be held in contempt of court for not complying with this court's orders.

Parties

[5] The parties in these contempt proceedings are as cited in *Pheko I*. [3] B For completeness and ease of reference, they are briefly described here. The applicants are the former residents of Bapsfontein Informal Settlement (Bapsfontein Settlement) who, having been unlawfully removed from their demolished homes, remain with no secure tenure but only with temporary housing. The respondent is the Ekurhuleni Metropolitan C Municipality (Municipality), in whose area Bapsfontein Settlement is situated. The Municipality authorised the relocation of the residents and the demolition of the applicants' homes. The Socio-Economic Rights Institute of South Africa (SERI) was admitted in *Pheko I* as amicus curiae (friend of the court) and continues to be of assistance to this court. D

Background

[6] *Pheko I* concerned the lawfulness of the relocation by the Municipality of hundreds of families that resided in Bapsfontein Settlement. This action was triggered by investigations that the Municipality had E commissioned into the land on which Bapsfontein Settlement is situated after complaints were made about the formation of sinkholes in the area.

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

A The investigations concluded that the land was dolomitic and that the residents of Bapsfontein Settlement should be relocated to a safer area. Subsequently Bapsfontein Settlement was declared a disaster area under the Disaster Management Act. [4]

[7] When the residents resisted relocation they were forcibly removed B and their homes were demolished at the instance of the Municipality. The residents launched urgent interdictory proceedings in the North Gauteng High Court, Pretoria (High Court). The High Court dismissed the application with costs, stating that the applicants could not be allowed 'to stay in a danger zone' where they could be 'swallowed by the C earth'. [5] It further held that the application lacked urgency [6] and that PIE [7] did not apply in the circumstances. [8] The applicants then sought leave to appeal directly to this court, where they effectively vindicated their rights under ss 10 and 26 of the Constitution. A crucial element of the relief granted was to enable the parties to contribute meaningfully to discussions aimed at finding an equitable solution. This included the submission D of reports from both sides at varying stages of the process.

[8] Having been ordered to file a report detailing the steps it had taken to secure adequate housing for the applicants, the Municipality consulted with the applicants. The applicants organised themselves into two E groups: the N12 Community and the Mayfield Community. The Municipality filed its report on 30 November 2012. The report indicated that the N12 Community applicants were willing to relocate to the Daveyton Farm and parts of Putfontein and Mayfield Extension, and that adequate provision of basic services would be made available to F them. This community confirmed that it was adequately consulted and its members were satisfied to move to the identified land. The report further indicated that the Mayfield Community applicants would only occupy the proposed land on condition that they were allocated permanent houses with running water and sewerage. Provision of these facilities was, at that time, problematic for the Municipality as a result of, G among other things, land-use planning concerns. The report concluded that —

> '(t)he Municipality shall await the direction of the (c)ourt prior to embarking on a process to have the [N12 Community applicants] moved to the land identified by the Municipality, as per their wishes'.

H The report failed to suggest a solution for the Mayfield Community applicants.

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

[9] The Mayfield Community applicants were unhappy with the A conclusions drawn by the report and the quality of the consultations that occurred between them and the Municipality. As a result, in their 24 December 2012 response to the report, the Mayfield Community applicants requested to file an expert report detailing why they were dissatisfied with the relocation plans of the Municipality. This court B acceded to their request and directed that the expert report be filed by 3 June 2013. The date passed without any submissions to this court. After a successful condonation application the expert report was to be filed on 25 October 2013. [9] This court received the expert report only on 7 July 2014. It was attached to an application to admit a further affidavit. C

[10] On 21 November 2013 this court directed the Municipality to file a second report by 29 November 2013, detailing: (1) the issues surrounding the relocation of the N12 Community applicants; and (2) progress on its obligation to find suitable land for the

Mayfield Community applicants. [10] These directions were made on the understanding D that, by agreement, land had already been identified in respect of the N12 Community applicants to the satisfaction of both the N12 Community applicants and the Municipality. The Municipality failed to report back to this court.

[11] A later order of this court, dated 12 March 2014, yet again required E that the Municipality's report be filed, on this occasion providing for a deadline of 14 April 2014. The order reads as follows:

> 'Following the [Municipality]'s failure to comply with the Court's directions dated 21 November 2013, the Court makes the following order: F

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

> A 1. The [Municipality] is ordered to file, by no later than Monday, 14 April 2014, a report on the progress made in respect of the [N12 Community applicants] regarding its undertaking towards the community set out in the report dated 30 November 2012.
>
> 2. The report must indicate steps taken to ensure that —
>
> B *(a)* permanent housing will be provided to the community;
>
> *(b)* the land utilised is suitable for occupation;
>
> *(c)* bulk and link engineering services will be available with sufficient capacity for the proposed densities;
>
> *(d)* all erven have access to roads; and
>
> *(e)* all erven are connected to the internal water and sewer C infrastructure network.
>
> 3. The [Municipality] is ordered to report also on the progress made in respect of its obligation to find suitable land for the Mayfield Community applicants. The report must address, inter alia —
>
> *(a)* progress regarding the acquisition of alternative land; and
>
> D *(b)* the processes to be completed before such land is acquired.'

[12] Once more the Municipality tendered no response. Due to the Municipality's non-compliance, this court issued further directions on 15 May 2014, setting the matter down for contempt proceedings on 12 August 2014. The Municipality was directed to —

> E 'show cause . . . why it should not be held in contempt of this Court for failing to report to it in accordance with the Court's order dated 12 March 2014 on the progress made in fulfilling its undertaking to the [N12 Community applicants] that is set out in the report to this court dated 30 November 2012'.

F [13] During the hearing the Municipality explained that it was not made aware of this court's directions and orders by its attorneys of record (Khoza & Associates Inc). It said that Mr Khoza (its attorney) believed that the matter was no longer active, and was in the midst of relocating offices. On 29 August 2014 further directions were issued, calling upon G the Municipality's attorneys to show cause why they should not: (1) be held in contempt of this court for failing to make the Municipality aware of the directions and order; and (2) jointly and severally with the Municipality, be ordered to pay costs of the applicants and the Municipality from their own pocket (*de bonis propriis*).

H [14] Before the hearing, SERI sought to have the executive mayor (mayor) and municipal manager joined in these proceedings. [11] The joinder was intended to ensure that the relevant responsible officials of the Municipality comply with the future orders of this court.

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

[15] On 28 August 2014 this court declared the Municipality to be in A breach of its constitutional obligations by failing to abide by the orders of this court dated 6 December 2011 and 12 March 2014. In addition this court issued an interim order (rule

nisi), calling upon the mayor and municipal manager to show cause why they should not be joined, and to indicate if there were any other responsible office bearers who should B also be joined. The court ordered the municipality to take steps to ensure the relocation of the N12 Community applicants and to file a progress report, canvassing the main issues in the order of 6 December 2011. [12]

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

A [16] The mayor, Mr Mondli Gungubele, deposed to an affidavit in response to the order granted after the hearing. He acknowledged the statutory powers and functions bestowed upon him as the political head of the Municipality. He asserted that he is not responsible for the day-to-day administrative functions of the Municipality. Instead, the B municipal manager and heads of various departments of the Municipality responsible for various specialised functions, like the provision of adequate housing, should be held responsible. The mayor stated further that he had asked to be furnished with reports related to these proceedings and that he was so furnished in line with his responsibilities in terms of the Local Government: Municipal Structures Act. [13] However, the C mayor asserted that the contents of the reports did not raise 'any alarm bells'. It was only after he was furnished with the most recent court order that he established that there had been a lack of progress on the part of the Municipality. The mayor expressed his regret at the Municipality's non-compliance. He undertook to monitor the matter 'in [his] role as the D political head of the [Municipality]' while surprisingly stating that if he were joined in the proceedings he would, in any event, rely on the municipal manager and the head of the Municipality's department for human settlements (regional department), Mr Devraj Chainee, to do that which the court may direct him to do.

E [17] The municipal manager, Mr Khaya Ngema, also deposed to an affidavit which generally mirrored the affidavit of the mayor. The municipal manager offered two new points. First, he suggested that it is the Gauteng Department of Human Settlements (Provincial Department) that is accountable for the current predicament. He stated that the Municipality's officials have, on several occasions, made contact with the F Provincial Department for the purposes of compliance with the court order of 6 December 2011, but that these efforts had not been successful. The Municipality intends to apply for the joinder of the relevant persons in the Provincial Department in these proceedings, as they 'will unlock the process of moving the community to their permanent houses'. Further, the municipal manager stated that joinder of those G officials —

> 'will go a long way to ensure that the officials not only take their administrative functions seriously but that they also learn to appreciate the necessity of complying with court orders timeously and ensure that H court orders are complied with without unnecessary delay'.

The municipal manager made the point that the relevant officials in the Provincial Department — for which the Member of the Executive Council for Human Settlements (MEC) is responsible — should be joined because 'they are ultimately responsible for providing the financial resources and support required by the [Municipality] in order to comply I with the court orders'. This was the first time, throughout the history of

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

this matter, that an argument relying on the financial constraints of the A Municipality was brought to the attention of this court.

[18] Second, the municipal manager identified Mr Chainee as the functionary responsible for 'ensur[ing] that the [Municipality] fulfils its obligation to provide adequate housing to its inhabitants'. He alluded to a forthcoming affidavit by Mr Chainee wherein he would explain that he B was 'the appropriate person, insofar as he has the relevant delegations of authority and responsibility, who shall assume

responsibility for ensuring that the court's orders and directions are adhered to'. Even if the municipal manager were joined in these proceedings, he asserted that he would rely on Mr Chainee to do what this court directs him to do since C his office 'does not have nor is it designed to have the capacity (of officials) to perform functions relating to the provision of adequate housing'.

[19] In response to the order of 28 August 2014 and the affidavits deposed to by the mayor and municipal manager, the Municipality D applied for an order: *(a)* joining the MEC; *(b)* directing the MEC to provide it with the financial resources and delegations necessary to enable it to comply and give effect to this court's order of 6 December 2011; and *(c)* directing the MEC to devise and implement a comprehensive plan to provide the Municipality with financial resources and file a report detailing that plan with the Registrar of this court. The E Municipality stated that the facts related to the joinder application were better known by Mr Chainee, who deposed to the supporting affidavit.

[20] Referring to the MEC's statutory obligations, [14] Mr Chainee supported the joinder of the MEC and motivated for his own joinder. However, shortly thereafter, the Municipality withdrew the joinder application. The Municipality did so on the basis that the issues F

A pertaining to provision of the necessary financial resources and delegations to enable it to give effect to the order of 6 December 2011 had been resolved through a series of collaborative meetings with officials of theMunicipality and Provincial Department. In addition the parties had

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since come to agree on the implementation of a comprehensive plan to A provide the Municipality with financial resources.

[21] Nevertheless, the MEC, based on his obligations under the Housing Act, was directed by this court on 5 December 2014 to show cause why he should not be joined in the contempt proceedings. Ms Xoliswa Mkhalali, B the regional head of the Provincial Department, deposed to the affidavit, responding to the directions on behalf of the MEC. She assured this court that, in principle, the MEC had no objection to being joined but did not think that the joinder was necessary. This, she stated, was because, up until the moment of the joinder application, the MEC C and the Provincial Department had no knowledge of the happenings in Bapsfontein Settlement. She pointed to certain inaccuracies in the Municipality's papers — for example, that there was no evidence of the Provincial Department being requested for assistance in December 2012.

[22] In the ordinary course, Ms Mkhalali explained, the Provincial Department's D involvement would only begin at the point of housing construction. Ordinarily, she said, a municipality would apply for approvals during the pre-planning stage so that the Provincial Department could budget and plan for the development. Yet, in this instance, no such application was tendered to the Provincial Department. A letter, E allegedly sent to the Provincial Department requesting assistance, was discussed at the meetings that came of the joinder application. However, the Municipality conceded to the fact that this letter may not have actually been sent to the Provincial Department. Ms Mkhalali also confirmed that the Municipality does not require any delegations or authorisations to commence the work required by the order of 6 December 2011, F nor does it rely on the Provincial Department for conducting feasibility studies; further, the bulk and internal services are generally done prior to the Provincial Department's involvement. [15]

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

A [23] Despite the recalcitrance imputed to the Provincial Department because of its inaction, Ms Mkhalali reassured this court that —

> '(n)otwithstanding the fact that the MEC was not previously notified of the court order or of the Municipality's failure to engage with the [Provincial] Department on this issue, of primary importance is the fact that there is a need for government to respond to the housing needs of B the applicants'.

The genuineness of this acknowledgement is supported by evidence of the resolutions adopted at the meetings that took place between the Municipality and the Provincial Department. These resolutions demonstrate C that it has been collaboratively decided that: *(a)* the Municipality and the Provincial Department are to work together to give effect to the court's directives; *(b)* officials in both offices are to jointly develop a plan to identify land and resolve the N12 Community applicants' housing backlog; *(c)* the Provincial Department is going to budget for the purchase of land, the provision of services and housing construction; and *(d)* D the Municipality, too, will budget for these costs through the urban-settlements development grant. [16]

Issues

[24] It is against this backdrop that the following issues must be E determined —

(a) whether the Municipality has shown good cause why it should not be held in contempt of the order of 12 March 2014;

F *(b)* whether the Municipality's attorney was in contempt;

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

(c) whether that attorney should pay the costs of the contempt A proceedings from his own pocket;

(d) whether the mayor and municipal manager should be joined in these contempt proceedings; and

(e) whether the MEC should be joined in these contempt proceedings. B

Contempt of court orders

[25] Before I deal with these issues, it is important to outline the current status of our law regarding contempt of court orders with reference to the decision of the Supreme Court of Appeal in *Fakie.*[17] I do so while keeping in mind the difficulties inherent in compelling compliance from C recalcitrant state parties in a manner that displays the courts' discontent with disregard for the rule of law.

[26] The starting point is the Constitution. It declares its own supremacy and this supremacy pervades all law. [18] Section 165 vouchsafes D judicial authority. It provides that courts are vested with judicial authority and that no person or organ of state may interfere with the functioning of the courts. [19] The Constitution explicitly enjoins organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. [20] In order to ensure E that the courts' authority is effective, s 165(5) makes an order of court binding on 'all persons to whom and organs of state to which it applies'. These obligations must be fulfilled. It is significant that this subsection specifically mentions organs of state, for 'justiciability and powers of constitutional review make sense only if non-judicial authorities cannot and do not undo court orders and/or their consequences'. [21] These F

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

A sections, read alongside the interpretive injunction of the supremacy clause, demonstrate why continual non-compliance with court orders and decisions would, inevitably, lead to a situation of constitutional crisis.

[27] Notwithstanding this clear constitutional imperative that the B authority of our courts is to be respected and upheld, certain state parties have, on occasion, displayed a troubling disregard for judicial orders. It is not difficult to reference examples of cases involving contempt, by state organs, of court orders where, most troublingly, constitutional rights are in issue. [22] The cases are by no means exhaustive of state parties' C non-compliance with the orders and decisions of our courts; they are included merely to illustrate the extent and nature of this phenomenon. What they show is not merely that state parties are failing, in a very serious way, to meet their constitutional obligations, but that these failures have real and serious consequences for those whose interests they D are there to serve. [23]

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

[28] Contempt of court is understood as the commission of any act or A statement that displays disrespect for the authority of the court or its officers acting in an official capacity. [24] This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. [25] This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil B proceedings is both contemptuous and a criminal offence. [26] The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order. [27]

[29] The courts' treatment of contempt has been developed over the C years. Under the common law there are different classifications of contempt: civil and criminal, *in facie curiae* (before a court) or *ex facie curiae* (outside of a court). [28] The forms of contempt that concern us here, namely those occurring outside of the court, could be brought before court in proceedings initiated by parties, public prosecutors or the court acting of its own accord (mero motu). [29] D

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

A [30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. [30] Civil contempt is a crime, [31] and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt B can, however, also be ordered in civil proceedings for punitive or coercive reasons. [32] Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings mero motu.

C [31] Coercive contempt orders call for compliance with the original order that has been breached, as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order. [33] By contrast, punitive orders aim to D punish the contemnor by imposing a sentence which is unavoidable. [34] At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the rule of law. [35]

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

[32] The pre-constitutional dispensation dictated that in all cases, when A determining contempt in relation to a court order requiring a person or legal entity before it to do or not do something (*ad factum praestandum*), the following elements need to be established on a balance of probabilities —

(a) the must order exist; B

(b) the order must have been duly served on, or brought to the notice of, the alleged contemnor;

(c) there must have been non-compliance with the order; and

(d) the non-compliance must have been wilful or mala fide. [36]

The import of *Fakie* C

[33] The question for consideration in *Fakie* was whether it was acceptable, in the light of the constitutional protections afforded to 'accused persons', to commit someone to prison found guilty of contempt where reasonable doubt exists as to any one element of the crime. [37] The majority in *Fakie* noted that with our Constitution coming D into force, the need has arisen to ensure that the principles of contempt accord with constitutional dictates. [38]

[34] In an instructive judgment the majority, per Cameron JA, outlined the history of contempt in South African law and how it has been dealt E with by other courts. The majority observed that the application for committal is a 'peculiar amalgam', as it is a civil proceeding that has in its arsenal the threat or consequence of criminal sanction. [39] Though the successful litigant's interest is in compelling compliance, the courts are able to grant the sanction of committal because there is a public interest being protected [40] — that is, the obedience to court orders and the F

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

A maintenance of the rule of law. [41] Acknowledging this amalgam leads to the question of whether the distinction between civil and criminal contempt orders exists. [42] The Supreme Court of Appeal concluded that in reality there is not as strict a distinction as previously believed and, in fact, the Constitution demands that the common law be amended to B protect the rights of those upon whom the sanction of imprisonment may be visited on being unsuccessful in contempt proceedings. [43]

[35] After surveying the remaining case law, international sources and the arguments of either side, *Fakie* concluded that this standard for a C finding of contempt where committal is the sanction is not in keeping with constitutional values and that the standard should rather be beyond a reasonable doubt. [44] Despite the fact that it is acknowledged that this mechanism (especially when employed by civil litigants) retains its civil character, the possibility of imprisonment requires the importation of D protections. [45]

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

[36] These protections are mandated by the Constitution. However, in A importing them we must be cognisant of the context of contempt proceedings: a respondent in contempt proceedings, *Fakie* said, is not an 'accused person' as envisioned by s 35 of the Constitution, and the protections afforded to a contemnor should not supersede the capacity of a non-state litigant who may not have the administrative might to B establish motive. [46] Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. [47] Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established. C

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[37] However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance, such as declaratory relief, [48] a mandamus demanding the contemnor behave in a particular manner, [49] a fine [50] and any further order that D would have the effect of coercing compliance. [51]

[38] I now deal with the above issues.

Should the Municipality be held in contempt?

[39] The key issue is whether, in the circumstances of this case, the E Municipality has shown good cause why it should not be held in contempt of this court's orders. There can be no doubt that the Municipality has not complied with this court's directions and orders. [52] However, the service of the order upon the Municipality, an essential element to a finding of contempt, is wanting. F

[40] The Municipality submitted that it did not receive the directions and order of this court due to its attorney's change of fax number and email address, and that it was an oversight not to furnish this court with a notice of the change of address. This much was confirmed by the attorney, who allegedly became aware of the directions and order only on G 14 June 2014, once he was contacted by the deputy registrar of this court. The Municipality submitted that there was no wilful default on its

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Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

A part and that the applicants suffered no prejudice. The registrar had transmitted the directions and order to an email address and fax number that had been changed during the period preceding transmission. But the Municipality neither specified the dates on which the addresses were changed nor explained why it was necessary for the attorney to change B his email address and not provide any forwarding service addresses. The Municipality simply said that it only became aware of the order of 12 March 2014 and the set-down direction in casu on 14 June 2014.

[41] The applicants contended that the explanation is inadequate. They could not, nonetheless, refute the averments regarding the Municipality's C non-receipt of the directions and order. They urged us to order the Municipality to take steps to move the N12 Community applicants and pay costs on a punitive scale. SERI submitted that the Municipality should be held in contempt and that a declaration should be granted to safeguard the court's institutional authority and ensure compliance. It submitted that, in addition to a rule nisi being issued for joinder of the D mayor and municipal manager, we should draw an inference that the Municipality was served or had become aware of the order. SERI also sought a punitive costs award against the Municipality.

[42] While courts do not countenance disobedience of judicial authority, E it needs to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect for judicial authority. [53] On whether this court should make a civil contempt order against the Municipality, it is necessary to consider whether, on a balance of probabilities, the Municipality's non-compliance was born of wilfulness and mala fides.

F [43] One has to accept readily that the Municipality's explanation may not be adequate. However, the undisputed evidence, confirmed under oath by its attorney, in particular that the order was not served and the Municipality was not made aware of it, negates a finding that proper service is established. This court cannot, in the circumstances, draw an G inference of wilfulness and mala fides. As a result, one cannot safely conclude that the Municipality is in contempt of the order. It follows that the Municipality has shown good cause why it should not be held in contempt.

[44] This conclusion does not, however, detract from the fact that the Municipality has breached its constitutional obligations by failing to H abide by the orders dated 6 December 2011 and 12 March 2014. The source and scope of these obligations are

found in the Constitution: s 152 which deals with the objects of local government provides:

'(1) The *objects of local government* are —

(a) to provide democratic and accountable government for local I communities;

(b) to ensure the *provision of services to communities* in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; A

. . .

(2) *A municipality must strive*, within its financial and administrative capacity, *to achieve the objects* set out in subsection (1).' [Emphasis added.]

[45] In addition s 73 of the Municipal Systems Act [54] outlines the general B duty placed on municipalities. It provides:

'(1) A municipality must give effect to the provisions of the Constitution and —

(a) give priority to the basic needs of the local community;

(b) promote the development of the local community; and

(c) ensure that all members of the local community have access to at C least the minimum level of basic municipal services.

(2) Municipal services must —

(a) be equitable and accessible;

(b) be provided in a manner that is conducive to —

(i) the prudent, economic, efficient and effective use of available D resources; and

(ii) the improvement of standards of quality over time;

(c) be financially sustainable;

(d) be environmentally sustainable; and

(e) be regularly reviewed with a view to upgrading, extension and improvement.' [55] E

[46] The effect of *Pheko I*, in terms of these obligations, entitled the applicants to relief. [56] Also, *Pheko I* clearly outlined the exact steps to be followed in order to effect that relief. [57] All of these obligations served as a basis for the court's order of 28 August 2014. The obligations continue to form the basis of the Municipality's ongoing responsibilities toward the applicants. F

Should Mr Khoza be held in contempt?

[47] When a court order is disobeyed, not only the person named or party G to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable. [58] The reason for extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise H

A interfere with, the due course of justice or bring the administration of justice into disrepute. [59]

[48] The attorney confirmed that he did not inform the Municipality of the directions and order. This, he said, was because he did not receive them since they were transmitted to a fax number that was no longer B linked to his changed email address.

He said that the email address was changed in or about August 2013 because it had become unreliable. In addition in July 2012 his offices were relocated to new premises, which resulted in the change of telephone numbers and fax numbers.

[49] The attorney explained that before the relocation he enquired from C the registrar of this court whether further directions had been issued. He asked because, he said, 'the applicants themselves had been in contempt of this court by failing to comply with the directions issued by the court'. As a result, he 'gained the impression that the applicants no longer intended to proceed with the matter'. And he did not therefore 'inform the registrar of the change of address'. He acknowledged that '(t)his . . . D was incorrect as the applicants later applied for condonation for the late filing of the reports which they were directed to file'. The attorney also made the enquiry because the Municipality was itself waiting for this court to issue further directions as to whether it should commence with the process of relocating the N12 Community applicants.

E [50] The standards of proof are those set out in *Fakie*: a balance of probabilities in respect of civil remedies and a reasonable doubt in respect of a committal order. While the existence of the order and non-compliance have been established, the requisite of service has not. It follows that without one of the requisites being established, no inference of wilfulness and mala fides can be drawn. The attorney's undisputed F evidence dispels any notion of wilfulness and mala fides on his part. I conclude therefore that contempt on the part of the attorney has not been established.

Should the attorney pay costs from his own pocket?

G [51] Costs *de bonis propriis* are costs which a representative [60] is ordered to pay out of his or her own pocket as a penalty for some improper conduct, for example, if he or she acted negligently or unreasonably. [61] Whether a person acted negligently or unreasonably must be decided in the light of the particular circumstances of each and every case. [62]

[52] The attorney submitted that this costs award is punitive and H awarded against attorneys only in exceptional circumstances where, for

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Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

example, the court finds that a legal representative did something out of A the ordinary and of an unusual nature. He submitted that his failure to inform the Municipality of the directions and order of this court was not as a result of gross negligence. I disagree.

[53] Mr Khoza is not only an attorney of record for the Municipality but B also an officer of this court. He knew that the matter was pending and there was no basis for him to believe that the applicants no longer intended to pursue the matter. Furthermore, he knew that the Municipality was awaiting further directions regarding its obligations to the N12 Community applicants; indeed, that was one of the reasons he proffered for making enquiries with the Registrar. His conduct is all the C more concerning in the light of the importance of the interests at stake and the harm that the extensive delay has already caused to the applicants. It follows that his conduct has been egregious.

[54] While the evidence may not establish wilfulness or mala fides, it does establish a gross disregard for his professional responsibilities. At D the very least, the attorney had an obligation to notify the registrar of this court and his clients of any change of address. [63] It is proper that he accepted that he inappropriately failed to inform the registrar of the change of his address. This was plainly not done. The failure to notify the registrar does, indeed, constitute gross negligence on his part. [64] E

[55] Accordingly Mr Khoza must be ordered to pay the costs from his own pocket to mark this court's displeasure at his gross negligence, particularly as an officer of this court. Next is whether the mayor, municipal manager and MEC should be joined in these proceedings.

Joinder of the mayor, municipal manager and MEC F

[56] The test for joinder requires that a litigant have a direct and substantial interest in the subject-matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the court. [65] This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of G decisions by our courts. [66]

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

A [57] In the light of my finding that contempt of this court's order on the part of the Municipality has not been established, no purpose would be served by joining the mayor, municipal manager and MEC in these contempt proceedings.

B [58] However, by virtue of their constitutional and statutory responsibilities, the joinder of the mayor and municipal manager in respect of this court's continuing supervision of the implementation of the orders in *Pheko I* is appropriate. The general duty imposed on municipalities in respect of the provision of municipal services includes giving effect to the Constitution by prioritising the basic needs of the community, promoting C the development of the community and ensuring that there is access to at least the minimum level of municipal services. [67]

[59] The mayor and the municipal manager are tasked with the oversight and management, respectively, of the provision of services by municipalities to the local community in a sustainable and, in the case of the municipal manager, equitable manner. [68] In addition to these responsibilities D the municipal manager is tasked with the implementation of national and provincial legislation applicable to the municipality, like the Housing Act. [69] Thus, despite Mr Chainee's efforts to exonerate the mayor and the E municipal manager, they nonetheless have constitutional and statutory obligations in relation to the supervisory orders of *Pheko I*. [70]

[60] As regards the joinder of the MEC, s 7 of the Housing Act makes it obligatory for him to take all reasonable and necessary measures to support and strengthen the capacity of the Municipality in its provision F of adequate housing. [71] When the Municipality fails to do so, the MEC is obliged to intervene by taking appropriate steps. [72] Based on the evidence before us, the MEC's office, in the latest collaboration with the Municipality, has identified personnel in its ranks that will become directly responsible for the implementation of steps to comply with this court's G orders. In the light of the MEC's statutory obligations in relation to the provision of housing and his role in the implementation of the order of 6 December 2011, these steps are appropriate. Those same obligations mean that he should be joined as a party having substantial interest in the execution of the supervisory orders in *Pheko I*. Accordingly an order to H that effect will be made.

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

Concluding remarks A

[61] Finally, it needs to be stressed that the Constitution enjoins organs of state, like the Municipality, to adhere and give effect to its principles and provisions, as they must to the court orders issued thereunder. [73] Where an organ of state fails in its duty, a court must assume an 'invidious position of having to oversee state action', [74] to address and B correct the failures.

[62] In response to the rule nisi calling on the mayor and municipal manager to show cause why they should not be joined in the proceedings, the mayor, Mr Gungubele, disclaimed all responsibility for the fact that his Municipality had failed to carry out the court's orders. He sought C to do so on the basis that he was not responsible for what he called the 'day to day administrative functions' of the Municipality. Instead, he pointed to a junior official, Mr Chainee (himself a new appointee), whom he said was

responsible. [75] For his part, the municipal manager, Mr Ngema, engaged an identical disclaimer. [76] D

[63] These disclaimers were unseemly and highly inappropriate. Who in a local authority, if not the mayor and municipal manager, is responsible for its failings of function? The offices they hold exist for the purpose of oversight in the interests of the community they serve. It is wrong for them to shrug off responsibility when their own municipal structure, the E one at whose symbolic and operational head they stand, conspicuously fails to fulfil a duty imposed by a court order. Nor can or should they be able to plead ignorance. The order this court issued on 6 December 2011 affected hundreds of families and households, perhaps thousands of people. Their daily living, human dignity and security and comfort were directly at stake. It is precisely because of the leadership entrusted F to the mayor and the municipal manager that they have a duty to undertake responsibility for implementing court orders.

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

A [64] This is not to say that they have to be involved in the minutiae of executing the order and overseeing the practicalities of its realisation. But what they must do is ensure that the municipal structures, for which they carry ultimate legal and moral responsibility, respond appropriately. This they owe to the courts. But, much more importantly, they owe it to the residents, those who put them in power and who depend on their B responsible exercise of that power, to act diligently and expeditiously.

[65] It bears repeating that courts shall not hesitate to enforce their orders.

[66] The remarks of Justice Brandeis in *Olmstead et al v United States*, [77] C which have been endorsed by this court, [78] remain apposite here:

> 'In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . [G]overnment is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a law-breaker, it *breeds contempt* for the law; it invites every man [or woman] to become D a law unto himself [or herself]; it invites anarchy.' [Emphasis added.]

[67] The Municipality, as an organ of state, is duty-bound to comply with the orders of this court, as it is with all of its obligations under the Constitution.

E **Order**

The following order is made*:*

1. The Ekurhuleni Metropolitan Municipality (Municipality) and Mr Bongani Khoza, the Municipality's attorney, are not held in contempt of this court's orders of 6 December 2011 and F 12 March 2014.
2. The rule nisi issued on 28 August 2014, in respect of the executive mayor and the municipal manager, is discharged.
3. The executive mayor and the municipal manager are joined as parties in the proceedings in relation to *Pheko and Others v Ekurhuleni Metropolitan Municipality* G 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34) (*Pheko I*) for the purpose of implementing the supervisory order.
4. The Member of the Executive Council for Human Settlements, Gauteng, is joined as a party in the proceedings in *Pheko I* for the purpose of implementing the supervisory order referred to in para 3 above. H
5. Mr Devraj Chainee, the head of department for human settlements for the Municipality, is joined in his official capacity as a party in the proceedings in *Pheko I* for the purpose of implementing I the supervisory order referred to in para 3 above.

Nkabinde J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring)

6. Mr Khoza and the Municipality are each ordered to pay 50% of A the applicants' costs in the contempt proceedings. Mr Khoza is ordered to pay costs *de bonis propriis*.

Applicants' Attorneys: *Gilfillan Du Plessis Inc*, Pretoria.

Respondent's Attorneys: *Khoza & Associates Inc*, Johannesburg.

* *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34).

1 *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34) (*Pheko I*).

2 The order reads:

'In the event, the following order is made:

'1. Condonation is granted.

2. Leave to appeal directly to this court is granted.

3. The appeal is upheld.

4. The order of the North Gauteng High Court, Pretoria, under case No 5394/11 is set aside.

5. It is declared that the removal of the applicants from their homes, the demolition of the homes, and their relocation by the Ekurhuleni Metropolitan Municipality were unlawful.

6. The Municipality must identify land in the immediate vicinity of Bapsfontein for the relocation of the applicants and engage meaningfully with them on the identification of the land.

7. The Municipality must ensure that the amenities provided to the applicants and people resettled in terms of this order are no less than the amenities and basic services provided to them as a result of the relocation of March 2011.

8. The Municipality must file a report in this court confirmed on affidavit by no later than 1 December 2012 regarding steps taken in compliance with para 6 of this order to provide access to adequate housing for the applicants.

9. The applicants may, within 15 days of the filing of the Municipality's report, lodge affidavits in response to the report.

10. The Municipality is ordered to pay the applicants' costs in this court and in the High Court, including, where applicable, costs of two counsel.'

3 *Pheko I* above n1 at para 4.

4 57 of 2002.

5 *Pheko and Others v Ekurhuleni Metropolitan Municipality* (GNP case No 5394/11, 9 June 2011; [2011] ZAGPPHC 130) (High Court judgment) at 5.

6 Id at 6.

7 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

8 High Court judgment above n5 at 4.

9 Condonation was granted on 16 September 2013.

10 The directions read:

'The Chief Justice has issued the following directions:

1. The [Municipality] is directed to file, by no later than Friday, 29 November 2013, a report on the progress made in respect of the [N12 Community applicants] regarding its undertaking towards the community set out in the report dated 30 November 2012. The report must indicate steps taken to ensure that —

(a) permanent housing will be provided to the community;

(b) the land utilised is suitable for occupation;

(c) bulk and link engineering services will be available with sufficient capacity for the proposed densities;

(d) all erven have access to roads; and

(e) all erven are connected to the internal water and sewer infrastructure network.

2. The [Municipality] is directed to report also on the progress made in respect of its obligation to find suitable land for the Mayfield Community applicants. The report must address inter alia —

(a) progress regarding the acquisition of alternative land; and

(b) the processes to be completed before such land is acquired.

3. Further directions may be issued.'

11 This interlocutory application was lodged under rule 31 of the Rules of this Court. The rule provides:

'(1) Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts —

(a) are common cause or otherwise incontrovertible; or

(b) are of an official, scientific, technical or statistical nature capable of easy verification.

(2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court.'

12 The order reads:

'1. It is declared that the [Municipality] is in breach of its constitutional obligations by failing to abide by the orders of this court dated 6 December 2011 and 12 March 2013.

2. The [mayor] and [municipal manager] are ordered to show cause on affidavit by no later than

Monday, 15 September 2014, why they should not be joined to these proceedings.
3. The [Municipality] is ordered to identify any other office bearers and/or officials of the [Municipality] who are responsible for compliance with orders of this court and give notice of such office bearers and/or officials by no later than Monday, 15 September 2014.
4. The [Municipality] is ordered forthwith to give effect to its agreement with the [N12 Community applicants] and to take the steps necessary to ensure relocation of the [N12 Community applicants].
5. The [Municipality] is ordered to file, by no later than Thursday, 27 November 2014, a progress report detailing steps taken to —
(a) purchase the land identified by it in its report of 30 November 2012 with a view to relocating the [N12 Community applicants] to such land as agreed to by them in their report dated 28 December 2012;
(b) provide permanent housing to the [N12 Community applicants];
(c) ensure that the land utilised is suitable for occupation;
(d) ensure that bulk and link engineering services are available with sufficient capacity for the proposed densities;
(e) ensure that all erven have access to roads; and
(f) ensure that all erven are connected to the internal water and sewer infrastructure networks.
6. The applicants and the amicus curiae may respond to the contents of the progress report referred to in paragraph 5 above by no later than Monday, 29 December 2014.'

13 117 of 1998.

14 See the Housing Act 107 of 1997, specifically ss 7 and 9 thereof which provide:

'7 Functions of provincial governments

(1) Every provincial government, through its MEC must, after consultation with the provincial organisations representing municipalites . . . do everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy.
(2) For the purposes of subsection (1) every provincial government must through its MEC—
(a) determine provincial policy in respect of housing development;
. . .
(c) take all reasonable and necessary steps to support and strengthen the capacity of municipalities to effectively exercise their powers and perform their duties in respect of housing development;
(d) co-ordinate housing development in the province;
(e) take all reasonable and necessary steps to support municipalities in the exercise of their powers and the performance of their duties in respect of housing development;
(f) when a municipality cannot or does not perform a duty imposed by this Act, intervene by taking any appropriate steps in accordance with section 139 of the Constitution to ensure the performance of such duty;
. . . .
(3) An MEC must —
(a) administer every national housing programme and every provincial housing programme which is consistent with national housing policy and section 3(2)*(b)*, and for this purpose may, in accordance with that programme and the prescripts contained in the Code, approve —
(i) any projects in respect thereof; and
(ii) the financing thereof out of money paid into the provincial housing development fund as contemplated in section 12(2);
. . . .
(5) The MEC may, subject to any conditions he or she may deem appropriate in any instance —
(a) delegate any power conferred on him or her by this Act; or
(b) . . . Provided that the delegation or assignment does not prevent the person who made the delegation or assignment from exercising that power or performing that duty himself or herself.
. . .
9 Functions of municipalities
(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to —
(a) ensure that —
(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
(ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;
(iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;
(b) set housing delivery goals in respect of its area of jurisdiction;
(c) identify and designate land for housing development;
(d) create and maintain a public environment conducive to housing development which is financially and socially viable;
(e) promote the resolution of conflicts arising in the housing development process;
(f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;
(g) provide bulk engineering services, and revenue generating services insofar as such services are not provided by specialist utility suppliers; and
(h) plan and manage land use and development.'

15 These statements as to the allocation of functions find support in the National Department of Human Settlement's publication *National Housing Policy and Subsidy Programmes*, specifically s 1: 'Simplified Guide to the National Housing Code', part B: 'Overview of the Current National Housing Programmes', which explains the various housing-subsidy instruments that are available to assist low-income households to access adequate housing. Under the heading 'Housing Assistance in Emergency Circumstances' it is explained, in para 4.5, that —
'(t)he projects will be undertaken on the basis of a partnership of cooperative governance between the

relevant municipality, the Provincial Department, and the National Department. *The developer role will be fulfilled by municipalities*. The Provincial Department can assist the municipality *if the municipality lacks capacity*, and can assume the role of the developer if the municipality cannot meet the project commitments.' [Emphasis added.]

16 The urban settlements development grant (USDG) was created under sch 4 to the Constitution. Its purpose is to upgrade informal settlements — either by creating formal housing or by upgrading services to informal settlements — where the urban population is growing, with an increasing number of poor people. There has historically been a misalignment of powers and functions between the different spheres of government and the USDG would make it more affordable for metropolitan municipalities to acquire land. (Ms Moore, chief director: urban Development and infrastructure, National Treasury 'National Treasury briefing on Urban Settlements Development Grant' *Meeting of the Budget Committee on Appropriation* (12 September 2012), available at https://pmg.org.za/committee-meeting/14853/.)
See also Ms Ndlovu, Director of Human Settlements, Ekurhuleni Metropolitan Municipality 'Ekurhuleni Presentation' Minutes of the Committee Meeting of Human Settlements: Urban Settlements Development Grant 3rd quarter spending for 2012/13 by Johannesburg, Tshwane and Ekurhuleni Metros (19 June 2013), available at https://pmg.org.za/committee-meeting/16074/— where challenges facing the Municipality were mentioned and specific attention was paid to Bapsfontein Settlement:

'The City did not have planned relocations, and when it happened in Bapsfontein it had been just a once off. There were people who lived in environmentally sensitive areas, and when the situation was critical, those people were moved.'

17 *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) ([2006] ZASCA 54) (*Fakie*).

18 Section 1*(c)* of the Constitution provides:

'The Republic of South Africa is one, sovereign, democratic state founded on the following values:
. . .
(c) supremacy of the Constitution and the rule of law.'

19 Sections 165(1) and (3).

20 Section 165(4). Under s 239 of the Constitution 'organ of state' is defined to mean —

'*(a)* any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution —
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation,
but does not include a court or a judicial officer; . . .'.

21 Du Plessis 'Interpretation' in Woolman et al (eds) *Constitutional Law of South Africa* Service 6 (2014) 2 at 32 – 99.

22 See, for example, *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) (2008 (9) BCLR 865; [2008] ZACC 8) (*Nyathi*); *N and Others v Government of the Republic of South Africa (No 3)* 2006 (6) SA 575 (D) (*N and Others*); *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) (2003 (11) BCLR 1236); and *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T) (*Federation of Governing Bodies*).

23 The extent of state parties' non-compliance and the harm that it can cause not only to the authority of the courts but also to the public is illustrated in the following cases:
In *Nyathi* id, the applicant had obtained an unopposed High Court judgment against the state respondent for negligent and improper care administered to him at two hospitals. That care had resulted in a stroke and severe left hemiplegia, thereafter requiring full-time care and medical treatment. The respondent admitted liability, leaving only the issue of quantum to be addressed. Unable to obtain an interim payment from the respondent to cover his medical and legal fees, the applicant obtained an unopposed order from the High Court obliging the respondent to make an interim payment. The respondent failed to comply with that order, however, requiring the applicant to launch proceedings in the High Court, challenging the constitutionality of a provision of the State Liability Act 20 of 1957, which prevented execution against state property. The respondent did not respond to the notice of motion. It was only when the matter was set down in this court for contempt proceedings that the respondent made the payment, nearly two years after the unopposed action had been commenced. The applicant died two months after the payment was made.
Federation of Governing Bodies id, concerned the rights ancillary to the proper running of the school system and provision of quality education. Having obtained a consent order, which in effect required that the respondent comply with the relevant statutory prescripts, the applicant brought contempt proceedings, contending that steps were being taken to close pre-primary schools without engaging the affected parties. The High Court found for the applicant, holding that the respondent had failed to comply with its obligations under the consent order.
Similarly, in *N and Others* id, the applicants, who were prisoners at Westville Correctional Centre whose HIV status had deteriorated to and below a cd4 count of 200 cells/ml, had successfully sought an order compelling the state correctional facility to provide them with immediate antiretroviral (ARV) treatment. That order included the requirement that the respondent lodge with the court registrar an affidavit setting out the manner in which it would comply. The respondent failed to file such a report. The reprehensibility of the state parties' conduct in relation to this matter, which on the evidence included denying public-interest groups the ability to enter the prison to consult with the prisoners regarding their medical well being, is brought home by the fact that one of the prisoners lost his life shortly after the initial court order was granted.

24 *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others* 1956 (1) SA 105 (N) (*Cape Times*) at 106B – C.

25 Further, any interference with the administration of justice would constitute a basis for a finding of contempt of court. Id at 106B.

26 *Fakie* above n17 at para 6. Prior to the pronouncement of *S v Beyers* 1968 (3) SA 70 (A) there was uncertainty about the ability of a civil order to attract public prosecution. That case provided that, even

where a litigant seeking a coercive civil contempt order abandons its cause of action, that does not, depending on the nature and seriousness of the contempt, preclude the court from enforcing a criminal sanction such as committal (see *Fakie* above n17 at para 11).

27 Cilliers et al *Herbstein & Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (Juta, Cape Town 2009) volume 2 at 1100.

28 *Cape Times* above n24 at 106C – D; *Fakie* above n17 para 11.

29 Id at 110C. Comparable foreign jurisprudence is helpful in this regard: In the United States 'it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders'. See *Young v United States ex rel Vuitton et Fils SA* 481 US 787 (1987) at 793. By comparison, in Canada, courts may institute contempt proceedings *ex mero motu* —

'(b)ut it is a drastic procedure which should be used cautiously only to uphold the authority of the Court and its process, or to enable justice to be properly administered, or to maintain the authority of the law. It ought not to be used merely to uphold and vindicate the processes of the law for the benefit of one of the litigants.' (*R v UFAW* [1967] 65 DLR (2d) 579 (BCCA) at 591.)

And in the United Kingdom, civil contempt is understood to vindicate the public's interest in the enforceability of court orders. See Lowe & Suffrin *The Law of Contempt* 3 ed (Butterworths, London 1996) at 559. Therefore, when contempt takes on a public dimension, 'particularly if the offender is deliberately pursuing a policy of challenging a court's authority', British courts are empowered to initiate contempt proceedings mero motu (id at 559 and 659). See also *Churchman and Others v Joint Shop Stewards' Committee of the Workers of the Port of London and Others* [1972] 3 All ER 603 (CA) at 608.

30 See Burchell *Principles of Criminal Law* 3 ed (Juta & Co Ltd) at 955.

31 Above n26.

32 *Fakie* above n17 at para 71.

33 Id in para 74. There are divergent views between the majority and the minority as to the distinction to be drawn between these two classifications. However, the characterisation presented by Heher JA, of the minority, appears to accurately capture the common-law position in this regard.

34 Id in para 75.

35 *York Timbers Ltd v Minister of Water Affairs and Forestry and Another* 2003 (4) SA 477 (T) ([2003] 2 All SA 710) (*York Timbers*) at 506D; and *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH) at 456A – B. As explained id. See also s 1*(c)* of the Constitution.

36 *Fakie* above n17 para 12.

37 Id.

38 Id. See also ss 2, 12, 35 and 39(2) of the Constitution.

39 *Fakie* above n17 para 8.

40 Id paras 34 and 38 – 39.

This, as *Fakie* points out, is acknowledged by incorporation in the test for contempt itself that the contempt must have been committed wilfully and with mala fides. Said differently, having the requirements of mala fides and wilfulness within the test for contempt acknowledges the fact that contempt is an act done on purpose, much like the intentional component in other crimes (id paras 11, 23 and 40). The corollary of this is that good faith avoids the infraction. This is because such a sanction cannot be lawfully imposed for a mere disregard of a court order but should be for the 'deliberate and intentional violation of the court's dignity, repute or authority'. Therefore, the honest belief, even if mistaken, that there is a justification for non-compliance does not accord with that level of intent (id paras 9 – 10).

By comparison, courts in Canada and the United Kingdom require proof beyond a reasonable doubt that the contemnor intended to commit an act disallowed by a clear and unequivocal order of which the contemnor had notice. However, they do not require a showing that the contemnor intended to disobey the order or interfere with the administration of justice. See *TG Industries Ltd v Williams* 2001 NSCA 105 ([2001] 196 NSR) (2d) 35 (*TG Industries*) in paras 16 – 17; *Attorney-General v Times Newspapers Ltd* [1991] 1 AC 191 at 217 ([1991] 2 All ER 398 (HL) at 414*b*); and Lowe & Suffrin above n29 at 565 – 7.

41 Compare Lowe & Suffrin above n29 at 656 where the same is said about English law:

'(I)t is obvious that disregard of a court order not only deprives the other party of the benefit of that order but also impairs the effective administration of justice.'

Compare *International Union, United Mine Workers of America v Bagwell* 512 US 821 (1994) (*Bagwell*) at 828 (noting that the imposition of fines both vindicates the court's legal authority, associated with criminal contempt, and coerces the contemptuous party to comply with the court's orders, associated with civil contempt).

42 See *Fakie* above n17 at paras 11 – 16 for the Supreme Court of Appeal's exposition of the civil and criminal dimensions of contempt in the common law. For comparison with other jurisdictions, compare Miller *The Law of Contempt in Canada* (Carswell, Scarborough 1997) at 13:

'Because all alleged contempts must be proved beyond a reasonable doubt, at the end of the day there is little practical distinction between criminal contempts (summarily, those that have a public character and offend against the administration of justice generally) and civil contempts (those that bear on litigation among private parties such as disobedience of orders or rules of procedure in such litigation).'

For a discussion of the distinction between civil and criminal contempt in American law, see *Bagwell* id at 827 – 81. For an English criticism of the maintenance of the distinction between civil and criminal contempt, see *Attorney-General v Newspaper Publishing plc* [1988] Ch 333 at 362 ([1987] 3 All ER 276 at 294).

43 *Fakie* id paras 34 – 41.

44 Id paras 19, 29 and 39.

45 Id para 24.

46 Id paras 41 and 42.

47 Id para 41.

48 See, for example, *York Timbers* above n35 at 506C – D.

49 See, for example, *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) ([2006] 2 All SA 455); and *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE) ([2005] 1 All SA 745) para 21.

50 See, for example, *Jeebhai v Minister of Home Affairs and Another* 2007 (4) SA 294 (T) para 54; and *S v Mkize* 1963 (3) SA 218 (N).

51 Some of the mechanisms employed in other jurisdictions include community service, striking a written submission, an order that the contemnor tender security for compliance and sequestering the contemnor's property. See Lowe & Suffrin above n29 at 557; *Miller* above n42 at 129.

52 See above [10] – [12] and n2.

53 *Cape Times* above n24 at 106A – B.

54 32 of 2000.

55 In addition s 9(1) of the Housing Act, quoted in full above n14, makes it obligatory for every municipality, as part of the municipality's process of integrated development planning, to take all reasonable and necessary steps within the framework of legislation to ensure access to adequate housing and living conditions.

56 *Pheko I* above n1 paras 49 – 50.

57 Id in para 53. In particular see paras 6 – 8 of the order (for the full text see above n2).

58 *Cape Times* above n24 at 106D – E.

59 Id. See also *Fakie* above n17 paras 6 and 8.

60 See *Zalk v Inglestone* 1961 (2) SA 788 (W) at 795A.

61 *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC) (2006 (8) BCLR 901; [2006] ZACC 7) para 54.

62 *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A) at 725B – C. For the difference between costs *de bonis propriis* and costs on an attorney and client scale, see *Pieter Bezuidenhout-Larochelle Boerdery (Edms) Bpk en Andere v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O) at 236F – H.

63 Rule 1(8) of the Constitutional Court Rules, read with rules 4, 4A and 16 of the Uniform Rules of Court.

64 Above n61. See also *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (A) where similarly an attorney cost the applicant money for not having obeyed the rules of court — see 663H – 664D.

65 *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

66 See, for example *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others* 2015 (2) BCLR 182 (CC) (2015) 36 *ILJ* 363; [2014] ZACC 35) paras 186 – 187; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) (2010 (5) BCLR 457; [2010] ZACC 6) paras 11 – 12; *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) ([2009] 1 All SA 39; [2008] 11 BLLR 1023; [2008] ZASCA 99) para 9; and *Ex parte Body Corporate of Caroline Court* 2001 (4) SA 1230 (SCA) ([2001] ZASCA 89) para 9.

67 Section 73(1) of the Municipal Systems Act above at n54.

68 Section 56(3)*(e)* of the Local Government: Municipal Structures Act 117 of 1998; and s 55(1)*(d)* of the Municipal Systems Act above n54, respectively.

69 Municipal Systems Act above n54 at s 55(1)*(p)*.

70 Above n72 – 75 and ss 152 and 156 read with sch 4, part A, of the Constitution.

71 Above n15.

72 Section 7(2)*(f)* of the Housing Act read with s 139 of the Constitution, and see also above n16.

73 Contempt of court in all cases is to be prohibited and condemned, but much more so where the order with which the state is unwilling to comply concerns the provision of basic human rights. What is more, the situation begins to look dire when the affidavits deposed to by state parties contain bureaucratic babble that is clearly aimed, not at assisting the judiciary to arrive at a just result, but rather at avoiding their constitutional obligations. Often constraints on state parties, particularly financial ones, that may limit or delay their capacity to achieve certain results, are acknowledged and moderated by courts through reporting requirements. In crafting the reporting mechanisms that accompany declarations of positive obligations, not only are courts being sensitive to the very real resource constraints of the state, they are also engaging in a collaborative process in which different branches of government take ownership of their respective constitutional obligations. Courts in such circumstances serve primarily to ensure that the state parties are working to meet those obligations, while enabling them to explain any difficulties or delays that they may encounter in doing so.

74 *Nyathi* above n22 para 85.

75 As set out above [16].

76 As set out above [17] – [18].

77 277 US 438 (1928) at 485.

78 *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) (2001 (2) SACR 66; 2001 (7) BCLR 685; [2001] ZACC 18) para 68.

GORDON v DEPARTMENT OF HEALTH, KWAZULU-NATAL 2008 (6) SA 522 (SCA)

Citation	2008 (6) SA 522 (SCA)
Case No	227/07
Court	Supreme Court of Appeal
Judge	Scott JA, Cloete JA, Mlambo JA, Maya JA and Leach AJA
Heard	May 16, 2008
Judgment	September 17, 2008
Counsel	*M Pillemer SC* (with *P Blomkamp*) for the appellant. *PJ Olsen SC* (with *J Nxusani* and *S Sewpersad*) for the respondent.
Annotations	Link to Case Annotations

G

Flynote : Sleutelwoorde

Constitutional law - Human rights - Right to equality before the law - Right not to be unfairly discriminated against - Affirmative action as unfair H discrimination - Rational relationship between measures and objectives required - Ad hoc and arbitrary conduct excluded - Appointment resulting from such conduct arbitrary - Amounting to unfair labour practice - Race-based appointment of less qualified candidate - No affirmative-action policy or programme in place and affirmative action not one of selection criteria - Appointment arbitrary and unconstitutional - Interim I Constitution, 1993, s 8(3)*(a)*, read with Labour Relations Act 66 of 1995, Schedule 7, item 2(2)*(b)*.

Labour law - Employment equity - Affirmative action - Affirmative action as unfair discrimination - Race-based appointment of less qualified candidate - Rational relationship between affirmative action measures and objectives required - Employer having no employment equity policy or J programme - Affirmative action not one of selection criteria - Race-based

appointment unconstitutional and amounting to unfair labour practice - A Interim Constitution, 1993, s 8(3)*(a)*, read with Labour Relations Act 66 of 1995, Schedule 7, item 2(2)*(b)*.

Practice - Parties - Joinder - Whether required - Direct and substantial interest - Whether relief sought relevant to enquiry - Unsuccessful applicant to post approaching Labour Court for relief that left successful applicant's appointment intact - Successful applicant not joined - Successful applicant B having direct and substantial interest in proceedings only where relief sought entailing setting aside of appointment.

Headnote : Kopnota

The appellant, a white male, was turned down when he applied for a post in the respondent department. A black male, one M, was appointed instead, C notwithstanding the selection panel's finding that the appellant was the most suitable applicant for the post. The appellant approached the Labour Court (LC) for 'protective promotion' as defined in para 9(1)*(c)*, part B.VI/III of the Public Service Commission Staff Code, which in essence amounted to his being provided with all the benefits he would have received had he been appointed to the post, without actually being

appointed. The D appellant alleged that the respondent had arbitrarily and unfairly discriminated against him, and that this amounted to an 'unfair labour practice' as intended in item 2(1)*(a)* of Schedule 7 to the Labour Relations Act 66 of 1995 (LRA). The respondent contended that M was appointed in the furtherance of equality, as intended in s 8(3)*(a)* of the 1993 Constitution (Act 200 of 1993, henceforth the 'interim Constitution'). This link was E sought to be made on the basis of race only. It appeared that the respondent did not have an affirmative action policy or plan in place at the time of M's appointment. The Labour Court dismissed the appellant's claim and the Labour Appeal Court (LAC) dismissed his appeal on the ground that M had not been joined in the application. In a further appeal to the Supreme Court of Appeal, F

Held, as to the non-joinder of M, that the issue was whether the party sought to be joined had a direct and substantial interest in the matter. If the judgment or order of the court could not be sustained and carried into effect without necessarily prejudicing the interests of the party who had not been joined, he had a legal interest in the matter and had to be joined. The nature of the relief sought was therefore relevant to whether the party concerned had a G direct and substantial interest in the subject-matter of the proceedings. (Paragraphs [9] and [11] at 529C and 530F.)

Held, further, that M would have had an interest in the proceedings only if the validity of his appointment had been directly implicated, and that he would thus have been a necessary party only if the order applied for could not be carried out without substantial detriment to his interests. (Paragraph [10] at H 530C.)

Held, further, that the LAC's view that M had a direct and substantial interest in the matter, and that the failure to join him had therefore been fatal to the appellant's case, had to be reversed. (Paragraph [11] at 530G.)

Held, further, as to the merits of the application, that it was apparent from the precedents that the plans and/or policies at issue were subjected to scrutiny I to determine if they were rationally connected with the constitutional imperative of promoting and/or achieving equality and that ad hoc and random action was found to be incapable of meeting the objective. (Paragraph [22] at 536D - E.)

Held, further, that the term 'measures' as set out in s 8(3)*(a)*, as well as the terms 'practices' and 'policies' in item 2(2)*(b)* of Schedule 7 of the LRA, meant J

A something much more than mere ad hoc or random action, as was the case in the present matter. (Paragraph [22] at 536F - G.)

Held, further, that the respondent did not have an affirmative action policy, plan and/or programme in place, nor was the application of affirmative action one of the criteria applicable in the selection of candidates. Clearly the appointment was an ad hoc and arbitrary act. It could never itself amount B to a measure within the contemplation of s 8(3)*(a)* of the interim Constitution (or s 9(2) of the 1996 Constitution), both of which required more than an ad hoc act. The appointment was not by itself a measure, and was clearly arbitrary and therefore unfair as intended in item 2(1)*(a)* of the LRA. (Paragraph [25] at 537F - H.)

Held, further, that the respondent had been obliged to comply with the legislative C framework applicable at the time, which emphasised that suitable candidates could not be denied appointment if they complied with the stipulated requirements, even though representivity was the objective, and that there had thus been no justification for not appointing the appellant. (Paragraphs [27] and [28] at 538D and 538I - 539B.)

D Appeal upheld and the existing order replaced with one *(a)* declaring the appointment of M to be an unfair labour practice as intended in item 2(1)*(a)* of Schedule 7 of the Labour Relations Act; and *(b)* ordering the respondent to pay the applicant the difference between what he would have earned had he been appointed to the post on the effective date and what he actually earned for the period from the effective date to the date of his retirement, together with interest. (Paragraph [29] at 539C - F.)

Cases Considered

E **Annotations**

Reported cases

Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A): referred to

F *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A): referred to

Bekker v Meyring, Bekker's Executor (1828 - 1849) 2 Menz 436: applied

Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA): dictum in para [21] applied

Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA): referred to

G *Collin v Toffie* 1944 AD 456: referred to

Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (SCA) (1997 (4) BCLR 531): distinguished

Eskom v Hiemstra NO and Others (1999) 20 *ILJ* 2362 (LC): referred to

Gordon v Department of Health, KwaZulu-Natal (2004) 25 *ILJ* 1431 (LC): reversed on appeal

H *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A): referred to

Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council (2000) 21 *ILJ* 1119 (LC): compared

Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) (2004 (11) BCLR 1125): dictum in para [41] applied

Motala v University of Natal 1995 (3) BCLR 374 (D): referred to

I *Peacock v Marley* 1934 AD 1: referred to

President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC) (1997 (6) BCLR 708): referred to

Public Servants Association v Department of Justice and Others (2004) 25 *ILJ* 692 (LAC): applied

Public Servants Association of South Africa and Others v Minister of Justice and J *Another* 1997 (3) SA 925 (T): referred to

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S v Zuma and Others 1995 (2) SA 642 (CC) (1995 (1) SACR 568; 1995 (4) BCLR 401): A referred to

Shabalala and Others v Attorney-General, Transvaal, and Another 1996 (1) SA 725 (CC) (1995 (12) BCLR 1593): referred to

Stoman v Minister of Safety and Security and Others 2002 (3) SA 468 (T): dictum at 480A - D applied

Traube and Others v Administrator, Transvaal, and Others 1989 (1) SA 397 (W): B distinguished.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa Act 200 of 1993, s 8(3)*(a)*: see *Juta's Statutes of South Africa 1996* vol 5 at 1-134

The Constitution of the Republic of South Africa, 1996, s 9(2): see C *Juta's Statutes of South Africa 2007/8* vol 5 at 1-23

The Labour Relations Act 66 of 1995, Schedule 7, item 2(2)*(b)*: see *Juta's Statutes of South Africa 1998* vol 4 at 2-242.

Case Information

Appeal against the decision in *Gordon v Department of Health, Kwazulu-Natal* (2004) 25 *ILJ* 1431 (LC). The facts appear from the reasons D for judgment.

M Pillemer SC (with *P Blomkamp*) for the appellant.

PJ Olsen SC (with *J Nxusani* and *S Sewpersad*) for the respondent.

Cur adv vult.

Postea (September 17). E

Judgment

Mlambo JA:

[1] This is an appeal, with leave of this court, against the judgment of the Labour Appeal Court (Zondo JP, Jappie AJA and Basson AJA) dismissing an appeal to that court against the judgment of the Labour Court (Pillay J) which had dismissed the appellant's claim. The judgment of the F Labour Court has been reported, see *Gordon v Department of Health, KwaZulu-Natal* (2004) 25 *ILJ* 1431 (LC).

[2] The respondent on 11 April 1996 advertised the post of Deputy Director: Administration: Greys Hospital: Pietermaritzburg. The appellant, a white male, and Mr Z Mkongwa, a black male, both employees of G the respondent, were amongst the applicants. The appellant had started working for the respondent in February 1967 as an assistant administration clerk and had progressed to the positions of assistant senior administration clerk in 1972, administration officer in 1978, senior administration officer in 1985 and, in 1992, was promoted to the H position of assistant director - Midlands Hospital Complex comprising Fort Napier Hospital, Townhill and Umgeni's C and R Centres. He occupied this position when he applied for the advertised position. On the other hand Mr Mkongwa had started his career with the respondent (at Edendale Hospital) in June 1974 as an assistant administrator and had progressed to the position of administration officer in June 1989. He I was in that position when he applied for the advertised position having obtained an Honours degree in Administration.

[3] The selection panel decided, after interviewing all candidates, that the appellant was the most suitable for the post as he was already administering three hospitals at the time. The panel also found that he J

A had exhibited strong leadership, planning and control competencies which they did not find in the other candidates, including Mr Mkongwa. The panel recommended that the appellant be promoted to the post which recommendation was endorsed by Prof Greene-Thompson, the head of the Department of Health in the province. The recommendation B was then conveyed to the Provincial Public Service Commission by the respondent. It is not in dispute that, in its letter to the Commission, the respondent recorded that the appellant was found suitable with due regard to five agreed criteria. The Commission did not accept the respondent's recommendation for the appellant's appointment and directed the respondent to appoint Mr Mkongwa instead. It stated that C this directive was based on Mr Mkongwa's 'academic qualifications, experience and the constitutional imperative to promote representivity in the public service'. The respondent then appointed Mr Mkongwa to the post.

D [4] The appellant, aggrieved by his non-appointment, instituted proceedings in the Labour Court against the respondent claiming that he had been discriminated against unfairly on the arbitrary grounds of his race and colour and that this was an unfair labour practice. He claimed protective promotion, by way of relief, with effect from 1 June 1996, the date on which he contended he should have been appointed. Protective E promotion is described in para 9(1)*(c)*, part B.VI/III of the Public Service Commission Staff Code as follows:

> Protective Promotions are effected on the recommendation of a Commission to protect the position of officers and employees . . . who are found to have been prejudiced in the filling of a promotion post after F such a post had been filled.

This in essence amounts to providing all the benefits of the promotion post to one employee without actually appointing him thereto with the consequence that the appointment of another employee to that post remains intact.

G [5] The Labour Court held that appointing the appellant to the post would not have given effect to the 'constitutional imperative' of promoting equality and transforming the public service, and that for that reason he could not be regarded as the most suitable candidate. The Labour Court concluded that the failure to appoint the appellant did not amount H to unfair discrimination and consequently dismissed his claim. The appellant's claim and the basis upon which it was dealt with by the Labour Court were not considered by the Labour Appeal Court (LAC) as that court, having invited the parties to address it on the non-joinder of Mr Mkongwa in the proceedings, reasoned that in the event of the I appellant's contention being upheld, ie that he was more suitable for appointment than Mr Mkongwa, this would have amounted to Mr Mkongwa's appointment being 'a wrong appointment'. This, concluded the LAC, meant that Mr Mkongwa had an interest in the proceedings and that the failure to join him deprived him of the opportunity to also have his say. This led the LAC to conclude that the appellant's failure to J join Mr Mkongwa was fatal and it dismissed the appeal.

MLAMBO JA

[6] The LAC reached its conclusion by relying, amongst others, on its A earlier decision in *Public Servants Association v Department of Justice and Others* (2004) 25 *ILJ* 692 (LAC), in which it had rejected an appeal on a similar basis. In that matter the LAC upheld a decision of the Labour Court which had on review set aside an arbitration award of the Commission for Conciliation, Mediation and Arbitration (CCMA). B The CCMA had ruled that the Department of Justice had committed an unfair labour practice by not appointing the appellants and instead appointing employees who were alleged to have been far less experienced. The Department of Justice had justified its appointment of the successful appointees on the basis that it was advancing representivity C in the department. That is the stance of the respondent in this case.

[7] In *Public Servants Association v Minister of Justice*, as here, the appellants had not joined the successful appointees. There the LAC reasoned that the appellants' claim that they, and not the successful D appointees, were suitable for appointment created a dilemma for the Department of Justice regarding the correctness of its decision not to appoint the appellants. The LAC referred to *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). In that matter a trade union had instituted proceedings seeking the reversal of a decision by the E Minister of Labour terminating the appointment of an arbitrator in a dispute between the union and its members on the one hand and their employer on the other. The union had not joined the employer in the litigation. Fagan AJA restated the principle that a third party must be joined in proceedings if he is shown to have a direct and substantial F interest in the subject-matter of the litigation. He found in that matter that the employer had a direct and substantial interest in the litigation as it would have had to comply with the arbitrator's award in the event of the arbitrator ruling in favour of the union and its members. Fagan AJA also rejected submissions that the employer, though not cited, was aware G of the proceedings as it had been given informal notice thereof. The LAC found that the facts in the *Amalgamated Engineering Union* case were analogous. The LAC reasoned that, notionally, this gave rise to a situation where the successful appointees, if removed from their posts as per the award of the CCMA, could themselves challenge their removal H from their posts and, in the event of them being successful, this could potentially place the Department in an untenable position. This situation, concluded the LAC, demonstrated that the successful appointees had a direct and substantial interest in the matter and that failure to join them was fatal to the appellants' case. I

[8] The LAC then went on to consider the question whether the successful appointees should 'at least' have been afforded an opportunity to be heard even if there may have

been no obligation to join them. In this regard the LAC referred to *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (SCA) (1997 (4) BCLR 531); [1]

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and to *Traube and Others v Administrator, Transvaal, and Others* 1989 (1) SA 397 (W) [2] In the *Traube* matter Goldstone J had set aside a decision of the Director of Hospital Services in the Transvaal turning down applications for appointment by certain doctors without giving them a hearing, a decision confirmed on appeal albeit for different reasons.[3] The *Du Preez* matter dealt with the rights and interests of certain persons who were not given notice of proceedings in which allegations about their alleged complicity in certain criminal actions were to be aired. The LAC found that by analogy, as the successful appointees had already been appointed to their posts when the arbitration commenced in the CCMA, a finding by the CCMA that they were not suitable for appointment to those positions 'could no doubt detrimentally affect their existing rights and interests' and that 'the duty to act fairly obliged the (CCMA) commissioner not to make such a finding without complying with the *audi alteram partem* rule or without having them joined in the proceedings first'. The LAC further rejected a submission that it was not necessary to join the successful appointees as the relief sought was not directed at the setting-aside of their appointments. In this regard the LAC found that joining the successful appointees was not solely dependent upon the question of relief. The LAC stated at 705B - C:

> Even if no relief were sought against the appointees, they should have been joined or at least should have been given an opportunity to be heard before the commissioner could make the finding that 'as an

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> objective fact' they are not suitable for the posts to which they were appointed. This is so because such a finding would, with or without any relief being sought against the appointees, affect their rights and interests adversely.

For these reasons the LAC dismissed the appeal.

[9] The *Du Preez* and *Traub* decisions had nothing to do with non-joinder, a fact acknowledged by the LAC. They were concerned primarily with the *audi alteram* principle in circumstances where a public body had failed to afford certain individuals a hearing in matters in which their interests and rights were at stake. The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.[4] In the *Amalgamated Engineering Union* case (supra) it was found that 'the question of joinder should . . . not depend on the nature of the subject-matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'.[5] The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.[6] This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.[7]

[10] All the cases I have referred to also illustrate the point that the order or judgment of the court is relevant to the question whether a party has a direct and substantial interest in the subject-matter of any proceedings. It is so that in the course of its reasoning a court makes findings and expresses views which do not form part of its

judgment or order. An example in point in the employment arena concerns a potential finding by a court that a successful appointee was not suitable for appointment. The 'unsuitable' appointee has no legal interest in the matter if the order H will be directed at the employer (the author of the unsuitable appointment) to compensate the 'suitable' but unsuccessful applicant. Of course the successful but 'unsuitable' appointee will always have an interest in

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A the order to confirm his/her suitability for the job but this is not a direct and substantial interest necessary to found a basis for him or her to be joined in the proceedings. In a situation where a number of applicants compete for a position, they provide information to the prospective employer to influence the decision in their favour. That is as far as they B can take it. Once the employer selects from amongst them it is up to the employer to defend its decision if challenged. This is because the employer, as the directing and controlling mind of the enterprise which is vested with the managerial prerogative to manage it, has a legal interest in the confirmation of its decision as it faces a potential order against it. The successful appointee can only have a legal interest in the proceedings C where the decision to appoint him is sought to be set aside which can lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests.

D [11] As already pointed out, the relief sought in this matter and in *Public Servants Association v Minister of Justice* (supra) was not directed at the setting-aside of the Department's decisions and the reversal of the appointment. The LAC was thus incorrect in finding that the facts in the *Amalgamated Engineering Union* case were analogous to those in the *Public Servants* case. In the *Amalgamated Engineering Union* case E the employer who had not been joined would have been prejudiced, as found by Fagan AJA, because it had a direct and substantial interest in the appointment of an arbitrator regarding a dispute it had with its employees and the union. In the *Public Servants* case there was no potential prejudice to the successful appointees as no relief was directed F at them. The LAC further erred in finding that the relief sought was irrelevant in considering whether a party had a direct and substantial interest in a matter. The cases referred to by the LAC do not support this conclusion and as pointed out above they dealt with a completely separate and unrelated principle. In the circumstances the LAC's decision that Mr Mkongwa had a direct and substantial interest in the matter G and that the failure to join him was fatal to the appellant's case must be reversed.

[12] In the circumstances it becomes necessary to consider the appellant's claim, which was not dealt with by the LAC, that he was the victim of unfair racial discrimination when the respondent appointed Mr H Mkongwa and not him. This claim is based on item 2(1)*(a)* of Schedule 7 of the Labour Relations Act 66 of 1995 (LRA), which provides:

> (1) For the purpose of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving -
>
> I *(a)* the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

The appellant contends that in the absence of a rational policy, plan or J programme which justified his non-appointment the respondent acted in

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an inherently arbitrary manner, in failing to appoint him based on his A race and colour. This, he says, violated item 2(1)*(a)* and therefore was unfair, even if this

occurred within the constitutional imperative to advance persons, groups and/or categories of people previously disadvantaged by unfair discrimination.

[13] On the other hand, the respondent's case is that objectively viewed B the appointment of Mr Mkongwa is immune from judicial scrutiny as it was a measure in itself designed to achieve the constitutional imperative of promoting equality and transforming the public service. It was submitted that Mr Mkongwa was a black person who was obviously disadvantaged by past unfair discrimination and his preference over the C appellant was a measure, in itself without more, designed to achieve his advancement to enable his full and equal enjoyment of all rights and freedoms in the Constitution. This, it was submitted, was the objective of his appointment, which is the important element in the process and not whether there was an overarching policy, plan or programme in D terms of which the appointment was made. It was further submitted that in any event it was not obligatory to have a programme, plan or policy in place to advance this constitutional imperative.

[14] The question therefore is whether the appointment of Mr Mkongwa, a black candidate, instead of the appellant, a white E candidate, found more suitable by the selection panel, is immunised from judicial scrutiny by the respondent's *ipse dixit*, without more, that it was an affirmative action appointment in furtherance of the constitutional imperative of promoting equality.

[15] Item 2(1)*(a)* must be read with item 2(2)*(b)* in the same schedule which provides: F

> (2) For the purposes of sub-item (1)*(a)* -
>
> *(b)* an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons or groups or categories of persons disadvantaged G by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. . . .

These provisions are clearly based on s 8 of the interim Constitution[8] which was applicable at the time. Section 8 provided:

> **8 Equality** H
>
> (1) Every person shall have the right to equality before the law and to equal protection of the law.
>
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, I ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
>
> (3)*(a)* This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or

> A categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.[9]

[16] The first issue requiring attention is the proper approach to s 8 and items 2(1)*(a)* and 2(2)*(b)*. It can hardly be contested that the appellant was discriminated against on the basis of his colour and race. The issue B is whether this was unfair and therefore not countenanced by s 8.[10] The thrust of s 8 was to 'guarantee both equality before the law and equal protection of the law, and prohibits unfair discrimination both generally and on the particular grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, C culture or language'.[11] The section further makes provision for measures designed for the advancement of persons and groups disadvantaged by past racial discrimination. This, in essence, permits unequal treatment where the objective is to promote equality.[12] This has been found to contemplate the substantive form of equality as opposed to the formal D type. See *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) (2004 (11) BCLR 1125) at paras 26 - 27, where Moseneke J states:

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[26] The jurisprudence of this Court makes plain that the proper reach A of the equality right must be determined by reference to our history and the underlying values of the Constitution. As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere B non-discrimination which requires identical treatment, whatever the starting point or impact. Of this Ngcobo J, concurring with a unanimous Court, in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* observed that:

> 'In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing C simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.' D

[27] This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic underprivilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.[13] E

[17] Affirmative action is unquestionably the most embraced means to promote equality and it entails in essence the upliftment of those who were disadvantaged by unfair discrimination. Mahomed J commented in *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC) (1995 (12) BCLR 1593) at para 16 that: F

> Viewed from this angle therefore it is clear that the Constitution aims to redress historical inequities and imbalances. It requires as a constitutional imperative that the public service be broadly representative of the South African community. The attainment of this constitutional objective, in particular in the public service would be impossible without a programme of affirmative action. G

[18] The question that arises in our case is whether the appointment of Mr Mkongwa was a measure within the contemplation of item 2(2)*(b)* read in the context of s 8(3)*(a)*. The respondent submits that it was such a measure even though it was ad hoc. The resolution of this question involves an investigation whether the appointment in itself was designed H to achieve the constitutional imperative of promoting equality. Section 8(3)*(a)* contemplates 'measures' while item 2(2)*(b)* contemplates 'policies'

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A and 'practices' (as the means) to advance the constitutional imperative and both provide that these must be 'designed to achieve . . . adequate protection and advancement'. It has been found that measures that are found to be inherently arbitrary and/or irrational cannot be said to have been designed to achieve the objective of the constitutional B imperative of equality. The decision in *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) illustrates this at 480B - D, where the court said:

> I am respectfully in agreement with the learned Judge in the *Public Servants Association* case that a policy or practice which can be regarded as haphazard, random and overhasty, could hardly be described as C measures designed to achieve something. There must indeed be a rational connection between the measures and the aim they are designed to achieve. This view has also been expressed by academic writers, such as Mureinik in 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31. I accept, at least for present D purposes, that affirmative action measures are indeed reviewable, as found by Swart J in the *Public Servants Association* case, *inter alia* based on the opinion expressed by *Mureinik*, and argued on behalf of the applicant in this case. In order to honour constitutional ideals and values, and to strive to truly move towards the achievement of substantive equality, proper plans and programmes must be designed and put into place. Mere random and haphazard discrimination would E achieve very little, if anything, and might be counter-productive.

See also *Minister of Finance v Van Heerden* (supra) where Moseneke J at 139 said:

> [41] The second question is whether the measure is 'designed to protect or advance' those disadvantaged by unfair discrimination. In F essence, the remedial measures are directed at an envisaged future outcome. The future is hard to predict. However, they must be reasonably capable of attaining the desired outcome. If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end. Moreover, if it is clear that they are not reasonably G likely to achieve the end of advancing or

benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by s 9(2).

[19] Our jurisprudence shows that our courts have focused on the H question whether policies, plans or programmes put up as measures designed to promote equality were indeed capable of achieving that objective. In *Motala v University of Natal* 1995 (3) BCLR 374 (D) what was sought to be impugned was a plan by the University to limit the number of Indian students in preference to black students, which recognised the several disadvantages suffered by black students in I particular. Hurt J had this to say about that policy:

> On the papers before me I was satisfied that the policy described by the deponents for the respondent was a 'measure designed to achieve the adequate protection and advancement of . . . a group . . . of persons [black students] disadvantaged by unfair discrimination'.

J (At 383B - C.)

MLAMBO JA

[20] In *Stoman v Minister of Safety and Security* (supra) a white police A officer claimed that the failure to appoint him to an advertised post and the appointment instead of a black officer in terms of an Equity Plan of the South African Police Service amounted to unfair racial discrimination as he was the most suitable for the position. The Equity Plan was found by Van der Westhuizen J to be bona fide and designed to B contribute to the promotion of equality and the protection and advancement of persons previously disadvantaged by unfair discrimination.[14] In *Minister of Finance v Van Heerden* (supra) at issue were certain rules of the Political Office-Bearers Pension Fund which provided for differentiated employer contributions in respect of members of Parliament. The objective of the rules was to 'ameliorate past disadvantage related to the C pension benefits need of new political office-bearers'. Having analysed the rules of the fund Moseneke J stated at 142:

> [52] I am satisfied that the evidence demonstrates a clear connection between the membership differentiation the scheme makes and the relative need of each class for increased pension benefits. The scheme D was designed to distribute pension benefits on an equitable basis with the purpose of diminishing the inequality between privileged and disadvantaged parliamentarians. In that sense the scheme promotes the achievement of equality. It reflects a clear and rational consideration of the need of the members of the Fund and serves the purpose of advancing persons disadvantaged by unfair discrimination. E

[21] In *Public Servants Association of South Africa and Others v Minister of Justice and Another* 1997 (3) SA 925 (T) (referred to in *Stoman*) the Department of Justice had earmarked some posts in terms of an interim arrangement to implement affirmative action before the completion of a F rationalisation process in the department and in the absence of a finalised affirmative action plan or programme. The only persons who were invited to apply for the earmarked posts and to the interviews were women. No explanation was however advanced for the basis upon which the posts were thus earmarked. The earmarking was criticised by the G court as haphazard, random and overhasty. For this reason the court was of the view that the earmarking of the posts amounted to an 'untrammelled discretion to earmark posts for designated groups without any overall plan or policy'. In this regard the court reasoned that s 8(3)*(a)* required affirmative action measures to be designed to achieve the H

MLAMBO JA

A adequate protection and advancement of disadvantaged groups which was different to haphazard and random action.[15]

[22] It cannot be disputed that in the cases referred to above what was at issue were plans, policies and/or programmes envisaging a pattern of conduct whose objective was to promote equality. Those measures that B survived judicial scrutiny are those found to have been rationally connected to their objective. See Albertyn & Kentridge (supra) at 173 that:

> The better view is that the use of the word 'designed' as opposed to 'aimed' imports the requirement of a rational relationship between C means and ends. In other words, it is not sufficient that the *purpose* of the measures in question is to redress past discrimination - the means selected to effect that purpose must be reasonably capable of doing so. The latter reading is preferable because it is more likely to ensure that affirmative action programmes are carefully constructed in ways which are best able to accomplish what they set out to achieve.

D It is apparent from the cited cases that the plans and/or policies at issue were subjected to scrutiny to determine if they were rationally connected with the constitutional imperative of promoting and/or achieving equality and that ad hoc and random action was found to be incapable of meeting the objective. From this it can be deduced that properly E formulated programmes go a long way to satisfying the requirement of rationality. This is so since a properly crafted programme or policy provides a basis upon which it can be measured as to whether it meets the constitutional objective. In *Public Servants Association of South Africa v Department of Justice* there was no policy or plan in place but an ad hoc F arrangement which was found to be random and haphazard and therefore not designed to achieve the required purpose. See also *Eskom v Hiemstra NO and Others* (1999) 20 *ILJ* 2362 (LC). This, in my view, clearly shows that the term 'measures' as set out in s 8(3)*(a)* as well as the terms 'practices' and 'policies' in item 2(2)*(b)* of Schedule 7 of the LRA mean something much more than mere ad hoc or random action as G we have in this case.

[23] The injunction that the public service must be broadly representative is an important one. It enjoins those in charge to strive towards representivity. This in my view calls for attention to be focused on the respects in which the service is not representative and what measures H should be implemented to achieve the required representivity. This suggests that a properly considered policy or plan to address the situation as opposed to ad hoc means is the way to go to achieve representivity. It must therefore be so that ad hoc and random action is impermissible. Compare *Independent Municipal and Allied Workers Union v Greater Louis* I *Trichardt Transitional Local Council* (2000) 21 *ILJ* 1119 (LC) at para 19, where it was said:

> There appears to be no doubt therefore that for affirmative action to survive judicial scrutiny the following is relevant:

> 19.1 there must be a policy or programme through which affirmative A action is to be effected;
>
> 19.2 the policy or programme must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination.

[24] *In casu* the appointment of Mr Mkongwa is sought to be justified on B the basis that it was a measure in itself of advancing Mr Mkongwa who was disadvantaged by past discrimination. Mr Mkongwa's race was therefore the only basis on which his appointment was sought to be linked to the constitutional imperative by the Commission even though the selection panel did not support it. From the evidence it is clear that C the respondent did not have a policy or overarching plan of affirmative action. The Secretary of the Commission, Dr Ndlovu, who testified, was unable to provide a coherent basis for rejecting the selection panel's recommendation. His view was simply that this was a case where affirmative action had to be implemented. He could not provide any evidence of guidelines by his Commission to the respondent in terms of D which representivity was to be addressed in the recruitment process. His evidence demonstrates that the Commission itself had not applied its mind to the implementation of affirmative action: they simply held a view in this case that a black candidate should be appointed. He could provide no evidence of how that appointment would have made the respondent E more representative, nor was he able to provide a factual basis of the demographics which prompted the Commission to impose its view on the respondent.

[25] It has to be pointed out, as appears from the cases cited, that the policies, plans and/or programmes involved there were crafted in F consideration of the context, such as identifying relevant demographics and the gaps in representivity that had to be addressed through affirmative action. This was not the case here nor was the

application of affirmative action one of the criteria applicable in the selection of candidates. These are issues that would have been catered for in a specially formulated G plan, policy or programme which would have provided the basis of the appointment. Clearly, the appointment was an ad hoc and arbitrary act. It can never in itself amount to a measure within the contemplation of s 8(3)*(a)* or s 9(2) which clearly require something much more than an ad hoc act. The appointment was not a measure in itself and was clearly inherently arbitrary and therefore unfair as contemplated in item H 2(1)*(a)*.

[26] Therefore the submission that the appointment of Mr Mkongwa was in itself a measure within the contemplation of s 8(3)*(a)* is misconceived. Furthermore, the submission that the appointment was a 'practice' within the meaning of item 2(2)*(b)* is also misplaced. Even if one I were to find that the term 'measures' in s 8 also contemplates a practice, a single act or appointment is not and can never amount to a practice. The terms 'practice' and 'measures' presuppose more than one act. The language of the Constitution must be respected. One cannot give a term in the Constitution a meaning inconsistent with it. In *S v Zuma and* J

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A *Others* 1995 (2) SA 642 (CC) (1995 (1) SACR 568; 1995 (4) BCLR 401) at para 17 the court said:

> I am, however, sure that Froneman J, in his reference to the fundamental 'mischief' to be remedied, did not intend to say that all the principles of law which have hitherto governed our Courts are to be B ignored. Those principles obviously contain much of lasting value. Nor, I am equally sure, did the learned Judge intend to suggest that we should neglect the language of the Constitution. While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' C meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.

[27] In the circumstances of this case and in view of the absence of a plan D or policy in terms of which affirmative action was to be applied, the respondent was obliged to comply with the legislative framework ap- plicable at the time in selecting candidates. There are a number of provisions in the Public Service Act and the interim Constitution which are relevant regarding appointments in the public service. Section 11(1)*(b)* of the PSA provides:

> E Only the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer in question, and such conditions as may be determined or prescribed or as may be directed or recommended by the Commission for the making of the appointment or the filling of the post, shall be taken into account.

F The high-water mark of this provision is that no person who qualifies for appointment shall be favoured or prejudiced and that suitability amongst others shall be the criteria to be considered when making appointments. Section 212(2) of the interim Constitution provided, inter alia, that the public service should 'promote an efficient public administration broadly G representative of the South African community'. In turn s 212(4) of the interim Constitution provides:

> In the making of any appointment or the filling of any post in the public service, the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer concerned, and such conditions as may be determined or H prescribed by or under any law, shall be taken into account.

[28] There is clear emphasis in these provisions that suitable candidates cannot be denied appointment if they comply with stipulated requirements, even though representivity is the objective. Therefore, in the I quest to attain representivity, efficiency and fairness were not to be compromised. To justify the failure to appoint a candidate who complied with stipulated requirements it had to be shown that that action was not unfair. The evidence at our disposal is clear that the respondent did not have an affirmative action plan or policy in terms of which it appointed Mr Mkongwa. The evidence is also clear that the selection panel found J the appellant to be the most suitable candidate and recommended that

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he be appointed. It is also common cause that the appellant complied A with all the requirements for the post in terms of s 11(1)*(b)* of the PSA. In the light of all these facts it was clearly unfair not to appoint him. The Labour Court was therefore incorrect to conclude that it was not a requirement for the respondent to have had a plan or programme first before appointing Mr Mkongwa. In the circumstances, the appellant has B succeeded in showing that the failure to appoint him was inherently arbitrary and therefore amounted to unfair discrimination which is an unfair labour practice as contemplated in item 2(1)*(a)*.

[29] It follows that the appeal must be upheld. In the circumstances, the following order is granted: C

1. The appeal succeeds with costs including the costs of two counsel and the order of the Labour Appeal Court is set aside.

2. In its place the following order is substituted: D

> 'The appeal succeeds with costs. The order of the Labour Court is set aside and the following order is substituted:
>
> *(a)* It is declared that the appointment of Mr Mkongwa to the post of Deputy Director: Administration: Greys Hospital instead of the applicant constituted an unfair labour practice as envisaged by item 2(1)*(a)* of Schedule 7 of the Labour Relations Act 1995, in that it discriminated unfairly against the applicant. E
>
> *(b)* The respondent is ordered to pay the applicant the difference between what he would have earned had he been appointed to the said post on the effective date 1 June 1996 and what he actually earned for the period 1 June 1996 to the date of his retirement on 28 February 2003, together with interest at the F prescribed legal rate calculated from the date on which each monthly salary payment became due until date of payment.
>
> *(c)* In the event the parties are unable to agree the amount due to the applicant they are granted leave to approach this court on the same papers, duly supplemented insofar as necessary, for an order determining the amount due. G
>
> *(d)* The respondent is ordered to pay the applicant's costs.'

Scott JA, Cloete JA, Maya JA and Leach AJA concurred.

Appellant's Attorneys: *Llewellyn Cain Attorney*, Pietermaritzburg; *Lovius Block*, Bloemfontein. H

Respondent's Attorneys: State Attorney, Pietermaritzburg and Bloemfontein.

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1 Particularly to the statement at 230I-231A (SA) that:
'In my view, the solution to the problems raised by the issues in this case may be found in the common law, and more particularly the rules of the common law which require persons and bodies, statutory and other, in certain instances to observe the rules of natural justice by acting in a fair manner. In recent years our law in this sphere has undergone a process of evolution and development, focusing upon that principle of natural justice encapsulated in the maxim *audi alteram partem* (which for the sake of brevity I will call the "*audi* principle").'
And at 231F that:
(T)he *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly.'.

2 Particularly to the statement in 400I-J that:
'A decision that a professional person is unsuitable for a post is potentially of the utmost importance and will, if it remains, be a permanent blot on his good name.'
And further at 401C-D that:
'Where the suitability of a person is the issue, and an adverse decision has serious consequences for that person in relation to his application and in relation to his career, then I have no doubt that in the absence of a clear provision to the contrary in the statute he must be entitled to be heard before he is made to suffer an adverse decision.'.

3 See *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A).

4 *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) para 21.
5 At 657.
6 See also *Collin v Toffie* 1944 AD 456 at 464; *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) at 521A; *Peacock v Marley* 1934 AD 1 at 3; *Burger v Rand Water Board and Another* 2007 (1) SA 30 (SCA) at para 7.
7 *Bekker v Meyring, Bekker's Executor* (1828-1849) 2 Menz 436.
8 The Constitution of the Republic of South Africa Act 200 of 1993.
9 Section 8 was replaced by s 9 of the Constitution of the Republic of South Africa, 1996, which provides:

'9 Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'.

10 This approach is no different to what s 9(5) of the Constitution envisages as postulated in *Stoman v Minister of Safety and Security and Others* 2002 (3) SA 468 (T) at 476J-477A.
11 Etienne Mureinik: 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* at 31.
12 See Catherine Albertyn & Janet Kentridge: 'Introducing the right to equality in the Interim Constitution' (1994) 10 *SAJHR* at 149:

'This clause (s 8(3)*(a)*) makes it clear that the prohibition of discrimination on the grounds listed in s 8(2) does not require the immediate abandonment of all consciousness of the named classifications. It acknowledges that the achievement of equality will require remedial measures which are geared to redressing both individual and group disadvantage created by a history of oppression and apartheid.' (At 172.).

13 See also the statement by Goldstone J in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) (1997 (6) BCLR 708) at 23E-F (SA) that:

'In s 8(3), the interim Constitution contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.'.

14 The learned judge stated at 483D:

'My concluding impression is that there is nothing before me indicating that the relevant policies and guidelines of the SAPS regarding measures to achieve equality and representivity do not comply with the constitutional requirements emanating from s 9(2). These policies and guidelines seem to have been created bona fide and with the intention of achieving the relevant ideals. In view of what is before me, I am of the opinion that there are measures designed to contribute to the promotion of equality in general and specifically to the protection and advancement of persons or categories of persons previously disadvantaged by unfair discrimination.'.

15 At 991I-J.

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Democratic Alliance v Acting Director of Public Prosecutions, KwaZulu-Natal 2016 JDR 0300 (KZP)

Citation	2016 JDR 0300 (KZP)
Court	KwaZulu-Natal Division, Pietermaritzburg
Case no	4962/2013
Judge	Vahed J
Heard	August 01, 2014
Judgment	September 23, 2015
Appellant/ Plaintiff	Democratic Alliance
Respondent/ Defendant	Acting Director of Public Prosecutions, KwaZulu-Natal National Director of Public Prosecutions Peggy Yoliswa Nkonyeni Michael Mabuyakhulu

Summary

Criminal law — Prosecution — Prosecuting authority — Decision to discontinue prosecution —Withdrawal of charges against inter alia the Speaker of Provincial Legislature and Member of Executive Council — Refusal by NPA of request by Democratic Alliance for record of decision — Record compellable (apart from representations made by third respondent to Minister of Justice) as political party having locus standi to apply for review of decision.

Judgment

Vahed J:

Introduction

[1] The applicant asserts that it has a right of access to information held by the first respondent for the purpose of assessing whether it is entitled to launch proceedings reviewing and setting aside her decision to withdraw charges brought against the third and fourth respondents. To that end it seeks (in addition to costs) the following relief:

a. "An Order that the first respondent's decision to refuse to grant the applicant's request for access to information dated 30 August 2012 is set aside."

b. "An Order directing the first respondent to furnish to the applicant within·15 days the record of decision relating to the decision to withdraw charges against the third and fourth respondents, namely, all the information which was considered in coming to that decision."

The parties

[2] The applicant, The Democratic Alliance, is a registered political party and a body corporate.

[3] The first respondent is the Acting Director of Public Prosecutions for KwaZulu-Natal. At the time of the decision in issue and when the matter was argued the post was occupied by Ms Sophy Moipone Dinah Noko, an advocate in the employ of the National Prosecuting Authority, to which post she was subsequently permanently appointed.

[4] The second respondent is the National Director of Public Prosecutions. At the time of the decision in issue and when the matter was argued the post was occupied, in an acting capacity, by Ms Nomgcobo Jiba, the Deputy National Director of Public Prosecutions, an advocate in the employ of the National Prosecuting Authority.

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[5] Both the first and second respondents hold office in terms of and subject to the provisions of the National Prosecuting Authority Act, 1998 ("the Act").

[6] The third respondent is Ms Peggy Yoliswe Nkonyeni, a politician, at the time the Speaker in the KwaZulu-Natal Provincial Legislature.

[7] The fourth respondent is Mr Michael Mabuyakhulu, a politician, at the time the KwaZulu-Natal MEC for Economic Affairs and Tourism.

[8] Both the third and fourth respondents are members of the ruling political party, the African National Congress.

The Charges

[9] The first respondent's predecessor in title, one C S Mlotshwa, also then the Acting Director of Public Prosecutions for KwaZulu-Natal, indicted the third and fourth respondents, amongst twenty-one others, as accused 4 and 13 respectively, on a number of charges. That prosecution has featured on the lists as *S v Savoi and Others*, the first accused being one Gaston Savoi, the principal role-player behind a co-accused company, Intaka Holdings (Pty) Ltd (formerly Intaka Investments (Pty) Ltd).

[10] The indictment reveals that at the time of the alleged commission of the offences set out therein the third respondent was the then MEC for

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Health for KwaZulu-Natal and that the fourth respondent was the then MEC for Local Government, Traditional Affairs and Housing for KwaZulu-Natal. The indictment set out 54 counts and the third and/or fourth respondents were implicated in eleven of those charges.

[11] Those eleven counts were set out in the indictment as follows:

a. Count 1 (against the third respondent and 3 others):

> "Contravening section 2(1)(f) read with sections 1, 2(2), 2(3), 2(4) and 3 of the Prevention of Organised Crime Act 121 of 1998, as amended: Managing the enterprise through a pattern of racketeering activities. IN THAT prior to and during the period 20 March 2004 until 14 December 2008 ... the accused did wrongfully and unlawfully manage the operations or activities of the Enterprise, and knew or reasonably ought to have known, that any person, to wit, all accused, and other persons known and unknown to the State, whilst employed by or associated with that Enterprise, conducted or participated in the conduct, directly or indirectly, of such Enterprise's affairs through a pattern of racketeering activity as set out in Annexure A."

b. Count 4 (against the third respondent and 3 others):

> "Fraud read with the provisions of sections 99 and 103 of Act 51 of 1977 and the relevant provisions of section 51 of Act 105 of 1997. IN THAT upon or about 17 November 2006 ... the accused did unlawfully and with intent to defraud, falsely and to the prejudice, real or potential, of the Department of Health and/or its officials, KwaZulu-Natal gave out to the Department of Health and/or its officials that:

1. the installation of the Oxygen Self Generating Unit at Rietvlei Hospital ... by Intaka Investments (Pty) Ltd was going to reduce costs;

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2. the installation of the Oxygen Self Generating Unit at Rietvlei Hospital was to the benefit of the Rietvlei Hospital and the Department of Health, KwaZulu-Natal and/or its patients;

3. the Department of Health was going to save money from the installation of the Oxygen Self Generating Unit.

Whereas the accused when they gave out as set out above knew in truth and in actual fact that:

1. they knew that the Department of Health was not going to reduce costs by leasing the Oxygen Self Generating Unit from Intaka Investments (Pty) Ltd;

2. there was no benefit to be gained by the Department of Health from the agreement; and

3. the agreement was meant to benefit Intaka Investments (Pty) Ltd."

c Count 6 (against the third respondent and 3 others):

"Fraud read with the provisions of sections 99 and 103 of Act 51 of 1977 and the relevant provisions of section 51 of Act 105 of 1997. IN THAT during October 2006 ... the accused did unlawfully and with intent to defraud, falsely and to the prejudice, real or potential, of the Department of Health and/or its officials, KwaZulu-Natal gave out to the Department of Health and/or its officials that:

1. the Water Purification Plants quotations were genuine and independent quotations;

2. the said quotations were prepared by the companies who submitted them for consideration; and

3. the said quotations represented a fair and market related price for the said equipment.

Whereas the accused when they gave out as set out above knew in truth and in actual fact that:

1. the said Water Purification Plants quotations were false;

2. were not independent quotations;

3. the prices quoted in the said quotations were not a fair and market related price for the said equipment; and

4. the prices quoted in the quotations were inflated."

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d. Count 8 (against the fourth respondent and 3 others):

"Fraud read with the provisions of sections 99 and 103 of Act 51 of 1977 and the relevant provisions of section 51 of Act 105 of 1997. IN THAT during the period between 27 June 2005 to 05 June 2006 ... the accused did unlawfully and with intent to defraud, falsely and to the prejudice, real or potential, of the Department of Local Government, Traditional Affairs and Housing, KwaZulu-Natal and/or its officials gave out to the Department of Local Government, Traditional Affairs and Housing, KwaZulu-Natal and/or its officials that:

1. the need for the installation of the Water Purification Plants was urgent;

2. Intaka Investments (Pty) Ltd was a manufacturer of the water purification plants; and

3. Intaka Investments (Pty) Ltd was going to establish a manufacturing plant and/or factory in the KwaZulu-Natal province.

Whereas the accused when they gave out as set out above knew in truth and in actual fact that:

1. the need for the installation of the Water Purification Plants was not urgent;

2. Intaka Investments (Pty) Ltd was not a manufacturer of the water purification plants; and

3. Intaka Investments (Pty) Ltd was not going to establish a manufacturing plant and/or a factory in KwaZulu-Natal province."

e. Count 15 (against the third respondent):

"Contravening section 4(1)(a) read with sections 1, 2, 4(2), 24, 25 and 26(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. IN THAT upon or about 24 August 2007 ... the accused, a public officer, directly or indirectly, accepted or offered, or agreed to accept from accused no 1 and/or accused no 19 a gratification, to wit an amount of five hundred thousand rands (R500 000,00) ... in order to act, personally or by influencing other persons to award a tender and/or order for the

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supply of water purification plants to accused no 19, an act that was illegal, dishonest and biased in carrying out or performance of their powers, duties and function arising out of their constitutional, statutory, contractual obligations, which act amounted to the abuse of position of authority, the violation of their legal duty or set of rules which was designed to achieve an unjustified result, thereby committing the offence of corruption."

f. Count 16 (against the third respondent):

"Contravening section 4(1)(a) read with sections 1, 2, 4(2), 24, 25 and 26(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. IN THAT during or about 30 August 2007 ... the accused, a public officer, directly or indirectly, accepted or offered, or agreed to accept from accused no 1 and/or accused no 19 a gratification, to wit an amount of five hundred thousand rands (R500 000,00) ... in order to act, personally · or by influencing other persons to award a tender and/or order for the supply of water purification plants to accused no 19, an act that was illegal, dishonest and biased in carrying out or performance of their powers, duties and function arising out of their constitutional, statutory, contractual obligations, which act amounted to the abuse of position of authority, the violation of their legal duty or set of rules which was designed to achieve an unjustified result, thereby committing the offence of corruption."

g. Count 18 (against the fourth respondent and 1 other):

"Contravening section 4(a) read with sections 1, 24, 25, 26 and 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 and further read with section 51(2)(a) of Act 105 of 1997. IN THAT during the period between March 2004 and December 2007 ... the accused, a public officer, directly or indirectly, accepted or offered, or agreed to accept from accused no 1 and/or accused no 19 a gratification, to wit an amount of one million and fifty three thousand Rand (R1 053 000,00) ... in order to act, personally or by influencing other persons to award a tender and/or order for the supply of water purification plants to accused no 19, an act that was illegal, dishonest and biased in carrying out or

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performance of their powers, duties and function arising out of their constitutional, statutory, contractual obligations, which act amounted to the abuse of position of authority, the violation of their legal duty or set of rules which was designed to achieve an unjustified result, thereby committing the offence of corruption."

h. Count 22 (against the fourth respondent and 1 other):

"Contravening section 4(1)(a) read with sections 1, 2, 4(2), 24, 25, and 26(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. IN THAT the accused on or about 12 March 2007 ... unlawfully and intentionally accepted or agreed to accept gratification to wit, One Million Rand (R1 000 000,00) to Sipho Shabalala (Accused no.2), being a public officer, for the benefit of accused 2 and 13 in order for them to act in a manner that amounted to the illegal, dishonest and unauthorised carrying out of their powers, duties and functions and/or amounted to the abuse of a position of authority or the violation of a legal duty or a set of rules, which was designed to achieve an unjustified result, thereby committing an offence of corruption."

i. Count 24 (against the fourth respondent and 3 others):

"Contravening section 4 read with section 8(1) of the Prevention of Organised Crime Act, 121 of 1998. IN THAT during the month of August 2007 ... the accused unlawfully, whilst they knew or ought reasonably to have known that certain property, to wit a sum of R1 000 000,00, was proceeds of unlawful activities or that it formed part of the proceeds of unlawful activities to wit corruption, entered into an agreement or engaged in an arrangement or transaction with accused 2 to have an amount of R1 000 000,00 be handed to him which had or was likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of that money or the ownership thereof and/or any interest in which anyone may have in respect thereof, and/or of enabling or assisting accused nos 1 and 2 to avoid prosecution and/or to remove or diminish the said property acquired directly or indirectly as a result of commission of the offence(s)."

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j. Count 27 (against the third respondent and 4 others):

"Contravening section 4 read with section 8(1) of the Prevention of Organised Crime Act, 121 of 1998. IN THAT upon or about 24 August 2007 ... the accused unlawfully, whilst they knew or ought reasonably to have known that certain property, to wit an amount of five hundred

thousand rand (R500,000), was proceeds of unlawful activities or that it formed part of the proceeds of unlawful activities to wit corruption, agreed and arranged that an amount of five hundred thousand rand (R500,000) be paid into his company Rowmoor Investments (Pty) Ltd business account held with First National Bank, and that this agreement had the effect of concealing or disguising the nature, source, location, disposition or movement of that money or the ownership thereof and/or any interest in which anyone may have in respect thereof and/or removing or diminishing such money, which was acquired as a result of the commission of an offence."

k. Count 28 (against the third respondent and 4 others) :

"Contravening section 4 read with section 8(1) of the Prevention of Organised Crime Act, 121 of 1998. IN THAT upon or about 30 August 2007 ... the accused unlawfully, whilst they knew or ought reasonably to have known that certain property, to wit an amount of five hundred thousand rand (R500,000), was proceeds of unlawful activities or that it formed part of the proceeds of unlawful activities to wit corruption, agreed and arranged that an amount of five hundred thousand rand (R500,000) be paid into his company accused no 20's business account held with First National Bank, and that this agreement had the effect of concealing or disguising the nature, source, location, disposition or movement of that money or the ownership thereof and/or any interest in which anyone may have in respect thereof and/or removing or diminishing such money, which was acquired as a result of the commission of an offence."

[12] Attached to the indictment is a detailed summary of the substantial facts; a document covering some 27 typewritten pages.

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[13] In summary, the third respondent faced 1 count of racketeering, 2 counts of fraud, 2 counts of corruption and 2 counts of money laundering while the fourth respondent faced 1 count of fraud, 2 counts of corruption and 1 count of money laundering.

The facts

[14] During August 2012 the first respondent considered representations made by the third respondent to the effect that the prosecution against her be withdrawn and as a result took a decision, on or about 17 August 2012, to withdraw, and in fact withdrew, the charges against 9 of the intended accused, including the third and fourth respondents.

[15] On 20 August 2012 the applicant wrote to the first respondent requesting the record of the decision.

[16] On 29 August 2012 the first respondent declined that request in the following terms:

"Kindly be advised that we are unable to furnish you with the records of my decision to withdraw these charges as the records contain representations which are confidential in nature.

The charges are withdrawn due to lack of prospects of a successful prosecution against these persons."

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[17] On 30 August 2012 the first respondent lodged with the second respondent a written request for the access to the record of decision in terms of regulation 6 read with section 18(1) of the Promotion of Access to Information Act, 2000 ("PAIA") . The second respondent forwarded that request was forwarded to the first respondent to be dealt with.

[18] On 08 November 2012 one Theodore Leeuwschut, described as a Deputy Information Officer: NPA, responded to the request in the following terms:

"On 20 August 2012 your office sent a letter to the Office of the Director of Public Prosecutions in KZN requesting documentation on the decision to withdraw the case against the KZN Speaker, Ms Peggy Nkonyeni and MEC Michael Mabuyakhulu. On 29 August 2012, Adv. M Noko responded to your letter informing you that the information requested contains representations that is are (sic) confidential in nature. She further advised that the matter was withdrawn because there were no prospects of a successful prosecution against these people.

In terms of section 40 of the Promotion of Access to Information Act, the Act states that "*the information officer of a public body must refuse a request for access to information to a record if the record is privileged from production in legal proceedings unless the person*

entitled to the privilege has waived the privilege". I think Adv. Noko in her response to your letter dates 20 August 2012 addressed this issue.

I therefore wish to inform you that your request for access to information has been refused."

[19] The present application then commenced. All the respondents oppose the relief sought.

[20] Mr Ntsebeza SC, who appeared with Mr Mnyatheli for the first and second respondents, argued three points *in limine*. These were:

a. that the applicant lacks locus standi;

b . that the applicant has not exhausted its internal remedies and that the application is premature; and

c. that the applicant has failed to join all individuals against whom the decision to prosecute was withdrawn and that these individuals have a direct and substantial interest in the matter.

[21] Mr Dickson SC, who appeared for the third and fourth respondents, also argued *in limine* that the application was premature.

[22] Argument on the so-called merits of the application was also delivered.

Standing

[23] The essence of the first and second respondents' argument was that the applicant demonstrated no direct and substantial interest in the relief sought. Instead, they submit that the applicant has shown no more than a political, as opposed to a legal, interest and that the selection of only the third

and fourth respondents from among the nine against whom charges were withdrawn is indicative of that political interest.

[24] It is indeed so that the applicant is a registered political party active in the provincial legislature of which third and fourth respondents are members. At the time the application was brought, third respondent was the speaker of such legislature while fourth respondent served in the provincial executive elected by such legislature. In addition, when the matter was argued Mr Rall SC, who with Mr Christison appeared for the applicant, invited me to take judicial notice of the fact that subsequent to the commencement of proceedings the applicant had become the official opposition in the provincial legislature.

[25] In *Democratic Alliance & Ors v Acting National Director of Public Prosecutions & Ors* 2012 (3) SA 486 (SCA) the following observations and findings were made:

"[44] It was accepted on behalf of the third respondent that all political parties participating in the national parliament can be taken to subscribe to constitutional principles. Section 48 of the Constitution provides that before members of the national assembly begin to perform their functions they must swear or affirm faithfulness to the Republic and obedience to the Constitution. All political parties participating in parliament must necessarily have an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld. They represent constituents that collectively make up the electorate. They effectively represent the public in parliament. It is in the public interest and of direct concern to political parties participating in parliament that an institution such as the

National Prosecuting Authority (NPA) act in accordance with constitutional and legal prescripts. It can hardly be argued that citizenry in general would be concerned to ensure that there was no favouritism in decisions relating to prosecutions. Few members of political parties or members of the public have the ability, resources or inclination to bring a review application of the kind under discussion.

[45] It is of fundamental importance to our democracy that an institution such as the NPA, which is integral to the rule of law, act in a manner consistent with constitutional prescripts and within its powers, as set out in the National Prosecuting Authority Act 32 of 1998. Certainly

the membership of the DA can rightly be expected to hold the party they support to the foundational values espoused in the DA's constitution and to expect the DA to do whatever is in its power, including litigating, to foster and promote the rule of law. In this regard see *Justice Alliance of South Africa and Others v President of the Republic of South Africa and Others* 2011 (5) SA 388 (CC) para 17; and the recent decision of the full court in *Bio Energy Afrika Free State (Edms) Bpk v Freedom Front Plus* 2012 (2) SA 88 (FB) paras 15 - 17. It clearly is in the public interest that the issues raised in the review application be adjudicated and, in my view, on the papers before us, it cannot seriously be contended that the DA is not acting, genuinely and in good faith, in the public interest. See *Freedom Under Law v Acting Chairperson: Judicial Service Commission, and Others* 2011 (3) SA 549 (SCA) para 21.The question whether, in making the decision to discontinue the prosecution of Mr Zuma, the NPA had acted in accordance with the law or had wrongly and unlawfully succumbed to political power and influence, as alleged by the DA, is a matter for decision in the review application after all the papers have been filed. Presently, it follows that the DA has standing to act in its own interests, as well as in the public interest, and is entitled to pursue that application to its conclusion."

[26] In my view the same considerations apply to an application to enforce compliance with a request for a record of a decision to discontinue the prosecution of the Speaker of the Provincial Legislature and a Member

of the Executive Council of the province, given that such decision could be the subject of a review application. If the requested record discloses that the first respondent's decision complies with the principle of legality, this would obviate the need to bring a review application and save the applicant costs.

[27] After having had a request made in terms of PAIA declined the applicant commenced these proceedings. Section 78 of PAIA, subject to the discussion later in this judgment as whether the application is premature, permits the applicant to do this.

[28] The Applicant is a "requester" as defined in section 1 of PAIA. Once a request lodged by a "requester" is rejected, such requester is entitled to approach the court in the circumstances contemplated by section 78(2) of PAIA. In my view the Applicant is so entitled and accordingly has standing by virtue of its statutory right to enforce compliance with its request for information.

Internal Remedies - Application Premature

[29] Sections 74 to 82 of PAIA were relied upon by the respondents to contend that the application was premature because the applicant had failed to exhaust its internal remedies. Those sections provide:

"74 Right of internal appeal to relevant authority

(1) A requester may lodge an internal appeal against a decision of the

information officer of a public body referred to in paragraph (a) of the definition of '**public body**' in section 1-

(a) to refuse a request for access; or

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

in relation to that requester with the relevant authority.

(2) A third party may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph *(a)* of the definition of **'public body'** in section 1 to grant a request for access.

75 Manner of internal appeal, and appeal fees

(1) An internal appeal-

(a) must be lodged in the prescribed form-

(i) within 60 days;

(ii) if notice to a third party is required by section 49 (1) *(b)*, within 30 days after notice is given to the appellant of the decision appealed against or, if notice to the appellant is not required, after the decision was taken;

(b) must be delivered or sent to the information officer of the public body concerned at his or her address, fax number or electronic mail address;

(c) must identify the subject of the internal appeal and state the reasons for the internal appeal and may include any other relevant information known to the appellant;

(d) if, in addition to a written reply, the appellant wishes to be informed of the decision on the internal appeal in any other manner, must state that manner and provide the necessary particulars to be so informed;

e) if applicable, must be accompanied by the prescribed appeal fee referred to in subsection (3); and

(f) must specify a postal address or fax number.

(2) *(a)* If an internal appeal is lodged after the expiry of the period referred to in subsection (1) *(a)*, the relevant authority must, upon good cause shown, allow the late lodging of the internal appeal.

(b) If that relevant authority disallows the late lodging of the internal appeal, he or she must give notice of that decision to

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the person that lodged the internal appeal.

(3) *(a)* A requester lodging an internal appeal against the refusal of his or her request for access must pay the prescribed appeal fee (if any).

(b) If the prescribed appeal fee is payable in respect of an internal appeal, the decision on the internal appeal may be deferred until the fee is paid.

(4) As soon as reasonably possible, but in any event within 10 working days after receipt of an internal appeal in accordance with subsection (1), the information officer of the public body concerned must submit to the relevant authority-

(a) the internal appeal together with his or her reasons for the decision concerned; and

(b) if the internal appeal is against the refusal or granting of a request for access, the name, postal address, phone and fax number and electronic mail address, whichever is available, of any third party that must be notified in terms of section 47 (1) of the request.

76 Notice to and representations by other interested persons

(1) If a relevant authority is considering an internal appeal against the refusal of a request for access to a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1), the authority must inform the third party to whom or which the record relates of the internal appeal, unless all necessary steps to locate the third party have been unsuccessful.

(2) The relevant authority must inform a third party in terms of subsection (1)-

(a) as soon as reasonably possible, but in any event within 30 days after the receipt of the internal appeal; and

(b) by the fastest means reasonably possible.

(3) When informing a third party in terms of subsection (1), the relevant authority must-

(a) state that he or she is considering an internal appeal against the refusal of a request for access to a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) or43 (1), as the case may

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be, and describe the content of the record and the provisions of section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1), as the case may be;

(b) furnish the name of the appellant;

(c) in any case where that authority believes that the provisions of section 46 might apply, describe those provisions, specify which of the circumstances referred to in section

46 *(a)* in the opinion of the head might apply and state the reasons why he or she is of the opinion that section 46 might apply; and

(d) state that the third party may, within 21 days after the third party is informed, make written representations to that authority why the request for access should not be granted.

(4) If a third party is informed orally of an internal appeal in terms of subsection (1), the relevant authority must, on request, give a written notice stating the matters referred to in subsection (3) to the third party.

(5) A third party that is informed of an internal appeal in terms of subsection (1), may within 21 days after the third party has been informed, make written representations to the relevant authority why the request for access should not be granted.

(6) A third party that obtains knowledge about an internal appeal other than in terms of subsection (1) may-

(a) make written or oral representations to the relevant authority why the request for access should be refused; or

(b) give written consent for the disclosure of the record to the requester concerned.

(7) If the relevant authority is considering an internal appeal against the granting of a request for access, the authority must give notice of the internal appeal to the requester concerned.

(8) The relevant authority must-

(a) notify the requester concerned in terms of subsection (7) as soon as reasonably possible, but in any event within 30 days after the receipt of the internal appeal; and

(b) state in that notice that the third party may within 21 days after notice is given, make written representations to that authority why that request should be granted.

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(9) A requester to whom or which notice is given in terms of subsection (7) may within 21 days after that notice is given, make written representations to the relevant authority why the request for access should be granted.

77 Decision on internal appeal and notice thereof

(1) The decision on an internal appeal must be made with due regard to-

(a) the particulars stated in the internal appeal in terms of section 75 (1) *(c)*;

(b) any reasons submitted by the information officer in terms of section 75 (4) *(a)*;

(c) any representations made in terms of section 76 (5), (6) or (9); and

(d) if a third party cannot be located as contemplated in section 76 (1),the fact that the third party did not have the opportunity to make representations in terms of section 76 (5) why the internal appeal should be dismissed.

(2) When deciding on the internal appeal the relevant authority may confirm the decision appealed against or substitute a new decision for it.

(3) The relevant authority must decide on the internal appeal-

(a) as soon as reasonably possible, but in any event within 30 days after the internal appeal is received by the information officer of the body;

(b) if a third party is informed in terms of section 76 (1), as soon as reasonably possible, but in any event within 30 days; or

(c) if notice is given in terms of section 76 (7)-

(i) within five working days after the requester concerned has made written representations in terms of section 76 (9); or

(ii) in any other case within 30 days after notice is so given.

(4) The relevant authority must, immediately after the decision on an internal appeal-

(a) give notice of the decision to-

(i) the appellant ;

(ii) every third party informed as required by section 76 (1); and

(iii) the requester notified as required by section 76 (7); and

(b) if reasonably possible, inform the appellant about the decision in any other manner stated in terms of section 75 (1) *(d)*.

(5) The notice in terms of subsection (4) *(a)* must-

(a) state adequate reasons for the decision, including the provision of this Act relied upon;

(b) exclude, from such reasons, any reference to the content of the record;

(c) state that the appellant, third party or requester, as the case may be, may lodge an application with a court against the decision on internal appeal-

(i) within 180 days; or

(ii) if notice to a third party is required by subsection (4) *(a)* (ii), within 180 days,

after notice is given, and the procedure for lodging the application; and

(d) if the relevant authority decides on internal appeal to grant a request for access and notice to a third party-

(i) is not required by subsection (4) *(a)* (ii), that access to the record will forthwith be given; or

(ii) is so required, that access to the record will be given after the expiry of the applicable period for lodging an application with a court against the decision on internal appeal referred to in paragraph *(c)*, unless that application is lodged before the end of that applicable period.

(6) If the relevant authority decides on internal appeal to grant a request for access and notice to a third party-

(a) is not required by, subsection (4) *(a)* (ii), the information officer of the body must forthwith give the requester concerned access to the record concerned; or

(b) is so required, the information officer must, after the expiry of 30 days after the notice is given to every third party concerned, give the requester access to the record

concerned, unless an application with a court is lodged against the decision on internal appeal before the end of the period contemplated in subsection (5) *(c)* (ii) for lodging that application.

(7) If the relevant authority fails to give notice of the decision on an internal appeal to the appellant within the period contemplated in subsection (3), that authority is, for the purposes of this Act, regarded as having dismissed the internal appeal.

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 180 days apply to a court for appropriate relief in terms of section 82.

(3) A third party-

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;

(b) aggrieved by a decision of the information officer of a public

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body referred to in paragraph *(b)* of the definition of **'public body'** in section 1 to grant a request for access; or

(c) aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body,

may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.

79 Procedure

(1) The Rules Board for Courts of Law, established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must, before 28 February 2009, subject to the approval of the Minister, make rules of procedure for-

(a) a court in respect of applications in terms of section 78; and

(b) a court to receive representations *ex parte* referred to in section 80 (3) *(a)*.

(2) Until the rules of procedure in terms of subsection (1) *(a)* come into operation, an application in terms of section 78 must be lodged with a High Court or another court having jurisdiction.

(3) Any rule made in terms of subsection (1) must, before publication in the Gazette, be approved by Parliament.

80 Disclosure of records to, and non-disclosure by, court

(1) Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds.

(2) Any court contemplated in subsection (1) may not disclose to any person, including the parties to the proceedings concerned, other than the public or private body referred to in subsection (1)-

(a) any record of a public or private body which, on a request for access, may or must be refused in terms of this Act; or

(b) if the information officer of a public body, or the relevant authority of that body on internal appeal, in refusing to grant access to a record in terms of section 39 (3) or 41 (4), refuses to confirm or deny the existence or non-existence of the

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record, any information as to whether the record exists.

(3) Any court contemplated in subsection (1) may

(a) receive representations *ex parte*;

(b) conduct hearings in camera; and

(c) prohibit the publication of such information in relation to the proceedings as the court determines, including information in relation to the parties to the proceedings and the contents of orders made by the court in the proceedings.

81 Proceedings are civil

(1) For the purposes of this Chapter proceedings on application in terms of section 78 are civil proceedings.

(2) The rules of evidence applicable in civil proceedings apply to proceedings on application in terms of section 78.

(3) The burden of establishing that-

(a) the refusal of a request for access; or

(b) any decision taken in terms of section 22, 26 (1), 29 (3), 54, 57 (1) or 60, complies with the provisions of this Act rests on the party claiming that it so complies.

82 Decision on application

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;

(d) as to costs; or

(e) condoning non-compliance with the 180-day period within which to bring an application, where the interests of justice so require."

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[30] In s 1 of PAIA:
" '**public body**' means-

(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when-

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation;"

[31] The applicant correctly submits that this point *in limine* turns on whether the National Prosecuting Authority ("the NPA") is a public body in terms of paragraph (a) or (b) of the definition of 'public body'. The respondents argue for the former while the applicant contends for the latter.

[32] In *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC) it was held:
"[26] We conclude that the national sphere of government comprises at least Parliament and the national executive including the President. The national sphere of government is distinct in the sense that it is separate from the other spheres. It is allocated limited functional areas in terms of the Constitution. The provincial and national spheres of government have concurrent powers in relation to those functional areas described in Schedule 4 of the Constitution. All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each

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other. Their interrelatedness and interdependence is such that they must ensure that, while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 were designed in an effort to achieve this result.

[27] It is now possible to address the question whether the Commission is an organ of State which can be said to be within the national sphere of government. It is not, for the reasons that follow. In the first place, the Commission cannot be said to be a department or administration within the national sphere of government in respect of which the national executive has a duty of co-ordination in accordance with s 85(2) of the Constitution. Secondly, the Constitution in effect describes the Commission as a State institution that strengthens constitutional democracy, and nowhere in chap 9 is there anything from which an inference may be drawn that it is a part of the national government. The term 'State' is broader than 'national government' and embraces all spheres of government. Thirdly, under

s 181(2) the Commission is independent, subject only to the Constitution and the law. It is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government. Furthermore, independence cannot exist in the air and it is clear that the chapter intends to make a distinction between the State and government, and the independence of the Commission is intended to refer to independence from the government, whether local, provincial or national.

[28] As Langa DP said:

'[74] The Commission is one of the State institutions provided for in chap 9 of the Constitution and whose function under s 181(1) is to "strengthen constitutional democracy in the Republic". Under s 181(2) its independence is entrenched and as an institution, is made subject only to "the Constitution and the law". For its part, it is required to be impartial and to "exercise (its) powers and perform (its) functions without fear, favour or prejudice". Section 181(3) prescribes positive obligations on other organs of State who must," ...through legislative and other measures, ...assist and protect (it) to ensure (its) independence, impartiality, dignity and effectiveness . . .". Section 181(4) specifically prohibits any "person or organ of the State" from interfering with its functioning. Section 181(5)

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provides that:

"These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year."

[75] Although Constitutional Principle ("CP") VIII enacted in Schedule 4 of the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) provided, amongst other things, for regular elections, there was no CP which required the establishment of an independent body to administer them. Nevertheless, in the first certification judgment, this Court commented as follows on the independence of the Commission as provided for in the constitutional text it was dealing with:

" . . . NT 181(2) provides that the Electoral Commission shall be independent and that its powers and functions shall be performed impartially. Presumably Parliament will in its wisdom ensure that the legislation establishing the Electoral Commission guarantees its manifest independence and impartiality. Such legislation is, of course, justiciable."'

(Footnote omitted.)

[29] In elaborating on the independence of the Commission Langa DP said:

'[98] In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.

[99] The second factor, "administrative independence", implies that there will be [no] control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires "to ensure (its) independence, impartiality, dignity and effectiveness". The Department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary.'

The Commission cannot be independent of the national government, yet be part of it.

[30] The Commission has tried to make some point of the fact that the conduct of the election falls within the national legislative authority of Parliament, contending that this is a factor

which points to the Commission being part of the national sphere of government. This is an oversimplification. It is true that the Commission must manage the elections of national, provincial and municipal legislative bodies in accordance with national legislation. But this legislation cannot compromise the independence of the Commission. The Commission is clearly a State structure. The fact that a State structure has to perform its functions in accordance with national legislation does not mean that it falls within the national sphere of government.

[31] Our Constitution has created institutions such as the Commission that perform their functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission - and the other chap 9 bodies - was so that they should be and manifestly be seen to be outside government. The Commission is not an organ of State within the national sphere of government. The dispute between Stilbaai and the Commission cannot therefore be classified as an intergovernmental dispute. There might be good reasons for organs of State not to litigate against the Commission except as a last resort. An organ of State suing the Commission, however, does not have to comply with s 41 (3)."

[33] The NPA is established in terms of section 179 of the Constitution. Along with the courts and Judicial Service Commission, it is a chapter 8 institution. In terms of section 179(4) of the Constitution, "it exercise its functions without fear, favour or prejudice." The NPA is an institution of state integral to the well being of a functioning democracy and thus necessarily independent of the national, provincial

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and local spheres of government (which in terms of section 40 of the Constitution are to be interdependent and interrelated).

[34] The discussion concerning the NPA in *Democratic Alliance v President of the RSA* 2012 (3) BCLR 291 (SCA) is relevant for present purposes:

"[57] In order to fully appreciate the importance of the NPA and the NDPP in our constitutional democracy it is necessary first, to bear in mind that the Constitution empowers those who govern and imposes limits on their power and second, to consider the wider constitutional scheme in which both the institution and the individual are dealt with. A good starting place is an examination of the founding provisions of the Constitution. Section 1*(c)* of the Constitution states that the Republic of South Africa is one, sovereign, democratic state founded amongst other values on the supremacy of the Constitution and the rule of law. Section 1*(d)*, commits government to democracy and to accountability, responsiveness and openness. Section 2 of the Constitution reaffirms that the Constitution is the supreme law of the Republic and that law or conduct inconsistent with it is invalid and that the obligations imposed by it must be fulfilled. Thus, every citizen and every arm of government ought rightly to be concerned about constitutionalism and its preservation.

[58] The constitutional scheme is deliberate. Chapter 1 sets out the founding provisions and deals with founding values, citizenship, the national anthem, the national flag and languages. Chapter 2 states that the Bill of Rights is a cornerstone of democracy in South Africa and that it enshrines rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The State is obliged to respect, protect, promote and fulfil the rights referred to in the Bill of Rights. Chapter 3 of the Constitution deals with co-operative government and dictates that all spheres of government must adhere to constitutional principles in this regard and must conduct their activities within

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constitutional parameters. Chapter 4 sets out the composition of Parliament and its legislative authority. Section 48 provides that before members of the National Assembly begin to perform their functions, they must swear or affirm faithfulness to the Republic and obedience to the Constitution. Section 62(6) provides that before permanent delegates to the National Council of Provinces begin to perform their functions they must swear or affirm faithfulness to the Republic and obedience to the Constitution. Chapter 5, which is of importance to the present case, deals with the President and the National Executive. Section 83 of the Constitution provides:

"The President -

(a) is the Head of State and head of the national executive;

(b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and

(c) promotes the unity of the nation and that which will advance the Republic."

Section 84 sets out powers and functions of the President. Section 85 provides:

"(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by-

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation."

[59] Section 87 of the Constitution provides that within five days of his election the President must assume office by swearing or affirming faithfulness to the Republic and obedience to the Constitution. In *President of the Republic of South Africa and another v Hugo*

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1997 (4) SA 1 (CC) at paragraph 65, Kriegler J said of the relationship between the President and the Constitution:

"Ultimately the President, as the supreme upholder and protector of the Constitution, is its servant. Like all other organs of state, the President is obliged to obey each and every one of its commands."

[60] Chapter 6 deals with the provinces and their legislative authority. Before members of a provincial legislature begin their functions they too must swear or affirm faithfulness to the Republic and obedience to the Constitution. Section 118 of the Constitution obliges a provincial legislature to facilitate public involvement in the legislative process. Section 127 sets out the powers and functions of Premiers who also must swear or affirm faithfulness to the Republic and obedience to the Constitution. Members of an Executive Council of a province are collectively and individually accountable to the legislature for the exercise of their powers and the performance of their functions and can only act in accordance with the Constitution. Section 140 provides that a decision by a Premier of a province must be in writing if it is taken in terms of legislation or has legal consequences.

[61] Chapter 7 of the Constitution deals with local government. In terms of section 151 of the Constitution, a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation as provided for in the Constitution. Section 152 deals with the objects of local government and provides, amongst others, that local government must provide democratic and accountable government for local communities. I shall deal with Chapter 8, which deals with courts and the administration of justice, including providing for a National Prosecuting Authority, last. Chapter 9 sets out which state institutions are supportive of our constitutional democracy. They include the office of the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission. Section 181(2) states:

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"These institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."

Section 181(3) obliges other organs of state, through legislative and other measures, to assist and protect these institutions to ensure their independence and impartiality, dignity and effectiveness. The listed institutions are all accountable to the National Assembly and must report on the activities and the performance of their functions to the Assembly at least once a year.

[62] Chapter 10 deals with Public Administration. Section 195(1) dictates that public administration must be governed by the democratic values enshrined in the Constitution. Section 195(1)*(f)* provides that public administration must be accountable. The PSC, referred to earlier in this judgment, is established by section 196 of the Constitution. It is required to be independent and impartial and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The PSC is also accountable to the National Assembly and is required to report to it at least once a year.

[63] Chapter 11 deals with security services. Section 198 sets out the governing principles and states, amongst others, that national security must be pursued in compliance with the law, including international law. National security is subject to the authority of Parliament and the National Executive. Chapter 11 contains provisions dealing with the defence force, the police and the intelligence services.

[64] Chapter 12 of the Constitution recognises the status and role of traditional leaders according to customary law, subject to the Constitution. Chapter 13 deals with treasury control and financial matters, including the remuneration of persons holding public office. It also establishes a Financial and Fiscal Commission which, in terms of section 220(2), is required to be independent and impartial and subject only to the Constitution and the law.

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[65] Chapter 14 contains general provisions and embraces subjects such as international agreements, the application of international law, funding for political parties and transitional arrangements.

[66] Before dealing with Chapter 8 of the Constitution, which contains the provisions that relate to the courts and the administration of justice, including the NPA, it is necessary to consider the full and necessary import of the Chapters and provisions of the Constitution referred to in the preceding paragraphs. All the institutions, organs of state and public office bearers referred to are essential for the functioning of our constitutional democracy. The rule of law is a central and founding value. No-one is above the law and everyone is subject to the Constitution and the law. The legislative and executive arms of government are bound by legal prescripts. Accountability, responsiveness and openness are constitutional watchwords. It can rightly be said that the individuals that occupy positions in organs of state or who are part of constitutional institutions are transient but that constitutional mechanisms, institutions and values endure. To ensure a functional, accountable constitutional democracy the drafters of our Constitution placed limits on the exercise of power. Institutions and office bearers must work within the law and must be accountable. Put simply, ours is a government of laws and not of men or women.

[67] As we look back on 17 years of existence as a constitutional democracy and as we view what the constitutional compact means, we must all as a nation breathe more easily in the knowledge that we have truly broken with an authoritarian past in which government served the interests of a few and was unresponsive to the needs of the majority of its citizens and where no safeguards existed to ensure that power was not abused. See *S v Makwanyane* 1995 SA 391 (CC) at paragraph 262. Professor Mureinik explained (in the context of the interim Constitution) the fundamental change brought about because of a shift from a "culture of authority" to a "culture of justification". He described it as "a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered

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in defence of its decisions, not the fear inspired by the force at its command."

[68] It is now necessary to turn to consider that Chapter of the Constitution dealing with the administration of justice and which encompasses, not only judicial authority, but also the NPA. Section 165, which is located in Chapter 8 of the Constitution, provides that the judicial authority of the Republic is vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Importantly, organs of state, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The hierarchy of courts is established and listed in this chapter. Section 174(1) provides that any appropriately qualified woman or man who "is a fit and proper person" may be appointed as a judicial officer.

[69] Section 179 deals with the NPA. It is necessary to quote it in full:

"(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of-

(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and

(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.

(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

(3) National legislation must ensure that the Directors of Public Prosecutions -

(a) are appropriately qualified; and

(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).

(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.

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(5) The National Director of Public Prosecutions-

(a) must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process;

(b) must issue policy directives which must be observed in the prosecution process;

(c) may intervene in the prosecution process when policy directives are not complied with; and

(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:

(i) The accused person.

(ii) The complainant.

(ii) Any other person or party whom the National Director considers to be relevant.

(6) The Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority.

(7) All other matters concerning the prosecuting authority must be determined by national legislation."

[70] As can be seen the same theme that suffuses all the other Chapters of the Constitution permeates Chapter 8 as well, namely, that institutions of state integral to the well-being of a functioning democracy have to be above reproach, have to be independent and have to serve the people without fear, favour or prejudice.

[71] The national legislation envisaged in section 179(3) of the Constitution is the Act. That fact is expressly recognised in the Preamble to the Act. Section 2 of the Act provides for a single national prosecuting authority, as envisaged in section 179(3) of the Constitution. Section 3 sets out the structure of the prosecuting authority, namely, the office of the National Director and the offices of the prosecuting authority at the seat of each high court, established in terms of section 6. Section 5 establishes the National Office of the prosecuting authority which consists of the National Director, who is the head of and controls the office,

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Deputy National Directors and other members of the prosecuting authority appointed at or assigned to the office. Section 10 states that the President "must" in accordance with section 179 of the Constitution appoint the NDPP. The crucial section for present purposes is section 9(1) of the Act, which sets out the qualifications for appointment of the NDPP. Section 12 of the Act provides a fixed non-renewable period of ten years for a National Director to hold office. Section 12(5) can rightly be viewed as a protective provision to guard against political interference. It provides that a National Director cannot be suspended or removed from office, except in accordance with the provisions of subsections 6, 7 and 8.

[72] To understand the importance of the office of the NDPP and the power that he or she wields, regard should be had first, to the provisions of section 179(2) of the Constitution, set out in paragraph 68 above. The prosecuting authority has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to instituting criminal proceedings. This power is echoed in section 20(1) of the Act. Section 20 (1)*(c)* of the Act gives the prosecuting authority the power to discontinue criminal proceedings. It hardly needs stating that these are awesome powers and that it is central to the preservation of the rule of law that they be exercised with the utmost integrity. That must mean that the people employed by the prosecuting authority must themselves be people of integrity who will act without fear, favour or prejudice."

[35] In my view, like the chapter 9 institutions, the NPA is an organ of state but it operates independently of national, provincial or local government. Although a national Minister of State exercises final responsibility for it, that Minister cannot, and does not, dictate how it acts. And although it acts in the name of the state, it is not a sphere of government. It is accordingly a public body contemplated in

paragraph (b) of the definition . The applicant is therefore entitled to direct access to court in terms of s 78(2)(c) of PAIA.

Non-Joinder

[36] The first and second respondents argue that the application is fatally defective because all the former accused in respect of whom charges were withdrawn are not joined in the present application.

[37] The applicant states that it has no interest in the remaining seven. It has not requested the record of decision to withdraw charges against individuals other than the third and fourth respondents. The first respondent is therefore not obliged to disclose that information to the applicant.

[38] The applicant submits, correctly in my view, that the rule concerning the necessary joinder of parties is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he or she has waived his or her right to be joined. See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659.

[39] I cannot appreciate what direct and substantial interest the other persons in respect of whom charges were also withdrawn might have in the order sought in this matter. The point has no merit.

The Merits

[40] It serves to be reminded of what was said in *President of the RSA & Ors v M & G Media Ltd* 2012 (2) BCLR 181 (CC):

"[22] It is apparent from this comparative analysis of the standards applied by courts in other jurisdictions with legislation comparable to PAIA that the state may discharge its evidentiary burden only when it has shown that the record withheld falls within the exemptions claimed. Exemptions are construed narrowly, and neither the mere *ipse dixit* of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the state. Even in jurisdictions like Canada, where courts do not engage in a *de novo* reconsideration of the merits of an exemption claimed, the refusal of access to information held by the state must be reasonable. This is consistent with the importance placed in the Constitution on the right of access to information, as well as with the scheme of PAIA, according to which disclosure is the rule and exemptions from disclosure are the exception.

Discharging the burden under section 81(3)

[23] In order to discharge its burden under PAIA, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has discharged its burden under section 81(3) of PAIA is therefore to ask whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.

[24] The recitation of the statutory language of the exemptions claimed is not sufficient for the state to show that the record in question falls within the exemptions claimed. Nor are mere *ipse dixit* affidavits proffered by the state. The affidavits for the state must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the state is important to

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promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.

[25] Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it does, then the state has discharged its burden under section 81(3). If it does not, and the state has not given any

indication that it is unable to discharge its burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the state has only itself to blame."

[41] On my reading of the third and fourth respondents' answering affidavits they do not raise objections to the application in terms of PAIA, other than that they contend that it has been brought prematurely (ie. the second point *in limine*). Their remaining objection to the application are that it is "...an extension of the political mudslinging..." concerning their prosecution and that the application is an abuse of the court's process and is brought with an ulterior motive. While it is not their decision to refuse the request, I do not discern grounds why they support the first respondent's refusal of the request. I therefore agree with the applicant's submission that the first respondent's case rests on the evidence of its deponent alone.

[42] It appears that the principal ground for the refusal was that based on confidentiality and privilege. It stemmed from representations made by the third respondent only (not the fourth respondents), and then, not to the first

respondent, but instead to the Minister of Justice who in turn passed those on to the first respondent via the second respondent.

[43] The refusal based upon the alleged confidentiality of representations can only apply to the representations made by the third respondent to the Minister of Justice, which eventually found their way to first respondent. It cannot apply to the other parts of the record, including that part of the record pertaining to the decision to withdraw charges against fourth respondent because he obviously made no confidential submissions.

[44] Section 37 of PAIA provides:

"37. Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party.

(1) Subject to subsection (2), the information officer of a public body-

(a) must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement; or

(b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party-

(i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and

(ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied .

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

(a) already publicly available; or

(b) about the third party concerned that has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned."

[45] As I see it, the first problem with the confidentiality argument is that the third respondent's representations were not made to either the first or second Respondents; and then again they were not made in confidence.

[46] In her answering affidavit the third respondent makes no allegation in support of the contention that the representations were made in confidence or that an obligation of confidence was owed to her by first and/or second Respondents in terms of an agreement.

[47] The first respondent argues that the confidentiality that accused persons are entitled to in terms of their representations arises by operation of law.

[48] This, however, is not "an agreement" for the purposes of section 37(1)(a) of PAIA. Even if parties accept that they owe each other reciprocal duties of confidentiality that is insufficient for the disclosure of such information

to "constitute an action for breach of a duty of confidence". In *BHP Billiton Plc Inc & Ano v De Lange & Ors* 2013 (3) SA 571 (SCA) the following was said in this regard:

"[30] Turning to s 37(1)*(a)* of PAIA, a public body such as Eskom is obliged to refuse access 'if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement'. Eskom is on record as stating that there is no express provision in either of the contracts that imposes a duty of confidentiality in relation to the provisions of the contracts. It relies on its 'general' practice of not disclosing such information and then makes reference to a confidentiality agreement signed between Eskom, Hillside and Billiton. However, Billiton appears to accept that the agreement concerned applies only to the supply of electricity to another site. Billiton relies squarely on a statement in its affidavit that the 'parties' unanimously and continuously accepted that they owe each other reciprocal duties of confidentiality not to disclose any commercial or operationally sensitive or confidential information arising from those agreements.

[31] I agree with counsel for Media 24 that this is insufficient to 'constitute an action for breach of a duty of confidence' as contemplated in s 37(1)*(a)*, in the event of a disclosure of the records sought by Media 24. There is no reference in any of the agreements to a term to substantiate the 'general practice referred to above'. In my view s 37(1)*(a)* is inapplicable and does not avail Billiton in its attempt to avoid disclosure of the information sought by Media 24 in terms of the provisions of PAIA."

[49] With regard to the aspect of privilege the contentions are not entirely clear. No privilege has been claimed by the third and fourth respondents. The first respondent's claim in this regard is vague. She suggests that the information then led her to withdraw the charges against the

third and fourth respondents "...may be privileged ...". The applicant quite correctly submits that this is not good enough. Either it is privileged or it is not!

[50] To the extent that the privilege claimed by the first respondent is suggested to apply to what is contained in the prosecutor's brief (ie. the police docket) it is now firmly established that the blanket privilege that existed in pre-constitutional times no longer applies. See *Shabalala & Ors v Attorney-General of Transvaal & Ano* 1996 (1) SA 725 (CC) and *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) where the position was summarised as follows:

"[1] Police dockets, forming a prosecutor's brief, consist normally of three sections. Section A contains statements of witnesses, expert reports and documentary evidence. Section B contains internal reports and memoranda, and section C the investigation diary. In our law, following English precedent, the general rule is that one is not entitled to see his adversary's brief. This is referred to as litigation privilege, something different from attorney and client privilege. However, as the Constitutional Court has held in *Shabalala*, a 'blanket' docket privilege in criminal cases conflicts with the fair trial guarantee contained in the Bill of Rights. Accordingly, litigation privilege no longer applies to documents in the police docket that are incriminating, exculpatory or prima facie likely to be helpful to the defence. This means that an accused is entitled to the content in the docket 'relevant' to the exercise or protection of that right. The entitlement is not restricted to statements of witnesses or exhibits, but extends to all documents that might be 'important for an accused to properly "adduce and challenge evidence", . . . ensuring a fair trial'.

[2] The blanket privilege has not been replaced by a blanket right to every bit of information in the hands of the prosecution. Litigation privilege does still exist, also in criminal cases, albeit in an attenuated form as a result of

these limitations. Litigation privilege is in essence concerned with what is sometimes called work product and consists of documents that are by their very nature irrelevant because they do not comprise evidence or information relevant to the prosecution or defence."

[51] The applicant submits that it follows that the information pertaining to the decision to withdraw charges against third and fourth respondents must be: (a) exculpatory of the third and fourth respondents; (b) helpful to the defence of the

third and fourth respondents; and/or (c) incriminating of other accused. It is accordingly not protected by privilege, except insofar as it pertains to the work product of the prosecution team. That submission appears to me to be sound.

[52] The First Respondent has identified the record as containing:

a. Any notes or minutes recorded from her consultations with the prosecution team, including any written communications to and from the First Respondent and the prosecution team;

b. The memoranda of the prosecution team;

c. The prosecution team's personal deliberations on the representations received;

d. The evidence contained in the case docket.

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[53] It is arguable that, of these, the prosecution team's deliberations on the representations received may be protected by privilege on the basis that they constitute work product pertaining to the prosecution. The applicant submitted, however, that any notes and minutes of consultations between the first respondent and the prosecutors and any memoranda submitted by the prosecutors to the first respondent concerning the possibility of withdrawing charges against third and fourth respondents are not work product pertaining to the prosecution of the case, but rather pertain to a separate process, namely that contemplated in section 179(5)(d) of the Constitution. These are not covered by privilege. Section 179(5)(d) of the Constitution provides that the National Director of Public Prosecutions "...may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from ... the accused person, ... the complainant , ... [and] any other person or party...".

[54] Section 39 of PAIA provides a follows:

"39. Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings.—

(1) The information officer of a public body-

(a) must refuse a request for access to a record of the body if access to that record is prohibited in terms of section 60 (14) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977); or

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(b) may refuse a request for access to a record of the body if-

(i) the record contains methods, techniques, procedures or guidelines for-

(aa) the prevention, detection, curtailment or investigation of a contravention or possible contravention of the law; or

(bb) the prosecution of alleged offenders,

and the disclosure of those methods, techniques, procedures or guidelines could reasonably be expected to prejudice the effectiveness of those methods, techniques, procedures or guidelines or lead to the circumvention of the law or facilitate the commission of an offence;

(ii) the prosecution of an alleged offender is being prepared or about to commence or pending and the disclosure of the record could reasonably be expected-

(aa) to impede that prosecution; or

(bb) to result in a miscarriage of justice in that prosecution; or

(iii) the disclosure of the record could reasonably be expected-

(aa) to prejudice the investigation of a contravention or possible contravention of the law which is about to commence or is in progress or, if it has been suspended or terminated, is likely to be resumed;

(bb) to reveal, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;

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(cc) to result in the intimidation or coercion of a witness, or a person who might be or has been called as a witness, in criminal proceedings or other proceedings to enforce the law;

(dd) to facilitate the commission of a contravention of the law, including, but not limited to, subject to subsection (2), escape from lawful detention; or

(ee) to prejudice or impair the fairness of a trial or the impartiality of an adjudication.

(2) A record may not be refused in terms of subsection (1) *(b)* (iii) *(dd)* insofar as it consists of information about the general conditions of detention of persons in custody.

(3) *(a)* If a request for access to a record of a public body must or may be refused in terms of subsection (1) *(a)* or *(b)*, or could, if it existed, be so refused, and the disclosure of the existence or non-existence of the record would be likely to cause the harm contemplated in subsection (1) *(a)* or *(b)*, the information officer concerned may refuse to confirm or deny the existence or non-existence of the record.

(b) If the information officer so refuses to confirm or deny the existence or non-existence of the record, the notice referred to in section 25 (3) must-

(i) state that fact,

(ii) identify the provision of subsection (1) *(a)* or *(b)* in terms of which access would have been refused if the record had existed;

(iii) state adequate reasons for the refusal, as required by

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section 25 (3), in so far as they can be given without causing the harm contemplated in subsection (1) *(a)* or *(b)*; and

(iv) state that the requester concerned may lodge an internal appeal or an application with a court, as the case may be, against the refusal as required by section 25 (3)."

[55] The applicant pointed out that the first respondent made no specific reference to section 39 of PAIA, either in the response to the request for access or in her answering affidavit. She did however state that she enjoyed "... the prerogative to protect information especially regarding an on-going matter in court in respect of which accused persons have not even been arraigned or asked to state whether they plead guilty or not..." and that the "... release of the information or any part of it may cause havoc to the entirety of the case, and [that she needed] to move carefully with regard to any and all information that [she was] possessed with at this stage, because it is obviously bound up together inextricably...". This could perhaps be interpreted as a reference to the grounds of refusal set out in sections 39(1)(ii) and/or (iii) of PAIA. These sections justify a refusal of access to information where disclosure of a record "could reasonably be expected" to impede a prosecution, or result in a miscarriage of justice in a prosecution, or prejudice an investigation, or enable the identification of a confidential source of information, or result in intimidation or coercion of a witness, or facilitate the commission of a contravention of the law or prejudice or impair the fairness of a trial. However, it was submitted,

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correctly in my view, that it is insufficient for the first respondent to baldly allege that complying with the request for access will somehow interfere with the prosecution or the fairness of the trial. The first respondent bears the onus of

explaining why this "could reasonably be expected" to happen if the record is disclosed. No such explanation was forthcoming.

[56] In the answering affidavits suggestions were also made concerning a possible improper motive on the part of the applicant but this was not persisted in in argument. In any event the question of motive is irrelevant. See *Transnet Ltd & Ano v SA Metal Machinery Co (Pty) Ltd* 2006 (4) BCLR 473 (SCA).

[57] In the result I find that the applicant has established a case for the relief sought.

[58] I grant the following Order:

a. The first respondent's decision to refuse to grant the applicant's request for access to information dated 30 August 2012 is set aside.

b. The first respondent is ordered to furnish to the applicant, within 15 days of this Order, the record of the decision relating to the decision to withdraw charges against the third and fourth respondents.

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c. The respondents, jointly and severally, the one paying the others to be absolved, are ordered to pay the applicant's costs, such costs to include those consequent upon the employment by the applicant of two counsel.

Case Information:	
Date of Hearing:	01 August 2014
Date of judgment:	23 September 2015
For Applicant:	A J Rail SC (with AL Christison)
Instructed by:	Sinclair & Company
Care of:	Venns Attorneys 270/281 Pietermaritz Street Pietermaritzburg Ref: AJLG/Ip/D653a Tel: 033 355 3201
For 1st & 2nd Respondents:	D B Ntsebeza SC (with M Mnyatheli)
Instructed by:	State Attorney (KZN)
Care of:	Cajee Setsubi Chetty 195 Boshoff Street Pietermaritzburg Ref: 116/001157/13/0P13 Tel: 033 345 6719
For 3rd & 4th Respondents:	A J Dickson SC
Instructed by:	PKX Attorneys Suite 36, 3 on Cascades Crescent Montrose Pietermaritzburg Ref: M Potgieter Tel: 033 347 5354

The Constitution

OF THE REPUBLIC OF SOUTH AFRICA, 1996

As adopted on 8 May 1996 and amended
on 11 October 1996 by the Constitutional Assembly

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CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

(Manner of reference to the Act, previously "Constitution of the Republic of South Africa, Act 108 of 1996", substituted by s. 1 (1) of the Citation of Constitutional Laws, 2005 (Act No. 5 of 2005)
[Assented to 16 December 1996]

[DATE OF PROMULGATION: 18 DECEMBER, 1996]
[DATE OF COMMENCEMENT: 4 FEBRUARY, 1997]
(unless otherwise indicated - see also s. 243[5])
(English text signed by the President)

as amended by
Constitution First Amendment Act of 1997
Constitution Second Amendment Act of 1998
Constitution Third Amendment Act of 1998
Constitution Fourth Amendment Act of 1999
Constitution Fifth Amendment Act of 1999
Constitution Sixth Amendment Act of 2001
Constitution Seventh Amendment Act of 2001
Constitution Eighth Amendment Act of 2002
Constitution Ninth Amendment Act of 2002
Constitution Tenth Amendment Act of 2003
Constitution Eleventh Amendment Act of 2003
Constitution Twelfth Amendment Act of 2005
Constitution Thirteenth Amendment Act of 2007
Constitution Fourteenth Amendment Act of 2008
Constitution Fifteen Amendment Act of 2008
Constitution Sixteenth Amendment Act of 2009
Constitution Seventeenth Amendment Act of 2012

In terms of Proclamation No. 26 of 26 April, 2001, the administration of this Act has been assigned to the Minister for Justice and Constitutional Development.

ACT

To introduce a new Constitution for the Republic of South Africa and to provide for matters incidental thereto.

the extent required by the nature of the rights and the nature of that juristic person.

9 Equality

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

10 Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

11 Life

Everyone has the right to life.

12 Freedom and security of the person

(1) Everyone has the right to freedom and security of the person, which includes the right—

(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.

(2) Everyone has the right to bodily and psychological integrity, which includes the right—
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.

13 Slavery, servitude and forced labour

No one may be subjected to slavery, servitude or forced labour.

14 Privacy

Everyone has the right to privacy, which includes the right not to have—
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.

15 Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that—
(a) those observances follow rules made by the appropriate public authorities;
(b) they are conducted on an equitable basis; and
(c) attendance at them is free and voluntary.

32 Access to information

(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must—

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.

34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

35 Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right—

(a) to remain silent;

(b) to be informed promptly—

(i) of the right to remain silent; and

39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

IN RE BOE TRUST LTD AND OTHERS NNO 2013 (3) SA 236 (SCA) A

Citation	2013 (3) SA 236 (SCA)
Case No	846/2011 [2012] ZASCA 147
Court	Supreme Court Of Appeal
Judge	Cloete JA, Malan JA, Shogwe JA, Pillay JA and Erasmus AJA
Heard	September 10, 2012
Judgment	September 28, 2012
Counsel	*RJ Howie* for the appellants.
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Will — Execution — Freedom of testation — Trustees seeking removal of racial restriction from bursary bequest in order to make it palatable to university, which had rejected bequest — Good intentions of trustees and commendable purpose of bursary not trumping intention of deceased, who had, in C anticipation of rejection, provided that, if impossible for trustees to carry out their mandate, trust income to go to charities — Appeal against decision not to delete word 'white' from bequest dismissed.

Will — Execution — Freedom of testation — Not absolute — Court not bound to give effect to wishes of testator where rule of law preventing it from doing D so.

Practice — Joinder — Non-joinder — Necessary party — Extra-judicial notice informing party of proceedings and requesting it to join, sufficient to cure non-joinder if met by unequivocal response that it abided decision of court.

Headnote : Kopnota

E The failure to join a necessary party may be cured if an informal notice asking it whether it wished to intervene was met by an unequivocal response that it would abide by the decision of the court. (Paragraph [20] at 242B – C.)

The view that s 25 of the Constitution protects a person's right to dispose of their assets as they wish, upon their death, is well held. For if the contrary were F to obtain, a person's death would mean that the courts, and the state, would be able to infringe a person's property rights after he or she has passed away, unbounded by the strictures which obtain while that person is still alive. It would allow the state to benefit from someone's death. Freedom of testation is a founding principle of the law of testate succession: a testator enjoys the freedom to dispose of the assets which form part of his or her G estate upon death in any manner he or she deems fit. However, freedom of testation is not absolute, and the court is not obliged to give effect to the wishes of the testator if there is some rule of law preventing it from doing so. (Paragraphs [26] – [28] at 243C – 244B.)

In the present case the testatrix had bequested moneys to a trust with the sole purpose to provide bursaries to assist white MSc students intending to H obtain a doctorate at an overseas university. Four South African universities were nominated to participate in the selection processs. The testatrix had further provided that, if the trustees were unable to carry out the terms of the trust, the trust income had to be

distributed to certain named charities. When the SA universities declined to participate in the racially discriminatory nature of the scheme, the trustees approached a high court for an order I that the discriminatory word 'white' had to be deleted from the bequest in order to make it acceptable to the universities, thereby allowing the purpose of the bursaries to be achieved. The high court found that the trust income had to go to the charities as willed. In an appeal to the SCA —
Held, that the attitude of the trustees and the purpose of the bursaries, though commendable, could not be decisive in giving effect to the terms of the will. J (Paragraph [12] at 240G – H.)

Held, further, that the testatrix intended that, should it prove impossible to give A effect to the provisions of the bursary bequest, the money had to go to the charitable organisations, thereby providing for foreseen eventualities. (Paragraph [31] at 244G – H.)
Held, further, that the fact, that the universities would not participate, was an impossibility in respect of the bursary bequest, and that effect accordingly B meant the bequest had to go to the named charitable organisations in accordance with the wishes of the testatrix. (Paragraph [31] at 244H.) Appeal dismissed.

Cases Considered

Annotations

Case law C

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A): distinguished

Curators, Emma Smith Educational Fund v University of KwaZulu-Natal and Others 2010 (6) SA 518 (SCA): distinguished

Kethel v Kethel's Estate 1949 (3) SA 598 (A): applied D

Minister of Education and Another v Syfrets Trust Ltd NO and Another 2006 (4) SA 205 (C) (2006 (10) BCLR 1214; [2006] 3 All SA 373): considered

Rhode v Stubbs 2005 (5) SA 104 (SCA): dictum in paras [17] and [18] applied

Robertson v Robertson's Executors 1914 AD 503: dictum at 507 applied. E

Case Information

RJ Howie for the appellants.

Appeal from a decision in the Western Cape High Court (Mitchell AJ).

Order F

1. The appeal is dismissed.
2. The costs of the appeal, to be taxed as between attorney and client, are to be paid out of the funds of the trust.
3. A copy of this judgment must be forwarded, by the trustees, to all the named charitable organisations. G

Judgment

Erasmus AJA (Cloete JA, Malan JA, Shongwe JA and Pillay JA concurring):

[1] This is an appeal against the judgment and order of Mitchell AJ in H the Western Cape High Court, Cape Town, in which he dismissed an application to have the word 'white', used to identify a group of persons to benefit in terms of a trust, deleted.

[2] The appellants are the trustees of the Jean Pierre de Villiers Trust (the trust), a trust created by the will of the late Daphne Brice de Villiers. I Mrs De Villiers bequeathed some of her assets to her siblings, her nephews, her nieces and her godchild. The residue of her estate was left to the trust.

[3] Mrs De Villiers' last will and testament, dated 14 July 2002, included the following provisions: J

A '3.6 The residue of my estate to my hereinafter appointed trustees, in trust, to be administered by them, in terms of the powers granted herein and for the following purposes:

The trust shall be known as the Jean Pierre de Villiers Trust.

My trustees are empowered to use so much of the net income and, B if found necessary, of the capital as they shall decide, to provide my retired domestic assistant Paulus Mpai (identity No 15431), with a monthly income of R300 (three hundred rand) during his lifetime.

The remaining income shall be applied by my trustees for the C provision of small bursaries to assist *white* South African students who have completed an MSc degree in Organic Chemistry at a South African University and are planning to complete their studies with a doctorate degree at a University in Europe or in Britain.

D The selection of these students, and the size and duration of the bursaries shall, after discussions between them, be the joint responsibility of the four Organic Chemistry Professors of the Universities of Cape Town, Stellenbosch, Bloemfontein and Pretoria in consultation with Syfrets Trust Ltd. The only provisos in the selection of suitable candidates are that, in addition to a E competence in Organic Chemistry, such students must exhibit both the desire and the ability to benefit culturally from a period spent at such a university and that they must return to South Africa for a period to be stipulated by the Professors listed.

All surplus income shall be capitalised.

F In the event that it should become impossible for my trustee(s) to carry out the terms of the trust, I direct that the income generated by the trust be used annually to provide donations equal in size to each of the following charitable organisations: the Heart Foundation of South Africa; Optima College; the Society for the Prevention of Cruelty to Animals; Boy's Town; The Salvation Army; G Meals-On-Wheels; SOS Children's Villages; Avril Elizabeth Home; National Sea Rescue Institute; the South African Blind Workers Organisation.

Should any of these institutions no longer exist at such time, I direct that my trustee shall choose institutions with similar aims and objectives. I direct that all such donations be sent directly to H the organisation concerned and not to organisations collecting on their behalf.' [My emphasis.]

[4] From a letter written by her sister, annexed to the founding papers, it is clear that Mrs De Villiers had been repeatedly advised that one of the I primary objects of the trust, to bequeath bursaries to 'white' students, would possibly not be given effect to since it was discriminatory. Notwithstanding this warning, her will retained the word. The testatrix was of course free to change her will at any time up to her death. She did not. She did, however, provide that, should it become impossible for the trustees to carry out the terms of the trust, the income generated by the J trust had to be used annually to provide donations to a number of

charitable organisations. Mrs De Villiers passed away on 10 February 2006. A

[5] The first stipulation, under para 3.6 of the will, that provided for the payment of a monthly income to the testatrix's retired domestic assistant Mr Paulus Mpai, has been given effect to and is still continuing. Having B regard to the wording of the will itself, it is clear that the testatrix firstly wanted to provide for Mr Mpai. She made provision, in the event that the income might be insufficient, that capital could be used to satisfy this bequest. The provision for the bursary fund must therefore be separated from the bequest to Mr Mpai. This interpretation is reinforced by the fact that the section that deals with the bursary bequest, which comes C after the provision made for Mr Mpai, starts with 'The remaining income . . .'.

[6] It can furthermore be accepted that the motivation of the testatrix to provide for bursaries in her will was the fact that her late husband was a D leading applied chemist, with doctorates in chemistry from both Oxford University and the University

of Pretoria. Her wish was clearly to set up this trust in memory of her late husband after whom the trust was named.

[7] In order to give effect to the bequest of bursaries for 'white South E African students' the trustees, through their legal representatives, contacted the universities concerned. The enquiry was aimed at establishing whether the universities would accept the bursary bequests, on the conditions stipulated in the will. The letter from the legal representative of the appellants to the universities indicated that the bursary fund would be in an amount that exceeds R250 000 per annum. F

[8] All the universities responded negatively as a result of the racial selection criterion attached to the bursary. The University of Stellenbosch, through its legal services department, alluded to the fact that the university has adopted a new bursaries and scholarships policy which covers the awarding and administration of bursaries to fair, G non-discriminatory and equitable standards. They therefore elected to repudiate the bequest on behalf of the university. They, however, indicated that, should the trust deed be amended in due course to exclude the racial discriminatory condition, they would be willing to participate in the bursary fund. The University of the Free State indicated that, should the bursary be available to all races, they would gladly confirm their H participation.

[9] The University of Pretoria expressed similar sentiments to the University of Stellenbosch, and stated the following:

> 'The University wishes to emphasise that there are many students from I across the racial spectrum who, save for the race-specific limitation, would qualify for the scholarships envisaged in the will. It would therefore be remiss for the University to exclude certain segments of South African society, as reflected in the students demographics, from consideration for these bursaries on the ground as stated. . . . The University is therefore prepared to except the bequest on the condition J

Erasmus AJA (Cloete JA, Malan JA, Shongwe JA and Pillay JA concurring)

> A that the requisite steps are taken for word the white to be deleted from the will.'

The University of Cape Town, through the office of the registrar, noted that the bursary was for 'whites' only and responded as follows:

> 'While we are pleased that the testator has recognised the importance of B the scholarships for doctorate study in organic chemistry, the organic chemistry professor at University of Cape Town (in his/her representative capacity) will not take part in this, but would do so with the executors and the administrators to obtain (as we believe the constitution suggest that they ought) a High Court ruling scrapping the racial C restriction.'

[10] Given the attitude of the four universities, the appellants moved in the high court for a rule nisi calling upon all interested parties to show cause why the word 'white' should not be deleted from the will. The rule nisi was granted and served on the master of the high court and the universities concerned. It was not served on the charitable organisations. D No opposition to the rule nisi was received and a final order was sought.

[11] The trustees contended that the word 'white' fell to be deleted, as it was discriminatory against 'potential beneficiaries' of the bursaries contemplated in the will, on the basis of race. Consequently, they E contended, the will was contrary to public policy; the right to equality as enshrined in the Constitution; the provisions of s 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act; [1] the principles contemplated in ss 3 and 4 of the National Education Policy Act; [2] and the principles set out in *Minister of Education and Another v Syfrets Trust Ltd NO and Another*. [3]

F [12] The attitude of the trustees was set out in the founding affidavit as follows:

> 'In spite of this contingent directive being available to the trustees of the trust, Keddy, Brownell and I are of the view that trust by obtaining an order from this court that the word white be deleted from G clause 3.6 of the will so that the bursary bequest is acceptable to the South African universities and can be used to assist students in the manner contemplated in the will, than resorting to a disposal of the income to the charitable organisations.'

The attitude of the trustees and the purpose of the bursaries are noble H and commendable, but neither, unfortunately, can be decisive in giving effect to the terms of the will.

[13] The matter of *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal and Others*, [4] a judgment of this court, had not been decided at the time the application was brought. Nor had it been decided I at the time the court a quo gave its judgment on the application.

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[14] In dismissing the ex parte application Mitchell AJ emphasised the A principle of freedom of testation, the right to property as enshrined in the Constitution and the fact that it 'includes the right to give enforceable directions as to its disposal on the death of the owner'. He remarked that the provisions were not clearly contrary to public policy, in that the Constitution only prescribes discrimination which is unfair, and, further, B that there may be sufficient reason in the instant case why the testatrix specifically nominated white students as the beneficiaries of her bequest, namely:

> 'The testatrix has thought fit to require beneficiaries of the bursary trust to return to South Africa for a period determined by the universities C concerned after obtaining their doctorates. It seems at least possible that, in so doing, she was seeking to ameliorate this skills loss and indeed, to promote importation of skills obtained overseas. Certainly, it seems to me that the implementation of the bequest in accordance with its terms would have that effect.'

However, no finding was made on this point. D

[15] The high court correctly found that the bursary bequest was rendered impossible as a result of the universities' stance. The high court went on to find that this eventuality was, however, expressly and in terms E provided for by the testatrix, in that the trust income would then go to the charitable organisations.

[16] Nearly two years after the court below handed down judgment, the appellants applied for leave to appeal. The appeal was based on the decision of this court in *Emma Smith.* The appellants contended that if F they were to be given leave to appeal 'then in view of the decision in *Emma Smith*, such appeal must succeed'.

[17] Mitchell AJ denied leave to appeal for the reason that *Emma Smith* did not affect his judgment regarding Mrs De Villiers' will, holding that G the testatrix had foreseen the possibility that the bursary bequest might prove impossible to carry out, and had provided an alternative to which effect had to be given.

[18] The appellants are before this court with its leave. Before the appeal was heard, this court raised the issue of non-joinder of the charitable H organisations named in the will. The appellants' attorneys wrote to the charitable organisations, some of whose names had changed in the meantime.

[19] The common-law rule regarding the obligatory joinder of parties is I that anyone with a direct and substantial interest in a matter must be joined. The appellants concluded that the charitable organisations did not have a legal interest in these proceedings. How they reached that conclusion is beyond understanding. The relief they sought in the court below was to alter the trust created by Mrs De Villiers. If the court below granted the relief that was sought, the charities would not receive the J

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A funds; if it did not, the charitable organisations would. They thus had a substantial interest and they should have been joined. [5]

[20] The next question is whether a letter addressed to this court, an appellate court, informing it that the charitable organisations have B indicated that they abide the court's decision, is enough to cure that failure by the appellants. Put differently, was the informal notice, informing the charitable organisations of the proceedings and asking them if they wished to intervene (at the appeal stage), sufficient notice? Is this

type of extra-judicial notice sufficient? In my view it is. Eventually each of the charitable organisations was properly informed of the nature C and purpose of the proceedings and unequivocally indicated that it would abide the decision of this court. The decision in *Amalgamated Engineering Union v Minister of Labour*[6] is accordingly distinguishable on the facts.

[21] I now turn to the main issue in the appeal. Should this court uphold D the appeal and allow a deletion of a word in Mrs De Villiers' last will and testament, based on the principles enunciated in *Emma Smith*? Can *Emma Smith* be distinguished from this case?

[22] In *Emma Smith* this court held that the Bill of Rights applies to all law (which must by now, and properly, from the advent of the E Constitution, be seen as trite), including the law relating to charitable trusts. It further held that in the public sphere racially discriminatory dispositions will not pass constitutional muster. It dismissed the appeal and allowed the order directing the deletion of the racially discriminatory provisions to stand.

F [23] *Emma Smith* also dealt with a testamentary trust which created an educational fund to be administered by a university, restricting beneficiaries to white bursars. The will considered had been executed in 1938. The exclusive nature of the will, which went further than merely identifying persons of colour, caused less funds than were available for G the purpose, to be paid out. The court identified the question it had to answer as 'whether this bequest, to be administered by the university, can be allowed to stand in its racially exclusive form'. [7]

[24] It is immediately clear that the facts dealt with in *Emma Smith* are distinguishable from the facts of the instant case. The testamentary trust H dealt with there provided for the single purpose that the funds put in trust 'shall be dedicated in perpetuity for the promotion and encouragement of education'. No alternatives were stated, should the terms become impossible to carry out. Indeed, the trust functioned for decades prior to being challenged in the new constitutional dispensation.

I [25] In the instant case no bursaries were ever paid; they could not be, because of the universities' stance. The giving of the bursaries as Mrs De

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Villiers had intended had become impossible as a result of the universities' A stance. Must the alternative provided in the will be given effect to? Does Mrs De Villiers' right to dispose of her assets as she saw fit, whether we agree with her exercise of that right or not, require a court to see at least whether there is a way in which to interpret her will, so that it does not offend public policy? B

[26] Section 25(1) of the Constitution provides that no one may be deprived of property, except where the deprivation is done in terms of a law of general application. What is more, it entrenches the principle that no law may permit the arbitrary deprivation of property. The view that s 25 protects a person's right to dispose of their assets as they wish, upon C their death, was at least accepted in *Minister of Education v Syfrets*, although no decision to this effect was made. This view is, to my mind, well held. For if the contrary were to obtain, a person's death would mean that the courts, and the state, would be able to infringe a person's property rights after he or she has passed away, unbounded by the strictures which obtain while that person is still alive. It would allow the D state, in a way, to benefit from someone's death. Francois du Toit, after having done extensive research on freedom of testation in South Africa and in other jurisdictions, [8] states the position thus:

> 'Freedom of testation is considered one of the founding principles of the E South African law of testate succession: a South African testator enjoys the freedom to dispose of the assets which form part of his or her estate upon death in any manner (s)he deems fit. This principle is supplemented by a second important principle, namely that South African courts are obliged to give effect to the clear intention of a testator as it appears from the testator's will. Freedom of testation is further enhanced by the fact that private ownership and the concomitant right F of an owner to dispose of the property owned (the *ius disponendi*) constitute basic tenets of the South African law of property. An owner's

> power of disposition includes disposal upon death by any of the means recognised by the law, including a last will. The acknowledgement of private ownership and the power of disposition of an owner therefore serve as a sound foundation for the recognition of private succession as well as freedom of testation in South African law.' [9] G
>
> [Footnotes omitted.]

[27] Indeed, not to give due recognition to freedom of testation will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the H peace of mind of knowing that their last wishes would be respected after they have passed away.

2013 (3) SA p244

Erasmus AJA (Cloete JA, Malan JA, Shongwe JA and Pillay JA concurring)

A [28] But freedom of testation, and the rights underlying it, are not absolute. [10] The balance to be struck between freedom of testation and its limitations was formulated by Innes ACJ as follows:

> 'Now the golden rule for the interpretation of testaments is to ascertain B the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule of law from doing so.' [11]

[29] What is required then, firstly, and prior to any enquiry as to whether some rule of law prevents us from giving effect to those wishes, is to first C ascertain what the testatrix's wishes were. Indeed, the enshrined rights to dignity and property demand it.

[30] The key to determining what the testatrix's wishes were in the instant case is, what meaning should be attributed to the word 'impossibility'? D To ascertain that meaning the court may have regard to evidence outside of the wording of the will 'to fit the four corners of the will to the ground'. [12] The testatrix was informed that it might be impossible to give effect to the educational trust she had envisaged as a result of its effect being unlawful. It is with this impossibility in mind that E she included the word 'impossible' and stipulated an alternative.

[31] The appellants, however, insist that this should not be the case. They argue that a distinction is to be drawn between different types of impossibility. And that what Mrs De Villiers actually meant was that her alternative arrangement would only be triggered upon, in the words of F appellants' counsel, 'objective impossibility'. This would be the kind of impossibility, so the argument goes, where no South African university would ever offer the MSc in organic chemistry. I do not think this argument is correct. As I have said, the primary function of a court, in interpreting a will, is to ascertain the intention of the testator. To my G mind, it is clear that the testatrix intended that, quite simply, should it prove impossible, for whatever reason, to give effect to the provisions of the educational bequest, the money should go to the charitable organisations. The testatrix clearly set out a general scheme in which she provided for foreseen eventualities. In my view, therefore, the fact, that the universities would not participate as a result of the racial exclusiveness H of the bequest, is an impossibility in respect of the bursary bequest. The result must be that effect has to be given to the wishes of the testatrix so that the bequest to the named charitable organisations is enforced.

[32] The court a quo ordered that the costs be paid out of the funds of I the trust. I can see no reason why this should not include the costs occasioned by the appeal.

2013 (3) SA p245

Erasmus AJA (Cloete JA, Malan JA, Shongwe JA and Pillay JA concurring)

[33] In the event, the following order is made: A

1. The appeal is dismissed.
2. The costs of the appeal, to be taxed as between attorney and client, are to be paid out of the funds of the trust.

3. A copy of this judgment must be forwarded, by the trustees, to all B the named charitable organisations.

Appellants' Attorneys: *Carter & Associates*, Cape Town; *Symington & De Kok*, Bloemfontein. C

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1 Act 27 of 1996.
2 Act 4 of 2000.
3 2006 (4) SA 205 (C) (2006 (10) BCLR 1214; [2006] 3 All SA 373).
4 2010 (6) SA 518 (SCA).
5 *Kethel v Kethel's Estate* 1949 (3) SA 598 (A).
6 1949 (3) SA 637 (A).
7 In para 1.
8 See F du Toit 'The Impact of Social and Economic Factors on Freedom of Testation in Roman and Roman-Dutch Law' 1999 *Stell LR* 232; F du Toit 'The Limits Imposed upon Freedom of Testation by the *Boni Mores*: Lessons from Common Law and Civil (Continental) Legal Systems' 2000 *Stell LR* 358.
9 F du Toit 'The Constitutionally bound Dead Hand? The Impact of the Constitutional Rights and Principles on Freedom of Testation in South African Law' 2001 *Stell LR* 222 at 224.
10 *Rhode v Stubbs* 2005 (5) SA 104 (SCA) paras 17 and 18.
11 *Robertson v Robertson's Executors* 1914 AD 503 at 507.
12 NJ van der Merwe & CJ Rowland *Die Suid-Afrikaanse Erfreg* 3 ed at 478.

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Reportable

Of interest to other Judges

CASE NO: **A286/2015**

In the matter between:

AFRIFORUM Appellant

and

EMADLANGENI MUNICIPALITY Respondent

Heard: 9 March 2016

Delivered: 27 May 2016

Coram: Makgoka, Ranchod JJ *et* Canca AJ

Summary: Promotion of Access to Information (PAIA) – purpose and object of PAIA - request for access to records of a public body – proper approach to requests – public bodies should give effect to the objects of the Act.

Notice of appeal – contents thereof – in terms of rule 49(4) it is no longer a requirement to set out the grounds of appeal – the only requirements are that the notice state the part of the order being appealed, and the respect in which the variation of the order is sought.

Appeal – against dismissal of application to compel a public body to furnish records in terms of PAIA – Courts to adopt an interpretation which gives expression to the objects of PAIA and avoid too technical an approach.

Costs – award thereof in constitutional litigation - private party litigates against state – where private party unsuccessful – where private party successful – general principles restated.

JUDGMENT

MAKGOKA, J

[1] This appeal, with leave of the court a quo, is against the whole judgment of a single judge of this division (Kubushi J) handed down on 20 February 2015. The court a quo dismissed the appellant's application to compel the respondent to furnish certain information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), read with the Municipal Regulations on Minimum Competency Levels (the regulations).

Legislative frame-work

[2] To facilitate a better understanding of the appellant's claim for access to information and the respondent's refusal, I deem it prudent to outline, at the outset, the legal basis and legislative framework for the claim. Section 32 of the Constitution of the Republic of South Africa, 1996 guarantees the right of access to information held by the state. It reads:

'(1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

[3] In *Brümmer v Minister for Social Development and Others*[1] the Constitutional Court underscored the importance of this right in the following terms:

'The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'. . . . Apart from this, access to information is fundamental to the

[1] *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC).

realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.'[2] (Footnotes omitted.)

[4] PAIA is the national legislation contemplated in section 32(2) of the Constitution. PAIA was enacted to give effect to the right of access to information. The Constitutional Court has held that where Parliament enacts legislation to give effect to the rights in the Constitution, a litigant must found her or his cause of action on such legislation, and not directly on the Constitution, unless it is alleged that the legislation in question is deficient in the remedies it provides.[3] As a result, PAIA is the principal legal source defining the right of access to information, and the promotion of access to information in South Africa is now almost entirely regulated by the PAIA because of the principle of subsidiarity. [4]

[5] The purpose of PAIA is two-fold: to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and to promote a society in which the citizens have effective access to enable them to more fully exercise and protect their rights. In the preamble to PAIA, it is recognized that the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public bodies, which often lead to an abuse of power and human rights violations.

The parties

[6] The appellant is a non-governmental organization, registered as a non-profit company, with the aim of protecting the rights of 'minorities', with specific focus on the rights of Afrikaners.[5] The appellant's *locus standi* is not in issue. The respondent is a local municipality established in terms of Municipal Structures Act 117 of 1998, situated in Mpumalanga Province.

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[2] Paras 62-63.
[3] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as* Amicus Curiae*)* 2006 (2) SA 311 (CC) paras 96 and 434-437. See also *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) para 51; *MEC for Education: Kwazulu-Natal and others v Pillay* 2008 (1) SA 474 (CC) para 40.
[4] De Vos P and Freedman W (eds) (Oxford University Press 2014) *South African constitutional law in context* 622.
[5] http:/www.afriforum.co.za

The appellant's request for access to the records

[7] The appeal has its genesis in a request by the appellant for access to the records of the respondent. The appellant submitted the request on 4 October 2013 in the prescribed manner. It requested documents indicating compliance with the regulations published in the Government Gazette on 15 June 2007,[6] in respect of some of the respondent's senior employees. In terms of those regulations, the accounting officers, the chief financial officers, the senior managers, the financial officers, heads of supply chain management units and the supply chain management managers employed by the respondent have to comply with certain prescribed minimum competency levels in respect of higher education qualifications, work-related experience, core managerial and occupational competences and be competent in the unit standards prescribed for competency areas, as set out in the tables forming part of the regulations.

[8] The appellant's request was in two parts - (a) and (b) – requesting the following particulars, respectively:

(a) Documents indicating compliance with the Municipal Regulations on Minimum Competency Levels (see Annexure 'A')

(b) The report on the compliance with the prescribed minimum competency levels as envisaged in Chapter 7 section 14(4) of the Municipal Regulations on Minimum Competency Levels.

Annexure 'A' referred to in part (a) is a document titled 'Minimum Competency Levels for Accounting Officers' setting out the minimum competency requirements with regard to higher education qualification, work experience, core managerial and occupational competencies, financial and supply chain management competency areas.

The respondent's response to the appellant's request

[6] The regulations referred to above were published by the Minister of Finance, with the concurrence of the Minister for Provincial and Local Government, in terms of s 168 of the Local Government: Municipal Finance Management Act 58 of 2003.

[9] On 20 November 2013 the respondent responded to the appellant's request by informing the appellant that all officials employed by the municipality meet the minimum competency levels as required by the regulations, and that the appointments had been certified by the member of the executive council (the MEC) responsible for Local Government in the province. The respondent concluded on those grounds that there was no basis for the appellant's request.

Internal appeal

[10] Dissatisfied with the respondent's response, the appellant lodged an internal appeal with the respondent on 21 November 2013. In terms of s 77(3) of PAIA, the respondent was enjoined to decide the internal appeal as was reasonably possible, but in any event within 30 days after the internal appeal was received by the respondent's information officer. The respondent did not respond to the applicant's internal appeal. In terms of s 77(7) of PAIA, the respondent was deemed to have dismissed the appeal as it failed to give notice of its decision on the internal appeal.

The appellant's court application and the respondent's response

[11] As a result of the above, on 15 April 2014 the appellant launched an application in this division, seeking an order that the respondent be compelled to provide it with records it had requested. In an answering affidavit deposed to by the respondent's municipal manager, the respondent took a stance that the appellant's request in part (a) does not identify precisely the documents it required, as, according to the respondent, the appellant had simply put up as an annexure, schedules containing the minimum competency standards. According to the respondent, the nature of the request was 'so vague that it would entail producing and allowing the applicant to trawl through the personnel files of the individuals falling within the scope of the request.' This, the respondent contended, was an 'unacceptable invasion of the privacy of those individuals.'

[12] As regards part (b) of the request, the respondent said that it was equally vague in that it called for production of a 'report'. The respondent pointed out that in terms of regulation 14, two reports are to be prepared each financial year by the

respondent, and the respondent was therefore embarrassed in dealing with the request for a single report, without any specification as to the financial year in respect of which the report was sought. The respondent stated that it could not be expected of it to guess which report the appellant sought.

[13] The respondent contended, in the circumstances, that the appellant's request did not comply with s 18(2)(a)(i) which provides that the request should be made with sufficient particularity to enable an official of the public body concerned to identify the record requested. The respondent furthermore argued that the disclosure of the information requested would violate s 34(1) of PAIA, which provides for the mandatory protection of third parties who are natural persons. According to the respondent, the individuals to whom the appellant's request pertained, fell into the category of third parties.

[14] Reliance on s 34(1) is misplaced, and can be dismissed summarily. That section seeks to protect third parties, and not employees of the respondent. On the contrary, and quite pertinently, s 34(2)(f) provides that:

'A record may not be refused in terms of subsection (1) insofar as it consists of information-

(f) about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to-

(i) the fact that the individual is or was an official of that public body;

(ii) the title, work address, work phone number and other similar particulars of the individual;

(iii) the classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual.'

The judgment of the court a quo

[15] The application was heard by the court a quo on 20 January 2015. Judgment was handed down on 20 February 2015. In its judgment, the court *a quo* rejected the respondent's argument that part (a) of the request was vague. The court observed that the regulations provide for the monitoring of certain specified officials of the respondent, who were clearly identified in annexure 'A'. The court a quo pointed out

that Annexure 'A' set out those employees very clearly. As such, the court concluded, the documents requested would only be in respect of the categories of the employees referred to in annexure 'A'. The court went on to remark that on the mere reading of the annexure, it would have been easy for the respondent to ascertain which employees the applicant was referring to in the request.

[16] For that reason, so the court concluded, it was not required of the appellant to have specified the employees by name. However, with regard to the remedy, the court was disinclined to order the appellant to be given access to the requested documents, on the basis that the request was 'cumbersome and cannot be easily furnished'. The court seemed to seek reliance on s 45 for this conclusion. I shall revert to this aspect later in the judgment. With regard to part (b) the court *a quo* accepted the respondent's contention that the request was vague for failing to specify the report which was sought by the appellant. On the above considerations, the court a quo dismissed the appellant's application with costs.

The notice of appeal

[17] In its notice of appeal, the appellant stated that the court a quo erred in concluding that the request for information was cumbersome and could not be easily furnished. The appellant argued that because the respondent was required to perform the task of compiling consolidated reports on a regular basis, the court should have found that it was not cumbersome to comply with the appellant's request. The appellant also stated that the ground on which the application was dismissed, namely that the request was cumbersome, was never advanced by the respondent when the request was initially rejected, and should have been ignored by the court a quo. As to the finding that part (b) of the request lacked sufficient particularity, the appellant stated that the court should have found that the most recent report was required, and allowed the application.

The respondent's attack on the notice of appeal

[18] The respondent took issue with the appellant's notice of appeal. Initially, it was contended that the notice did not comply with the provisions of rule 49(3) of the

Uniform Rules of Court, in that the grounds of appeal were not fully set out. That rule provided in peremptory terms, for the notice of appeal to state whether the whole or only part of the judgment was appealed against. If only part of such judgment was appealed against, it had to be stated which part, and also specify the finding of fact and/or ruling appealed against and the grounds upon which the appeal was founded.

[19] Obviously, the contention in respect of rule 49(3) was made in ignorance of the amendment to the rules, which came into effect on 16 August 2013, in terms of which rule 49(3) was replaced by rule 49(4). The latter does not contain the requirements of the repealed rule 49(3). Its only two requirements are that the notice of appeal must state:

(a) what part of the judgment or order is appealed against; and

(b) the particular aspect in which the variation of the judgment or order is sought.

[20] In his supplementary written argument, and during oral argument, Mr *Ramano*, counsel for the respondent, graciously accepted that the new rule 49(4) did not require of the appellant to set out in detail, the grounds of appeal as was required in terms of rule 49(3). On that basis, counsel expressly accepted that the appellant's notice of appeal complied with the provisions of rule 49(4)(a). In my view, this concession was correctly made. In *Body Corporate of the Bel Aire Scheme v Sure Guard*[7] this Court observed that rule 49(4) is worded similar to rule 7(3) of the Supreme Court of Appeal rules, the essence of which was stated in *Leeuw v First National Bank*[8] as follows:

'In this court it is not required that grounds of appeal be stated in the notice of appeal. The nature of the proceedings is such that this court is entitled to make findings in relation to 'any matter flowing fairly from the record'. The parties in their written and oral arguments have dealt with all the issues relevant to the appeal and the appellant has not pointed to anything that has been overlooked...'

[21] In my view, these remarks are apposite. In *Body Corporate of Bel Aire*, above, the full court held at para 23 that, like in the Supreme Court of Appeal, it was no

[7] *Body Corporate of the Bel Aire Scheme N.O. SS 1821/2006 v Sure Guard CC* 2015 JDR 1021 (GP).
[8] *Leeuw v First National Bank Ltd* 2010 (3) SA 410 (SCA).

longer necessary for an appellant in a full court appeal to state the grounds of appeal in the notice.

The respondent's argument with regard to rule 49(4)(b)

[22] Mr *Ramano*, having accepted that the notice of appeal complied with sub-rule 49(4)(a), contended, however, that the notice fell short of the requirements of rule 49(4)(b). It would be recalled that this sub-rule requires the appellant to state in the notice of appeal 'the particular aspect in which the variation of the judgment or order is sought.' Counsel argued that the notice did not state this. It appears to me that counsel conflates the requirements of sub-rules (a) and (b). The former requires the appellant to identify a part of the order appealed against, while the latter is concerned with the relief or order that the appellant seeks to be substituted for that appealed against. In this respect, the appellant has stated in several instances in its notice of appeal that what it seeks is that the order of the court a quo be substituted with an order compelling the respondent to furnish it with the requested records. This, indubitably, complies with rule 49(4)(b).

[23] Counsel also placed reliance on the explanatory notes in *Erasmus Superior Court Practice* Vol 2 in which the learned authors seem to suggest that the notice of appeal under rule 49(4) must comply with the requirements of the repealed rule 49(3). I do not read the notes to have that effect. However, if that is what the learned authors seek to convey, their views are incompatible with the clear provisions of rule 49(4).

<u>The issues in the appeal</u>

[24] Having disposed of the preliminary argument, I turn now to the substantive issues in the appeal, which, I propose, are crisply, the following:

(a) Whether the respondent was entitled to rely on new grounds for refusing the appellant's request for access to its records;

(b) Whether the basis on which the court a quo dismissed the application is correct, in the context of PAIA;

(c) whether costs should be ordered in the matter, and if so, the principles involved.

[25] I consider the above issues, in turn.

New grounds of refusal raised in the answering affidavit

[26] To my mind, the position of the respondent is analogous to that of administrative bodies, where such bodies are generally, not permitted to furnish new or additional reasons to those they furnished when they took impugned decisions. In *Jicama*, Cleaver J cited with approval the following *dictum* in *R v Westminster City Council*:[9]

'... The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.'

[27] In *National Lotteries Board v South African Education and Environment Project*[10] Cachalia JA said:

'In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision. Whether or not our law

[9] *R v Westminster City Council, Ex Parte Ermakov* [1996] 2 All ER 302 (CA) at 316c-d.
[10] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA).

also demands the same approach as the English courts do is not a matter I need strictly decide.'[11]

[28] Given the above authorities, I am of the view that the court a quo should have found that it was impermissible, and not open to the respondent, for it to raise and place reliance on new grounds of refusal in the answering affidavit, to bolster its decision to refuse the applicant's request for access to the records. The matter should therefore have been determined on the ground relied on by the respondent in its letter dated 20 November 2013.

The basis on which the court a quo dismissed the application

[29] To consider the basis on which the application was dismissed, two sections of PAIA are relevant, namely ss 11 and 45. Section 11 gives effect to the right of access to information held by public bodies, while s 45 provides the grounds on which a request for access to a record of a public body may be refused. I find it prudent to set out in full, those sections.

[30] Section 11 reads:

> '(1) A requester must be given access to a record of a public body if—
>
> (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
>
> (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
>
> (2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.
>
> (3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by—
>
> (a) any reasons the requester gives for requesting access; or
>
> (b) the information officer's belief as to what the requester's reasons are for requesting access.'

[11] Para 27.

[31] Section 45 provides:

'The information officer of a public body may refuse a request for access to a record of the body if:

(a) the request is manifestly frivolous or vexatious;

(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

[32] Section 11(1)(a) provides, in peremptory and emphatic terms, the right to the requester to be furnished with the requested record if all procedural requirements have been met. The public body has no residual discretion to refuse such request, unless on one of the grounds of refusal set out in chapter 4 (ss 33-46).

Part (a) of the request

[33] In this regard, s 45 is relevant, as the court a quo seemingly relied on it to dismiss part (a) of the request. To recap on that aspect, the court a quo dismissed part (a) of the appellant's request on the basis that it was 'too wide and cumbersome'. Unfortunately, the court did not furnish any reasons why that was the case. However, just before reaching that conclusion, the court a quo had mentioned the provisions of s 45(*b*), which provides a basis of refusal if the 'work involved in processing the request would substantially and unreasonably divert the resources of the public body.' It is therefore not clear if the court a quo, by concluding that the request was wide and cumbersome', meant the substantial and unreasonable diversion of resources as envisaged in s 45(*b*).

[34] Three aspects arise from the above. First, the basis on which the court a quo dismissed the application, was never relied on by the respondent in its refusal contained in the letter dated 20 November 2013. It must be recalled that in that letter, the basis for the refusal of the request was that all its employees complied with the regulations. That ground itself, is not one of the grounds set out in chapter 4 (ss 33 – 46) on which a request for access to a record may be refused. On this basis alone, the court a quo should have found that the respondent's response to the appellant's request was inadequate, and based on irrelevant considerations.

[35] Second, the irony of the reason furnished for the refusal (that the respondent's employees complied with the regulations) is that for that very reason, access to the records should be given. That is because if such an assertion is made in good faith, it would be that the maker of the statement had checked and verified the very records the appellant sought. There should, in the result, be no difficulty in furnishing the records, unless, of course, the statement was made egregiously. I am fortified in this view by the fact in terms of regulation 14, the respondent is required to monitor compliance with the prescribed minimum competency levels for financial officials and supply chain managers, and report the consolidated information.

[36] Third, the basis on which part (a) of the applicant's request was premised (being too 'wide and cumbersome') is not a ground on which a request for access to a record may be refused in terms of PAIA. There is simply no such ground anywhere in the text of the Act. Even if one assumes that the court a quo meant to rely on s 45(*b*) – that compliance would substantially and unreasonably divert resources of the respondent - there was no evidence before the court to justify that conclusion. Ordinarily, such an assertion, backed by the relevant evidence, would be advanced by the public body to which the request is made. In the present case, no such assertion was made, and the court a quo misdirected itself by relying on a basis not advanced to it by the respondent.

Part (b) of the request

[37] I turn now to part (b) of the applicant's request. In this regard, the court a quo concluded that the request was vague, and lacked sufficient particularity to enable the respondent to determine which report should be made available to the appellant. The court pointed out that in terms of regulation 14 the respondent was obliged to prepare two reports in a financial year. As the appellant had not stated which of the two reports, or for which financial year, it required, the request was vague and that the respondent was entitled to refuse it. Once more, this ground was not advanced by the respondent in its response to the applicant's request, and should have been ignored. The appellant asserts that the respondent should have raised the issue of vagueness when the request was made and not remain quiet, only to raise the issue

during litigation. I agree. A simple letter to the appellant seeking clarity as to which report it sought, would have clarified whatever lurking vagueness there was.

[38] In my view, the court a quo overlooked the objects and purpose of PAIA, which among others, is to provide a simple and inexpensive mechanism of obtaining information held by public bodies. Also what seems to have eluded the court a quo, is the injunction in s 2(1), which provides that when interpreting a provision of PAIA, every Court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects. In my view, the court a quo adopted too technical an approach to the application. That approach led it astray, and in the process, scrutinized the applicant's request for access to the records with an eye reserved for court pleadings. That is inconsistent with the objects of PAIA.

The remedy

[39] The upshot of the above findings is that the appeal should be allowed. The respondent should be ordered to furnish the records requested by the appellant in parts (a) and (b) of its request. To avoid any further technical points of ambiguity with regard to part (b), I propose to make an order to facilitate the furnishing of further particulars by the appellant to the respondent as to the specific report it seeks. In that way, I will be adopting an approach which is consonant with the objects of PAIA, and giving effect to the right of access information held by public bodies.

Costs

[40] Finally, the issue of costs. This is a matter within the discretion of the court, which discretion must be exercised judiciously having regard to all the circumstances. The court a quo dismissed the application with costs. Unfortunately, in doing so, the court did not give consideration to the fact that it was concerned with constitutional litigation. The general principle with regard to costs in constitutional litigation was laid down by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*[12] and *Biowatch Trust v Registrar, Genetic*

[12] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC).

Resources and Others.[13] In *Affordable Medicines,* the Court held that one of the considerations is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. But there are exceptions, such as where the litigation is 'frivolous or vexatious'.[14]

[41] In *Biowatch* it was established that the general rule in constitutional litigation between a private party and the state is that if the private party is successful, it should have its costs paid by the state, while if unsuccessful each party should pay its own costs.[15] The present matter raises a constitutional issue of importance aimed at vindicating a constitutional right of access to information. Even if unsuccessful, as the court a quo found, the appellant should not have been mulcted in costs. Its application could not be described as frivolous or in any way inappropriate. Far from it, as it raised an important constitutional issue. The applicant was left with no choice but to approach the Court, as the respondent had refused to provide it with access to the requested records.

[42] The appellant has been successful in the appeal proceedings. In *Biowatch*, para 25, it was stated that 'particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.' In the present case, I find none of such reasons to deprive the appellant its costs. As a result, costs should follow the result in accordance with the principles discussed above.

Order

[43] In the result the following order is made:

1. The appeal is upheld;

2. The order of the court a quo made on 20 February 2015 is set aside and in its stead the following is substituted for it:

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[13] *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).
[14] Para 138.
[15] Paras 23 and 24.

(a) The respondent is ordered to furnish the applicant with the records requested in the applicant's request dated 4 October 2013;

(b) To the extent there is ambiguity in part (b) of the request referred to above, the respondent is entitled to request the applicant to furnish it with the information of the specific report it seeks;

(c) The respondent is ordered to pay the costs of the application.

3. The respondent is ordered to pay the costs of this appeal.

T.M. Makgoka
Judge of the High Court

I agree

N. Ranchod
Judge of the High Court

I agree

M. Canca
Acting Judge of the High Court

Date of hearing: 9 March 2016

Judgment delivered: 27 May 2016

Appearances

For the Appellant: Adv. J.L Basson

Instructed by: Hurter Spies Inc., Pretoria

For the Respondent: Adv. P. Ramano

Instructed by: Xaba Attorneys, Johannesburg

Adams & Adams, Pretoria

NATIONAL LOTTERIES BOARD AND OTHERS v SOUTH AFRICAN EDUCATION AND ENVIRONMENT PROJECT 2012 (4) SA 504 (SCA) C

2012 (4) SA p504

Citation	2012 (4) SA 504 (SCA)
Case No	788/10 [2011] ZASCA 154
Court	Supreme Court Of Appeal
Judge	Brand JA, Van Heerden JA, Cachalia JA, Shongwe JA and Seriti JA
Heard	September 16, 2011
Judgment	September 28, 2011
Counsel	*PM Kennedy SC* (with *FA Boda*) for the appellants. *D Borgström* (with *L Ackermann*) for the respondent.
Annotations	Link to Case Annotations

D

Flynote : Sleutelwoorde

Administrative law — Administrative action — Policy guidelines — Application — Inflexible application of guidelines by decision-maker — May result in E failure to exercise any discretion at all — If object of guideline met, then insignificant or technical instances of non-compliance generally to be condoned — Failure to properly exercise discretion may not be remedied by giving different reasons after fact.

Gaming and wagering — Lottery — National Lotteries Board — Policy guidelines F for allocation of grants — Inflexible or unreasonable application of guidelines not justified.

Gaming and wagering — Lottery — National Lotteries Board — Mandate — Board holding public funds for distribution to socially deserving projects — Funds not belonging to board — Grants not 'gratuities' to be distributed as G its largesse — Board to ensure that funds allocated as intended.

Headnote : Kopnota

Administrative decision-makers should not be excessively inflexible or dogmatic when applying the regulatory guidelines or general criteria enacted to aid them in their task. Elevating the guideline or criterion being applied into an immutable rule will unlawfully restrict or even abrogate the decision-maker's H discretion. If the object of the guideline or criterion was met, then insignificant or technical instances of non-compliance should generally be condoned. A decision-maker who unlawfully restricts or abrogates his discretion cannot remedy the situation by substituting different reasons after the fact. (Paragraphs [9], [11] and [28] at 509A – C, 509F – 510A and 514B – D.)

I The Lotteries Board holds public funds in trust for the purpose of allocating them to deserving projects, and it is under an obligation to ensure that they are so allocated, provided the projects in question meet the requirements. The funds do not belong to the board, nor are the grants 'gratuities' to be disbursed as its largesse. (Paragraph [39] at 516H – 517B.)

Applying these principles, the Supreme Court of Appeal held that the Lotteries Board J had not been justified in declining certain applications for financial

grants. The court found that the board had, by dogmatically applying its A guidelines, unlawfully abrogated its discretion, and that this could not be remedied by relying on a new reason introduced for the first time in its answering papers in the high court. The SCA accordingly upheld the high court's order setting aside the board's decision to decline the applications. (Paragraph [38] at 516F – H.) B

Cases Considered

Annotations:

Case law

Southern Africa

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others C 2004 (4) SA 490 (CC) (2004 (7) BCLR 687): dictum in para [57] applied

Fidelity Cash Management Service v CCMA [2008] 3 BLLR 197 (LAC): distinguished

Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management, and Others D 2006 (2) SA 191 (SCA) ([2005] 1 All SA 531): dictum in para [9] applied

Jicama 17 (Pty) Ltd v West Coast District Municipality 2006 (1) SA 116 (C): dictum in para [11] applied

MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another E 2006 (5) SA 483 (SCA) ([2006] 2 All SA 17): dictum in para [19] applied

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665): referred to

Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others F 1999 (4) SA 1 (SCA) ([1999] 3 All SA 365): referred to

Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) ([2005] 2 All SA 108): compared.

England G

R v Westminster City Council, Ex parte Ermakov [1996] 2 All ER 302 (CA): dicta at 315*g* – 316*d* applied

S, T and P v London Borough of Brent [2002] EWCA Civ 693: dictum in para [26] applied.

Case Information

Appeal from a decision in the Western Cape High Court (Gamble J). H

PM Kennedy SC (with *FA Boda*) for the appellants.

D Borgström (with *L Ackermann*) for the respondent.

Cur adv vult. I

Postea (September 28).

Order

The appeal is dismissed with costs, including the costs of two counsel. J

Judgment

A **Cachalia JA (Brand JA, Van Heerden JA, Shongwe JA and Seriti JA concurring):**

[1] This is an appeal, with leave of the Western Cape High Court (Gamble J), against an order reviewing and setting aside certain decisions B of the National Lotteries Board (the board). The decisions relate to the board's refusal to approve three applications by two registered charities for financial grants from the National Lottery Distribution Trust Fund (the fund). The main issue in this appeal concerns whether or not the board was justified in declining the applications because they did not comply with the guidelines for the distribution of moneys from C the fund.

[2] The fund was created under s 21 of the Lotteries Act 57 of 1997 (the Act) to receive moneys raised through national lottery competitions. The board, which is the first appellant, administers the fund primarily for the purpose of allocating grants to socially worthy projects.[1] The D South African Education and Environment Project, the first respondent, and the Claremont Methodist Church Social Impact Ministry, Sikhula Sonke, the second respondent, are the charities whose grant applications the board declined. It shall be convenient to refer to the first respondent by its acronym SAEP and to the second respondent by its abbreviated E name, Sikhula Sonke.

[3] The two charities have, over a period of time, applied to the board for funding. The projects for which they seek funding support pre-school and educational facilities in deprived areas of Cape Town. SAEP operates in the Philippi area by supporting crèches started up by women in the F Philippi community, providing extracurricular programmes in under-resourced high schools; offering bridging courses for promising students in preparation for tertiary education and supporting university students. Sikhula Sonke offers 'educare' facilities to approximately 4000 children in 65 pre-schools in the Khayelitsha community.

G [4] Distribution agencies (DAs), appointed by the Minister of Trade and Industry, facilitate the adjudication of funding applications and the distribution of funds to charities whose applications have been approved.[2] The agencies are not juristic persons in their own right, but subcommittees of the board. They perform their functions on the board's behalf. There are four such agencies of which only two concern H us, namely the DA for Charities, represented by the second appellant, and the DA for Arts, represented by the third appellant. The former is responsible for considering applications from organisations seeking funds earmarked for 'charitable expenditure'.[3] The Minister of Trade and Industry has determined that not less than 45% of the amounts available must be allocated for these purposes. The latter is similarly I responsible for considering applications for 'arts, culture and the

national historical, natural, cultural and architectural heritage'. In its A case not less than 28% of the amounts available in the fund have to be paid to meet these objectives.[4]

[5] Despite the minister's determinations and the overwhelming social need for these funds, the board and DAs have consistently failed to meet B their targets. This has resulted in major under-expenditure of the moneys earmarked for allocation. According to the board's annual report, in 2008, it set itself the 'strategic objective' to 'disburse 85% of the funds allocated', but made less than 50% available for allocation. Of this reduced amount the DA for Charities managed to distribute 40% and the DA for Arts only 29% of the total amount allocated. This C represented 32,5% of the total amount available in the fund for distribution. In 2009 they fared even worse distributing only 42 % of the allocated funds, which represented only 15% of the total amount in the fund available for distribution. Of this amount the DA for Charities distributed 37% and the DA for Arts only 28%. In total, in 2009, the fund had R6 billion in unallocated funds. For the years we are D considering the fund had simply not fulfilled its mandate.

[6] In its founding affidavit SAEP initially sought to review seven of its failed funding applications under s 6 of the Promotion of Administrative Justice Act 3 of 2000. In Sikhula Sonke's case, two applications were put E in issue. When the review was launched, SAEP was content to pursue its review only in respect of four of its unsuccessful applications. And, when the matter was called, SAEP abandoned one

more, leaving three remaining. Counsel for the board conceded the review in respect of two of these applications, leaving only one in issue, which was identified in the papers as the seventh application. Sikhula Sonke's dispute related to the eighth F and ninth applications. Three thus remained — SAEP's seventh application and Sikhula Sonke's eighth and ninth applications.

[7] As I mentioned at the beginning, the disputes over the three applications all concern how the DAs applied the guidelines when declining them. The board submits that its guidelines are clear, not G unduly burdensome and must be complied with to the letter. Counsel for the board urged us to have regard to the fact that because the board processes large numbers of applications, which is an onerous administrative responsibility, it cannot be expected to investigate every application that does not adhere strictly to the guidelines. Moreover, counsel for H the board submitted, the board's staff establishment is limited and its employees are constrained to apply the guidelines strictly. The board thus contends that by refusing to consider the three applications here in issue, it was merely applying the guidelines. It is therefore necessary to

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A consider the status of the guidelines issued by the DAs and how they are meant to be applied within the context of the Act's statutory framework.

[8] The board is listed as a public entity in schedule 3 of the Public Finance Management Act 1 of 1999. It must therefore manage its B finances properly by taking steps to prevent irregular expenditure and payments that do not comply with its operational policies.[5] The powers regulating the manner in which funding applications are made are provided for in the (Lotteries) Act and regulations. Under ss 28(2) and 30(2) of the Act the Ministers of Trade and Industry and of Finance may issue directions (in the case of the former, after consulting with the C Minister for Social Welfare or with the ministers responsible for arts, culture, science and technology and environmental affairs, as the case may be) regarding the allocation of funds by the DAs for Charities and Arts, respectively. When the decisions regarding these allocations were made the directions were contained in regs 3 and 5 of the 'allocation D regulations'.[6] In terms of s 32(3) of the Act the DAs must comply with directions by the Minister of Trade and Industry 'in determining the persons to whom, the purposes for which and the conditions subject to which that distributing agency is to allocate any amounts'. At the time that the applications under consideration were considered the Minister had not issued any such directions.[7] Regulation 10(2) of the 'Distributing E Agencies' regulations prohibits the allocation of funds to organisations under legal administration, that are insolvent, or that have previously breached conditions of their grants.[8] The regulations require applications to be made on a prescribed form,[9] a matter which is relevant to SAEP's seventh application.

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[9] So, the Act and the applicable regulations make it clear that the A requirements for applications are to be found in the regulations. This does not mean that DAs may not develop guidelines of the sort here in issue to assist them in making their decisions. Indeed, because the grant or refusal of an application involves the exercise of a discretion, our courts have recognised that it is prudent for decision-makers to apply B guidelines or general criteria to assist them with this task.[10] And, provided that these criteria are compatible with the enabling legislation, the only constraint is that they may not be applied rigidly or inflexibly in a particular case.[11] For if they are applied in this manner the decision-maker elevates the guideline to an immutable rule and thereby fetters its C discretion, which it may not do.[12]

[10] At the same time decision-makers must be consistent, particularly when dealing with large numbers of applications, as the board does. There is therefore a tension between having to apply a guideline strictly D and consistently when making multiple

decisions, and applying it flexibly in a particular case. It is this anxiety that motivates the litigation on the board's part — a point counsel for the board sought to drive home by insisting that a strict application of the guidelines is unavoidable. But this problem is inherent with multiple decisions, and does not relieve an E administrator of the duty to consider each application individually and justify every decision. The law requires nothing less. And it is no defence for the board to attempt to relieve itself of this duty by complaining that it has insufficient or inadequately trained staff to do this.

[11] That the guidelines in issue here in the main serve a useful purpose, F and generally accord with the regulations, is not disputed. Their object is to ensure that moneys are disbursed only to grantees that are demonstrably capable of administering them for their intended purpose and also that applicants for funding are treated similarly. In addition they minimise the danger of fraud. When receiving an application for funding G the decision-maker's mind must be directed to these purposes. In doing so, it is entitled to treat some aspects of the guidelines as peremptory requirements, such as that the financial statements of grantees be audited. For it would be untenable to insist on this requirement for some organisations, but not for others. However, it is not entitled to treat every H departure from its literal prescriptions as fatal. Not even statutory formalities are approached in this way. The real question a decision-maker must ask itself is whether the object of the guidelines has been

A achieved.[13] If it has, then insignificant or technical instances of non-compliance should generally be condoned.

[12] Against this background, it is convenient to deal first with Sikhula Sonke's two applications and then consider SAEP's application.

B Sikhula Sonke's eighth application

[13] This application for funding was made on 26 July 2007 and given the reference number 27999. The amount requested was R570 000. The DA for Charities declined the application on 27 August 2008, some 13 months later, for two reasons: first, that on its application form and C financial statements the organisation was named 'Sikhula Sonke' while its full name (Claremont Methodist Church Social Impact Ministry, Sikhula Sonke) appeared on other supporting documents; and secondly, that 'the management is not fully representative of the beneficiary community'.

D [14] However, for reasons that do not appear from the record, the DA made another decision on 15 October 2008. Again the application was refused based on an 'inconsistency in names'. It informed Sikhula Sonke of its decision by letter on 22 October 2008 and gave the reason for refusing the application as:

> E 'The inconsistency in names in that the application form and the financials are in the name of Sikhula Sonke and the NPO Certificate, Articles of Association and the bank statements are in the name of Claremont Methodist Church Social Impact Ministry, Sikhula Sonke.'

[15] The board invited Sikhula Sonke to appeal if it so wished. It did so F on 18 November 2008. The grounds of appeal indicated that Sikhula Sonke was clearly an abbreviation of the organisation's full name, employed to avoid repetitive and unwieldy references to the full name; it was also a 'trading name' used on all its stationery, letterheads, electronic communications and its website. Six months passed before G Sikhula Sonke was informed on 5 May 2009 that the appeal had failed. It appears from the record that a 'Special Board Committee' considered the appeal and confirmed the DA's decision. The reasoning was based upon paragraph three of the 2007 guidelines, which required applications to 'have exactly the SAME NAME throughout'.

H [16] Before I consider whether the board's insistence on the strict application of this guideline constituted a lawful basis for refusing the application, I must mention that the second reason given initially — that Sikhula Sonke's management was not representative of the beneficiary community — was abandoned on the second occasion when the application was considered. It appears that the DA introduced this requirement I in its public notice calling for funding applications. How it could have

done so is difficult to understand. The Act requires only that charitable expenditure be made 'by any organisation or institution established for

charitable, benevolent or philanthropic purposes'.[14] There is no requirement A for the organisation to be 'representative of the beneficiary community' before it may qualify for funding. There is a good reason for this: the unavoidable consequence of imposing such a condition would be to adversely impact on poor and vulnerable communities having access to sorely needed funds and services. B

[17] The idea that an organisation may be precluded from obtaining public funding to assist such communities only because its racial composition apparently differs from the community it intends assisting is not new. It resembles the racially discriminatory welfare policy from our recent past. That policy promoted separate services for different race C groups and separate boards of management of welfare organisations. Its effect was to deepen mass poverty and social inequality.[15] To repeat that error would be so inimical to the founding values of our Constitution — non-racialism, equality and human dignity (as they relate to ubuntu)[16] — that it is an unimaginable basis for public policy. In the absence of any suggestion that the Sikhula Sonke either employs persons or dispenses D funds on a racially discriminatory basis, the board correctly abandoned this rationale for initially refusing the application.

[18] I turn to consider whether Sikhula Sonke's 'inconsistency in the use of names' was a proper basis for refusing to approve its funding E application. The board's justification for adopting the guideline that the same name be used throughout the application is to prevent fraud, which could happen if funds are inadvertently paid to organisations for which they were not intended. Sikhula Sonke does not take issue with the purpose of the guideline. Its complaint is that the guideline was applied rigidly, resulting in the decision to refuse the funding application being F unreasonable or irrational.

[19] The undisputed facts support Sikhula Sonke's stance. It says that it did not understand the guideline to mean that it could not use abbreviations in its name. That 'Sikhula Sonke' was obviously an G

A abbreviation appears from the following: first, its auditors used the abbreviated name in the annual financial statements; second, the annual reports accompanying the application, including the cover sheet and every page of the 2006 and 2007 annual reports, bear a logo which reads 'Sikhula Sonke — We grow together', and the front cover bears the full B name; third, the letterhead used in correspondence to the board includes the logo in the top right-hand corner of the page, with the full name in the top left-hand corner; fourth, the letterhead and application also confirm its registration numbers as a non-profit and public-benefit organisation. The persons who processed the application entered these numbers into a database, which generated a print-out that referred to the C full name.

[20] There could thus have been no doubt that the abbreviated and full names referred to one and the same entity — more so after the full facts were placed before the Special Board Committee. Yet, in its answering D papers, the board insisted that the difference in names could lead to a reasonable suspicion of fraud. In their written submissions, counsel for the board submitted that it would have been unreasonable and unnecessarily onerous to expect the board to embark on an investigation to eliminate the possibility of fraud. This submission is utterly without merit. There was no need to embark on any investigation as all the facts E were before it. And, if it remained unsure afterwards it could have clarified the matter with a single telephone call to Sikhula Sonke or its auditors. Instead, the official who declined the application for this reason applied the guideline rigidly and thoughtlessly, as did the Special Board

Committee. It follows that the high court was correct to conclude that F the board's refusal to consider the application fell to be reviewed and set aside.

Sikhula Sonke's ninth application

[21] This application was submitted on 13 November 2008 to the G DA for Charities. The amount requested was R300 000 and a reference number 33667 allocated to it. The DA rejected the application seven months later, on 12 June 2009. On 2 July 2009 it furnished its reasons. These were that the 'Articles of association' were submitted without a 'Memorandum of association' outlining the organisation's objects; and that only one set of financial statements for the 2008 year was presented H instead of two, as the guidelines required.

[22] The high court found that the facts relied on to support these reasons were demonstrably wrong. The board wisely does not call into question this finding on appeal. The board, however, sought to rely on a I new reason, introduced for the first time in its answering papers in the high court. This was that the financial statements had not been signed by an independent accounting officer and that Sikhula Sonke had not provided proof of the officer's official registration.

[23] There is a factual dispute between the parties as to whether the application that was submitted by Sikhula Sonke to the board included J signed statements. When the matter was argued before us, it was

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common cause that copies of both the signed financial statements were A included in the bundle of documents before us, as was an unsigned copy. Assuming, in the board's favour, that the statements it received in support of this application were unsigned, I do not think it was reasonable for the board to reject the application for this reason. If it had any doubt regarding the efficacy of the statements, a phone call to the B accountants would have clarified the matter — a simple exercise that would not have unduly burdened the board. Instead the guideline was applied rigidly without any justification. There is, therefore, no merit in the board's attempt to defend this decision on this basis.

[24] The high court dismissed this new ground on another basis; it C was impermissible, the learned judge said, for the board to rely on new reasons for the first time in its answering affidavits. For this conclusion the high court relied on the decision of Cleaver J in *Jicama 17 (Pty) Ltd v West Coast District Municipality*,[17] which has an impressive English pedigree.[18] D

[25] Counsel for the board, however, submitted that this was not a 'new reason' but one that appeared from the record. The question therefore, so the submission went, was whether, objectively viewed, it was reasonable for the decision-maker to have rejected the application. For this E submission counsel relied on a judgment by the Labour Appeal Court in *Fidelity Cash Management Service v CCMA.*[19] That case involved a review of an arbitrator's award. The court held that an award of this nature may be set aside on review only if it is one that no reasonable decision-maker could reach. This question, the court said, must be determined by reference to all the evidence that was before the decision-maker. And, it F did not matter if the decision-maker failed to identify good reasons for his decision; as long as the decision, viewed objectively, was reasonable, this was good enough.

[26] In my view reliance on *Fidelity Cash* is misplaced. The question here G is not whether there were other reasons in the record that justified the board's decision, but whether it could give reasons other than those it gave initially for refusing the application.

[27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give H reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and

cannot be validated by different reasons given afterwards — even if they show that the original

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A decision may have been justified.[20] For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.

B [28] In the present matter the refusal of a funding application involves the exercise of a discretion. This means that the board could have exercised its discretion by waiving the requirement for signed statements in the guideline, or simply condoning the failure to comply strictly with it. It failed to exercise its discretion properly by applying the guideline dogmatically. The fact that it may have had other reasons for having C come to that conclusion does not change the fact that the board exercised its discretion unlawfully when it made the decision. In fact, it exercised no discretion at all. This cannot be remedied by giving different reasons after the fact. The high court, in my respectful view, got it right.

D SAEP's seventh application

[29] This application, which was allocated the reference No 35663, was submitted on 30 January 2009 for funding from the DA for Arts. The amount applied for was R313 560. This was in response to an advertisement calling for applications. The applications had to be supported E by documentation. Of importance in this regard was the requirement in the 2009 'guidelines for submission of applications' (referred to below) that '(a)pplicants must ensure that their auditors are registered with recognised professional bodies, eg Public Accountants and Auditors Board'. However, the advertisement calling for applications stated only that the application be accompanied by signed audited financial statements F for the two most recent years prepared by a firm of registered auditors.

[30] The record filed under rule 53 of the Uniform Rules indicates that the application was rejected at a meeting on 28 May 2009 for two G reasons: first, because both sets of financial statements were not 'audited' and secondly, since the auditors had not signed one of the sets of statements. However, when the decision was conveyed to SAEP on 15 July 2009, only the first of the reasons was given to justify the rejection.

H [31] SAEP's application included its annual financial statements for the years ended 30 June 2007 and 30 June 2008. They included reports from an independent accounting officer, Mr Van der Rede, who is a registered member of the Chartered Institute of Management Accountants (CIMA). His report concludes that SAEP's financial statements accord with generally accepted accounting practice. The board's internal check I list, which is used to capture the essential information pertaining to an application, indicates — with reference to Van der Rede — that it was satisfied with the 'auditor's current membership'. On the face of it, the application apparently complied both with Allocation reg 5(5)*(j)*, which

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requires an applicant for funding to keep proper accounting records, and A with reg 5 (5)*(k)*, which obliges it to furnish a written report regarding its finances.

[32] On this basis SAEP's founding affidavit took issue with the board's reason — that both financial statements for both 2007 and 2008 were not B audited — for declining its application. In its answering affidavit the board attempted to justify this reason by pointing out that Van der Rede's report attached to the 2007 statements refers to the 2006 statements (the 2008 statements were not placed in issue). The board now suggests that no financial statements were submitted at all for 2007. But this suggestion is disingenuous because all but one of the pages of the C financial statements refer to 2007. The reference to '2006' on the offending page is clearly an

error. Indeed the board had found the same error in a previous application and quite properly merely asked SAEP to correct it. The board then accepted the corrected version. It is incredulous that the deponent to the board's answering affidavit now attempts to make a case that this error amounted to 'material non-compliance' with D the guideline when it did not do so previously.

[33] The board's answering affidavit also added that SAEP had not complied with the 2009 guidelines in another respect: the financial statements had been signed off by Van der Rede, who is an 'accounting officer' and not an auditor whose qualifications the board recognises. E

[34] At this stage it is convenient to deal with the 2009 guidelines. Under the heading 'Signed audited financial statements' in section F the following is stated:

> 'It is compulsory for organizations to submit signed audited financial F statements for the two most recent years. Organisations that submit only one set of signed, audited financial statements will not be considered. The audited statements must be on a letterhead of the audit firm, must reflect the registration number of the audit firm and must be signed and dated. Financial Statements must be for the most recent audits 2006/2007 and 2007/2008.
>
> *Applicants must ensure that their auditors are registered with recognised G professional bodies, eg Public Accountants and Auditors Board. Financial statements that have been reviewed by an accounting officer are not audited. Any application (sic) that submits such statements will be declined.*
>
> An organisation that does not have signed two-year audited financial statements may form a partnership with an organisation that has the H required financial statements (see Partnership Guidelines). . . .' [Emphasis supplied.]

[35] These guidelines require only that the applicant's auditors are registered with a recognised professional body. The Public Accountants and Auditors Board is cited as an example of such body. However, the I prescribed form, referred to earlier, says that applicants must ensure that their auditors are registered with one of three professional bodies: the Public Accountants and Auditors Board, the Institute for Commercial and Financial Accountants, and the Institute for Certified Bookkeepers. The board submits that because CIMA, which recognises Van der Rede's qualifications, is not one of the professional bodies mentioned in the J

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A prescribed form, it was justified in declining the application on this ground.

[36] But the board has never before, since the publication of the prescribed form with the regulations in 2000, insisted on recognition of B only those professional bodies mentioned in it. The 2007 and 2008 Charities Sector guidelines, for example, have a list of eight professional bodies with which an 'accounting officer' may be registered. CIMA is one of these. In the latest guidelines issued in 2010, seemingly in recognition of the undue formalism of the 2009 guidelines, all first- time applications for less than R750 000 need only be submitted by a C bookkeeper, accountant, or accounting officer. No formal accreditation of their qualifications by any professional body is required. Also, in previous years, the board accepted financial statements prepared by Van der Rede without question. SAEP thus says that it reasonably relied on this practice when it submitted these financial statements.

D [37] There is no dispute on the papers that Van der Rede conducted a proper audit and that he had the necessary qualifications and competence to conduct audits into all financial entities, except for public companies (SAEP is not a public company). The board has not raised any concern regarding SAEP's financial integrity. In these circumstances E the board's submission, that it acted reasonably when it declined the application because of Van der Rede's lack of accreditation by one of the bodies mentioned in the prescribed form, cannot withstand scrutiny. The high court also observed that DAs have applied the concept of 'auditing' inconsistently and that the board's dogged insistence upon 'audited' financial statements only by a recognised body this time was F unreasonable and overly rigid. Here too, the high court was correct in its conclusion.

[38] To summarise: In each of the three decisions under review, the board adopted a rigidly formulaic approach to the application of the G guidelines, treating them as 'peremptory requirements' without exception: in the first, it rejected the application merely because it used the applicant's abbreviated name instead of the same name throughout the application as the guidelines require; it declined the second on the ground that the financial statements were not signed; and it refused the third because of its dogmatic insistence that the 'auditor' be recognised H by one of three professional bodies prescribed in the regulations, despite the board not having previously adhered to this practice, and the guideline itself having not clearly required this.

[39] I mentioned at the outset that the funds of the board are aimed at supporting socially worthy projects and that, for the years under review, I the board failed to disburse R6 billion. The rigid and inconsistent application of the guidelines, at least partly, explains why this has happened. Equally distressing is that the board does not appear to understand its mandate properly. Mr Nevhutanda, the chairperson of the board and the deponent to its answering affidavit, seems to hold the view that grants given by the board are 'gratuities', which are allocated at J the board's discretion. He is wrong. The board holds public funds in

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trust for the purpose of allocating them to deserving projects. And it A must ensure that these funds are allocated to those projects, provided of course that they meet the necessary requirements. The funds do not belong to the board to be disbursed as its largesse.

[40] The appeal is dismissed with costs, including the costs of two counsel. B

Appellants' Attorneys: *Dockrat Inc*, Johannesburg; *Honey Attorneys*, Bloemfontein.

Respondent's Attorneys: *Edward Nathan Sonnenbergs*, Cape Town; *Matsepes Inc*, Bloemfontein. C

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1 Section 26 of the Act.
2 Sections 28(1) and 28(2) of the Act.
3 Sections 26(3)*(b)* and 28 of the Act.
4 In terms of s 26(2) of the Act the Minister of Trade and Industry makes these allocations after consulting with the board. At the time that the applications under consideration were decided these percentages were determined by the Minister in terms of s 26(3) of the Act in GN R1468 of 2004, published in *GG* 27118, 15 December 2004. This determination is now contained in new regulations that applied from 30 July 2010, published in GN R645 in *GG* 33398, 20 July 2010.
5 Sections 51(1)*(a)*(i) and 51*(b)*(ii) of the Public Finance Management Act 1 of 1999.
6 'Allocation of Money in National Lottery Distribution Trust Fund' (allocation regulations) published under GN R3446, *GG* 21619, 29 September 2000 — contained in annexure LJK 20 vol 1 at 82 – 3. These regulations have subsequently been repealed and replaced (with effect from 30 July 2010) with the 'Regulations Relating to the Allocation of Money in National Lottery Distribution Trust Fund', published under GN R645, *GG* 33398, 20 July 2010. The applications in this case fall to be decided under the 'old' regulatory scheme applicable at the time that they were made — see *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others*; *Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others* 1999 (4) SA 1 (SCA) ([1999] 3 All SA 365) paras 15 – 19.
7 Such directions are now contained in the 'Directions for the Distribution Agencies in Determining the Distribution of Funds from the National Lottery Distribution Trust Fund', published under GN R644, *GG* 33398, 20 July 2010 (which took effect from 30 July 2010).
8 Published under GN R182, *GG* 22092, 22 February 2001, reg 10.
9 The Regulations entitled 'Allocation of Money in National Lottery Distribution Trust Fund' are published under GN R3446, *GG* 21619, 29 September 2000. Regulation 7 provides for the funding applications to be submitted to the DA on a prescribed form.
10 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) para 57.

11 *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) ([2006] 2 All SA 17) para 19.

12 *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management, and Others* 2006 (2) SA 191 (SCA) ([2005] 1 All SA 531) para 9.

13 Cf *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) ([2005] 2 All SA 108) para 22.

14 Section 1.

15 See Leila Patel *Social Welfare and Social Development in South Africa* (2005) at 73 – 4.

16 The concept of 'ubuntu' and its application to case law has been controversial. Here I use it in the limited and, I think, uncontroversial sense that Mahomed J did in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665) para 263, where he said:

(A) need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization. The need for ubuntu expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.'

17 2006 (1) SA 116 (C) para 11.

18 *S, T and P v London Borough of Brent* [2002] EWCA Civ 693 para 26 (Schieman LJ); *R v Westminster City Council, Ex parte Ermakov* [1996] 2 All ER 302 (CA) at 315*g* – 316*d*; Wade & Forsyth *Administrative Law* 10 ed at 441 – 2.

19 [2008] 3 BLLR 197 (LAC) paras 102 – 103.

20 See *Wade & Forsyth* (above n18).

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v M & G MEDIA LTD 2012 (2) SA 50 (CC) D

Citation	2012 (2) SA 50 (CC)
Case No	CCT 03/11 [2011] ZACC 32
Court	Constitutional Court
Judge	Ngcobo CJ, Cameron J, Froneman J, Jafta J, Mogoeng J, Mthiyane AJ, Nkabinde J, Van der Westhuizen J and Yacoob J
Heard	May 17, 2011
Judgment	November 29, 2011
Counsel	*MTK Moerane SC* (with *L Gcabashe*) for the applicants. *J Gauntlett SC* (with *F Ismail* and *F Pelser*) for the respondent.
Annotations	Link to Case Annotations

E

Flynote : Sleutelwoorde

F **Administrative law** — Access to information — Access to information held by public body — Request — Refusal — Burden of establishing that refusal complies with Act — Party claiming information falls within exemption to put forward sufficient evidence for court to conclude on probabilities that it falls within exemption — Recitation of statutory language of exemption insufficient, as is mere ipse dixit affidavit — Where party claims personal knowledge G of facts that place record within exemption, it need indicate how knowledge was acquired, in order for court to determine weight to be given to evidence — Promotion of Access to Information Act 2 of 2000, s 81(3).

Administrative law — Access to information — Access to information held by public body — Request — Refusal — Disclosure of record to court — Court to use section to examine record if in interests of justice for it to do H so — Promotion of Access to Information Act 2 of 2000, s 80.

Headnote : Kopnota

This case raises the issues of how the State discharges the burden under s 81(3) of the Promotion of Access to Information Act 2 of 2000 (PAIA) of establishing that its refusal to grant access to a record is justified; and I secondly, of when a court may call for additional evidence in the form of the contested record under s 80. (Paragraph [5] at 54B – C.)

Section 81(3) of the PAIA provides that:

'(3) The burden of establishing that —

(a) the refusal of a request for access; or

(b) any decision taken in terms of section 22, 26(1), 29(3), 54, 57(1) or 60, J

complies with the provisions of this Act rests on the party claiming A that it so complies.'

The approach to the question whether the State has discharged its burden is to ask whether the State has put forward sufficient evidence for a court to conclude that, on

the probabilities, the information withheld falls within the exemption claimed. Recitation of the statutory language of the exemption B claimed is not sufficient, and nor is an *ipse dixit* affidavit proffered by the State. Where the State's deponent claims personal knowledge of the facts that place a record within an exemption, an indication of how the alleged knowledge was acquired is necessary to determine the weight, if any, to be attached to the evidence set out in the affidavit. (Paragraphs [23] – [24], [26] and [28] at 60B/C – F, 60H – 61B and 61D – F.) C
As to when a court may under s 80 call for additional evidence in the form of the record, s 80(1) provides that 'any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which [the] Act applies, and no such record may be withheld from the court on any grounds'. The standard to assess whether a court should use s 80 is whether it would be in the interests of justice for it to do so. The section should be used sparingly. (Paragraphs [37], [39] and [45] at 63E, 63I and D 65H/I – 66A.)

Cases Considered

Annotations:

Reported cases

Southern Africa E

Barclays National Bank Ltd v Love 1975 (2) SA 514 (D): dictum at 516A – B considered

Brümmer v Minister for Social Development and Others 2009 (6) SA 323 (CC) (2009 (11) BCLR 1075): referred to

FirstRand Bank Ltd v Beyer 2011 (1) SA 196 (GNP): referred to F

Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A): referred to

Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland) 2005 (2) SA 110 (SCA) ([2005] 1 All SA 559): referred to

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A): referred to G

President of the Republic of South Africa and Others v M & G Media Ltd 2011 (2) SA 1 (SCA) (2011 (4) BCLR 363): dicta in paras [38] and [52] approved

Raphael & Co v Standard Produce Co (Pty) Ltd 1951 (4) SA 244 (C): referred to

Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP): referred to H

Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) (2006 (4) BCLR 473; [2006] 1 All SA 352): referred to.

Australia

McKinnon v Secretary, Department of Treasury 228 CLR 423: referred to. I

Canada

Canada (Information Commissioner) v Atlantic Canada Opportunities Agency [1999] 250 NR 314: referred to

Canada (Information Commissioner) v Canada (Prime Minister) [1993] 1 FC 427 (FCA): referred to J

A *Canada (Minister of Environment) v Canada (Information Commissioner)* [2000] FC case No A-761-99 (FCA): referred to

Rubin v Canada Mortgage and Housing Corp [1989] 1 FC 265 (FCA) ((1988) 52 DLR 4th 671 (CA)): referred to

Wyeth-Ayerst Canada Inc v Canada (Attorney General) [2003] FCA 257: referred to.

B United States

Arieff v United States Department of Navy 712 F 2d 1462: referred to

Currie v Internal Revenue Service 704 F 2d 523: referred to

Doyle v Federal Bureau of Investigation 722 F 2d 554: referred to

Hayden v National Security Agency 608 F 2d 1381: referred to

C *Hunt v Central Intelligence Agency* 981 F 2d 1116: referred to

Lawyers Committee for Human Rights v Immigration and Naturalization Service 721 F Supp 552: referred to

National Treasury Employees Union v United States Customs Service 602 F Supp 469: referred to

Navasky v Central Intelligence Agency 499 F Supp 269: referred to

D *Ollestad v Kelley* 573 F 2d 1109: referred to

Phillippi v Central Intelligence Agency 546 F 2d 1009: referred to

Ray v Turner 587 F 2d 1187: dicta at 1195 and 1212 approved

Santos v Drug Enforcement Agency, Office of Information and Privacy 357 F Supp 2d 33: referred to

State of North Dakota ex rel Olson v Andrus 581 F 2d 177: referred to

E *Stein v Department of Justice and Federal Bureau of Investigation* 662 F 2d 1245: referred to

Times Journal Co v Department of Air Force 793 F Supp 1: referred to

Weissman v Central Intelligence Agency 565 F 2d 692: referred to

Yeager v Drug Enforcement Administration 678 F 2d 315: referred to.

F Unreported cases

FirstRand Bank Ltd v Meyer (ECP case No 3483/10, 17 March 2011): referred to

M & G Ltd and Another v President of the Republic of South Africa and Others (GNP case No 1242/09, 4 June 2010): referred to.

Statutes Considered

Statutes

G The Promotion of Access to Information Act 2 of 2000, ss 80 and 81(3): see *Juta's Statutes of South Africa 2010/11* vol 5 at 1-247.

Case Information

An appeal against a decision of the Supreme Court of Appeal.

MTK Moerane SC (with *L Gcabashe*) for the applicants.

H *J Gauntlett SC* (with *F Ismail* and *F Pelser*) for the respondent.

Cur adv vult.

Postea (November 29).

Judgment

I **Ngcobo CJ (Froneman J, Mogoeng J, Mthiyane AJ and Yacoob J concurring):**

Introduction

[1] Shortly before the 2002 presidential election in Zimbabwe, former J President Thabo Mbeki appointed two senior judges to visit that

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country. It is by now common cause that the two judges were sent to A assess the constitutional and legal issues relating to that election. Upon their return, the judges prepared a report and submitted it to the President. The report has never been released to the public. M & G Media Ltd (M & G), the publisher of a weekly newspaper, the *Mail & Guardian*, requested access to the report pursuant to s 11 of the Promotion of Access to Information Act (PAIA, or the Act).[1] The B Presidency refused the request.[2]

[2] The request was refused on two grounds: first, that disclosure of the report would reveal information supplied in confidence by or on behalf C of another state or international organisation, contrary to s 41(1)*(b)*(i) of PAIA; and second, that the report had been prepared for the purpose of assisting the President to formulate executive policy on Zimbabwe, as contemplated in s 44(1)*(a)* of PAIA.

[3] In the ensuing litigation initiated by M & G pursuant to s 78 of PAIA, D the North Gauteng High Court, Pretoria (High Court), and, on appeal, the Supreme Court of Appeal held that the refusal to grant access to the report was not justified by either s 41(1)*(b)*(i) or s 44(1)*(a)* of PAIA, as claimed by the Presidency. The High Court ordered the President, the Deputy Information Officer and the Minister in the Presidency (together, E the State), who were the respondents in those proceedings, to make the report available, in its entirety, to M & G.[3] This order, including an order for costs, was upheld on appeal by the Supreme Court of Appeal.[4] With our leave previously granted,[5] the State is now appealing to this court.

[4] On appeal to this court, the State contended that both the Supreme F Court of Appeal and the High Court erred in finding that it had not discharged its statutory burden, imposed by s 81(3) of PAIA, of establishing that its refusal to grant access to the report was justified by either of the exemptions it claimed under ss 41(1)*(b)*(i) and 44(1)*(a)*.[6] The State also argued that, in responding to the application by M & G, its hands were tied. It argued that it could not give more information on its G refusal to provide access to the report without referring to the contents of the report that it sought to protect from disclosure, which would be in

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A contravention of the Act.[7] While the State admits that the report contains some information that is not confidential, it nevertheless resists the disclosure of even the non-confidential portions on the basis that they cannot reasonably be severed from those portions containing confidential information.

B Issues for consideration

[5] This case raises two important issues: first, how the State discharges the burden, under s 81(3) of PAIA, of establishing that its refusal to grant access to a record is justified; and second, the circumstances under C which a court may call for additional evidence in the form of the contested record under s 80.[8] These issues will be considered in this judgment in the light of the constitutional right of access to information held by the State and the statutory framework that regulates proceedings under PAIA.

D The constitutional right of access to information held by the State

[6] The constitutional right of access to information is governed by s 32 of the Constitution, which provides, in relevant part:

> "(1) Everyone has the right of access to —
>
> E *(a)* any information held by the state'.

[7] Section 11 of PAIA gives effect to this constitutional right, and provides:

> '(1) A requester must be given access to a record of a public body if —

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

F *(b)* access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

(2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.

(3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by —

G *(a)* any reasons the requester gives for requesting access; or

(b) the information officer's belief as to what the requester's reasons are for requesting access.'

[8] In *Brümmer v Minister for Social Development and Others*,[9] this court H explained the importance of the constitutional right of access to information held by the State as follows:

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'The importance of this right . . . in a country which is founded on A values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information". B

Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. . . . Access to information is crucial to C accurate reporting and thus to imparting accurate information to the public.'[10] [Citations omitted.]

[9] As is evident from its long title, PAIA was enacted '(t)o give effect to the constitutional right of access to any information held by the State'. And the formulation of s 11 casts the exercise of this right in peremptory D terms — the requester 'must' be given access to the report so long as the request complies with the procedures outlined in the Act and the record requested is not protected from disclosure by one of the exemptions set forth therein.[11] Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception. E

[10] The constitutional guarantee of the right of access to information held by the State gives effect to 'accountability, responsiveness and openness' as founding values of our constitutional democracy.[12] It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of F other rights in the Bill of Rights. The right to receive or impart information or ideas,[13] for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote[14] also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined. G

[11] But PAIA places limitations on the right of access to information. It does this by exempting certain information from disclosure. PAIA recognises, in its preamble, that there are 'reasonable and justifiable' limitations on the right of access to information, even in an open and democratic society.[15] Those limitations emerge from the exemptions to H disclosure contained in Ch 4 of the Act. The purpose of Ch 4 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and

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A international relations of the Republic;[16] the economic interests and financial welfare of the Republic and commercial activities of public bodies;[17] and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.[18]

B [12] We are not concerned, here, with the constitutionality of PAIA or the limitation on the right of access to information contained in Ch 4. What we are concerned with is the constitutional and statutory framework within which claims for exemption from disclosure must be considered and evaluated.

C The statutory framework that regulates proceedings under PAIA

[13] Court proceedings under PAIA are governed by ss 78 – 82. Section 81 provides that proceedings under PAIA are civil proceedings and the rules of evidence applicable in civil proceedings apply. The burden of establishing that the refusal of access to information is justified under the D provisions of PAIA rests on the State or any other party refusing access. Section 81 provides:

> "(1) For the purposes of this Chapter proceedings on application in terms of section 78 are civil proceedings.
>
> E (2) The rules of evidence applicable in civil proceedings apply to proceedings on application in terms of section 78.
>
> (3) The burden of establishing that —
>
> *(a)* the refusal of a request for access; or
>
> *(b)* any decision taken in terms of section 22, 26(1), 29(3), 54, 57(1) or 60, F
>
> complies with the provisions of this Act rests on the party claiming that it so complies.'

[14] In proceedings under PAIA, a court is not limited to reviewing the decisions of the information officer or the officer who undertook the G internal appeal. It decides the claim of exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits.[19] The evidentiary burden borne by the State pursuant to s 81(3) must be discharged, as in any civil proceedings, on a balance of probabilities.

[15] The imposition of the evidentiary burden of showing that a record H is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of PAIA read in the light of s 32 of the Constitution. I This is because the requester of information has no access to the

contents of the record sought and is therefore unable to establish that it A is not exempt from disclosure under the Act. By contrast, the holder of information has access to the contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions contained in Ch 4. Hence s 81(3) provides that the evidentiary burden rests with the holder of information and not with B the requester.

Foreign jurisprudence on discharging the evidentiary burden

[16] Before formulating the standard to assess whether the State has C properly discharged its burden under s 81(3), it is desirable to consider foreign jurisprudence dealing with comparable legislation, as we are encouraged to do by s 39(1)*(c)* of the Constitution.[20] Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a D safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we must exercise particular caution in referring to foreign jurisprudence.

[17] The United States has well-developed access to information E jurisprudence. Its Freedom of Information Act (FOIA) contains nine exemptions to disclosure and, like PAIA, provides for *de novo* judicial review of a government agency's reliance on an exemption to refuse access to a government record.[21] As with judicial review of refusals under PAIA, refusals made under FOIA place the burden to demonstrate to the F court that it has properly relied on the exemption claimed on the agency refusing the information request.[22] The agency claiming the exemption can discharge its

burden only by presenting the court with evidence that the information withheld falls within the exemption claimed, and such evidence should not be controverted by either contrary evidence on the G record or evidence of bad faith on the part of the agency.[23]

[18] The State may not rely on affidavits that are conclusory, merely repeat the language of the statute, or are founded upon sweeping and H

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A vague claims.[24] Affidavits must describe the justification for non-disclosure with reasonably specific detail for the requester of information to be able to mount an effective case against the agency's claim for exemption.[25] In the United States, public policy favours disclosure of information, and this requires that exemptions be construed narrowly.[26] B In addition, courts consider the burden borne by the government refusing access to information with an awareness that the requesting plaintiff is at a distinct disadvantage in attempting to controvert an agency's claims regarding the nature and contents of a record.[27]

[19] In *Hayden v National Security Agency*,[28] the District of Columbia C Circuit Court of Appeals summarised the appropriate procedures to be used by trial courts in determining whether documents should be released. It said:

> "(1) The trial court must make a de novo review of the agency's classification decision, with the burden on the agency to justify D nondisclosure. (2) In conducting this review, the court is to give "substantial weight" to affidavits from the agency. (3) The court is to require the agency to create as full a public record as possible, concerning the nature of the documents and the justification for nondisclosure. (4) If step (3) does not create a sufficient basis for making a decision, the court may accept classified affidavits In camera, E or it may inspect the documents In camera. This step is at the court's discretion . . . . (5) The court should require release of reasonably segregable parts of documents that do not fall within FOIA exemptions.'[29] (Citations omitted.)

[20] The Canadian equivalent of PAIA is the Access to Information Act. F[30] As with PAIA, the Access to Information Act provides for a number of exemptions to disclosure, as well as judicial review of a refusal of access to information.[31] The Act stipulates that the burden of establishing that a challenged refusal is authorised rests with the government institution refusing access.[32] Unlike in both the United

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States and South Africa, where courts engage in a *de novo* review of the A lawfulness of the refusal, Canadian courts limit their review to whether or not the refusal was reasonable.[33] As in the United States, to establish proper reliance upon a discretionary exemption from disclosure, the government must provide evidence that the record falls within the description that is contemplated by the statutory exemption invoked.[34] The B government must provide actual direct evidence of the confidential nature of the information at issue,[35] which must disclose a reasonable explanation for exempting the record.[36]

[21] In Australia requests for access to government records are governed C by the Freedom of Information Act, 1982.[37] Australian courts have held that the test for determining whether a refusal was justified is a reasonableness test, and the state's burden is not discharged merely by showing that the refusal was not irrational, absurd, or ridiculous.[38] Rather, it must go further to show that, in light of the public interest, there were reasonable grounds for the refusal. Even where a government D minister has certified refusal on the grounds of public interest, the court must still ask itself whether, in the light of countervailing factors in the public interest, there were reasonable grounds for the refusal.[39]

[22] It is apparent from this comparative analysis of the standards E applied by courts in other jurisdictions with legislation comparable to PAIA that the State may discharge its evidentiary burden only when it has shown that the record withheld falls within the exemptions claimed. Exemptions are construed narrowly, and neither the mere *ipse dixit* of the information officer nor his or her recitation of the words of the statute is

A sufficient to discharge the burden borne by the State. Even in jurisdictions like Canada, where courts do not engage in a *de novo* reconsideration of the merits of an exemption claimed, the refusal of access to information held by the State must be reasonable. This is consistent with the importance placed in the Constitution on the right of access to information, as well as with the scheme of PAIA, according to which B disclosure is the rule and exemptions from disclosure are the exception.

Discharging the burden under s 81(3)

[23] In order to discharge its burden under PAIA, the State must provide C evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the State has discharged its burden under s 81(3) of PAIA is therefore to ask whether the State has put forward sufficient evidence for a court to conclude that, on the probabilities, the information D withheld falls within the exemption claimed.

[24] The recitation of the statutory language of the exemptions claimed is not sufficient for the State to show that the record in question falls within the exemptions claimed. Nor are mere *ipse dixit* affidavits proffered by the State.[40] The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This E recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.[41]

[25] Ultimately, the question whether the information put forward is F sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it G does, then the State has discharged its burden under s 81(3). If it does not, and the State has not given any indication that it is unable to discharge its burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the State has only itself to blame.

H [26] In this case, deponents to the affidavits on behalf of the State claimed personal knowledge of the following facts: that the two judges received information from representatives of the Zimbabwean government in confidence; and that the report was commissioned and prepared for the purpose of assisting the President in the formulation of policy and I the taking of decisions pertaining to the situation in Zimbabwe. The

assertions of personal knowledge of specific facts, with which we are A concerned here, must be distinguished from the assertions of personal knowledge that generally preface all affidavits and that merely relate to the admissibility of affidavits as written evidence. In this case, the affidavits proffered by the State included both the standard assertions of personal knowledge in respect of the entirety of the information B contained within each affidavit, as well as specific assertions of personal knowledge of certain facts separately enumerated within the affidavits.

[27] The question here is not one of the admissibility of evidence, but of the sufficiency of evidence. The deponents have asserted personal knowledge of the facts that the two judges received information from C representatives of the Zimbabwean government in confidence and that the report was commissioned for the purpose of assisting the President in the formulation of policy relating to the situation in Zimbabwe. The question is therefore whether these claims of personal knowledge are sufficient to place the record within the exemptions claimed. D

Sufficiency of claims of personal knowledge

[28] The Supreme Court of Appeal held that a deponent's assertion that information is within his or her personal knowledge 'is of little value without some indication, at least from the context, of how that knowledge was acquired'.[42] I agree. An indication of how the alleged knowledge E was acquired is necessary to determine the weight, if any, to be attached to the evidence set out in the affidavit. The key question is whether the deponent would, in the ordinary course of his or her duties or as a result of some other capacity described in the affidavit, have had the opportunity to acquire the information or knowledge alleged.

[29] In *Barclays National Bank Ltd v Love*,[43] the court, in the context of F summary judgment, held that '(a)lthough it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his own knowledge he should . . . at least give some indication of his office or capacity which would show an opportunity to have acquired personal knowledge of the facts to which he deposes'.[44] G (Citation omitted.) The principle articulated in *Love* is sound. It is about how knowledge, practically speaking, is acquired, and how a deponent lays the foundation for alleging personal knowledge of certain facts. It acknowledges that laying a foundation for personal knowledge of a fact cannot practically require a deponent to produce a paper trail of every knowledge-building action he or she has undertaken. H

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A [30] While the principle that *Love* and its progeny articulate applies generally in civil proceedings, the principle must be applied with caution in access to information cases. What must be borne in mind is that access to information disputes are concerned with a constitutional right. In addition, the scheme of PAIA is such that information must be disclosed B unless it is exempt from disclosure under one or more narrowly construed exemptions. And what is more, the holder of information bears the onus of establishing that the refusal of access to the record is justified under PAIA. The say-so of a deponent that he or she has personal knowledge of the facts that put the record within one or more exemptions is insufficient without an indication, at least from the C context, of how that knowledge was acquired.

[31] The opportunity to acquire knowledge may emerge from the duties of the deponent and the office he or she occupies, as well as the seniority of the deponent within the office and his or her prior experience with D similar activities or procedures within the office. The nature of the deponent's office may therefore provide evidence that the deponent would, in the ordinary course of his or her duties, acquire personal knowledge of the information in question. In addition to the standard operating procedures of an office and the post occupied by a deponent providing a basis for alleging personal knowledge of certain facts, E circumstances specific to the particular record at issue and the specific exemption claimed could support a deponent's claim to personal knowledge.

Evidence of exemption claimed

F [32] As I have stated above,[45] the question whether the information put forward is sufficient to place the record within the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided. If the information provided is sufficient for the court to conclude, on the probabilities, that the record falls within the exemption claimed, then G the State has discharged its burden under s 81(3).

[33] In terms of the assessment of whether the State has discharged its burden under s 81(3), s 81(2) provides that the rules of evidence applicable in civil proceedings apply to proceedings under PAIA. What H must be emphasised, however, is that proceedings under PAIA differ from ordinary civil proceedings in certain key respects. First, these disputes involve a constitutional right of access to information. Second, access to information disputes are generally not purely private disputes — requesters of information often act in the public interest and the outcome of these disputes

therefore impacts the general health of our democratic I polity. Third, parties to these disputes may be constrained by factors beyond their control in presenting and challenging evidence. And finally, courts are empowered to call for additional evidence in the form of the contested record.

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[34] The facts upon which the exemption is justified will invariably be A within the knowledge of the holder of information. In these circumstances, the requester may have to resort to a bare denial of the facts alleged by the holder of information justifying refusal of access. A bare denial will normally not be sufficient to raise a genuine dispute of fact, and the *Plascon-Evans* rule would require that the application be decided B on the factual allegations made by the party refusing access to the record.[46]

[35] On the other hand, a holder of information who needs to rely on the contents of the record itself, in order to justify the exemption claimed, will be prevented from doing so by the provisions of ss 25(3)*(b)* and C 77(5)*(b)* of PAIA, which preclude 'any reference to the content of the record' in order to support a claim of exemption.

[36] Courts should therefore approach these disputes mindful of both the disadvantage at which requesters are placed in challenging evidence D put forward by the holder of the record, and the restraints placed on the party holding the information in terms of how it may refer to the contents of the record in justifying refusal of access. In the light of these challenges in producing and refuting evidence, courts have been empowered by s 80 to call for additional evidence in the form of the contested record so that they may test the validity of the exemptions claimed. E

[37] The issue that arises is the circumstances under which it is proper for a court to exercise its discretion under s 80 to call for additional evidence in the form of the record. It is to that issue that I now turn.

When may s 80 be invoked? F

[38] Section 80 provides, in relevant part:

> '(1) Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any G grounds.
>
> . . .
>
> (3) Any court contemplated in subsection (1) may —
>
> *(a)* receive representations *ex parte*;
>
> *(b)* conduct hearings in camera; and H
>
> *(c)* prohibit the publication of such information in relation to the proceedings as the court determines, including information in relation to the parties to the proceedings and the contents of orders made by the court in the proceedings.'

[39] Section 80(1) was drafted as an override provision that may be applied despite the other provisions of PAIA and any other law. As such, I s 80 should be used sparingly. In the United States, courts have emphasised that in camera review should only be undertaken 'as a last

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A resort' or only 'where absolutely necessary'.[47] There, courts resort to 'judicial peek' when the affidavits provided by the State are insufficient to enable them to responsibly engage in a *de novo* review of whether an exemption from disclosure has been validly claimed. In those instances, courts will undertake an in camera review of the record in question in B order to assist them in determining whether the record falls within the exemption claimed. As the court noted in *Hayden*: '*in camera* review is a last resort to be used only when the affidavits are insufficient for a responsible *de novo* decision.'[48] (Citation omitted.)

[40] Section 46 of the Canadian Access to Information Act, which is C strikingly similar to our s 80, gives a court considering an application under the Act the discretion to 'examine any record to which [the] Act applies that is under the control of a government institution' and further provides that 'no such record may be withheld from the Court on any grounds'.[49] The Canadian Federal Court of Appeal has held that:

> 'Parliament enacted section 46 so that the Court would have the D information and material necessary to the fulfilment of its mandate to ensure that the discretion given to the administrative head has been exercised within proper limits and on proper principles.'[50]

[41] What appears to inform the exercise of discretion to resort to E judicial peek in both the United States and Canada is the duty of a court

to make a responsible decision.[51] Judicial peek facilitates the responsible A exercise of the judicial function where courts may be lacking the material necessary to responsibly determine whether the record falls within the exemption claimed. Both in camera review in the United States and s 46 in Canada empower courts to call for additional evidence to enable them to properly adjudicate disputes concerning access to information. B As the Canadian Federal Court of Appeal has held, the power to examine privileged records under s 46 'goes beyond a mere inspecting power: it includes the ability for the Courts to use privileged communications as evidence to decide the merits of the exemption claimed and the legality of the refusal to disclose.'[52] C

[42] Section 80 does not spell out the circumstances under which the power to examine the record may be exercised. It is a discretionary power that must be exercised judiciously, with due regard to the constitutional right of access to information and the difficulties the parties face in presenting and refuting evidence. It empowers courts to D independently review the record in order to assess the validity of the exemptions claimed, and provides legislative recognition that, through no fault of their own, the parties may be constrained in their abilities to present and refute evidence.

[43] The requester may be constrained by lack of access to the record E sought when attempting to challenge claims by the record holder that the record is exempt from disclosure. The hands of the body holding the information may also be tied by the provisions of ss 25(3)*(b)* and 77(5)*(b)* of PAIA, which preclude the record holder from referring to the protected contents of the record sought in justifying its refusal. Both of F these factors could result in the court having insufficient information and material necessary for it to responsibly fulfil its duty to decide whether the exemption is rightly claimed. In these circumstances, s 80 provides courts with the power to use the record in question as additional evidence to decide whether the exemption is lawfully claimed.

[44] Courts should exercise their discretion to call for additional G evidence in the form of the contested record only where there is the potential for injustice as a result of the unique constraints placed upon the parties in access to information disputes. This injustice, as I have pointed out above, may arise because either the requester or the holder of information is prevented by factors beyond its control from presenting the evidence necessary to make its case.[53] H

[45] As a discretionary power afforded to the courts to prevent injustice, the standard for assessing whether a court should properly invoke s 80 in

A a given case is whether it would be in the interests of justice for it to do so.

[46] It is neither necessary nor desirable to detail all of the circumstances under which a court may conclude that it would be in the interests of B justice for it to exercise its discretion and invoke the provisions of s 80. It will generally be in the interests of

justice to invoke s 80 where there is doubt, emerging from the unique limitations parties in access to information disputes face in presenting and refuting evidence, as to whether an exemption is rightly claimed. This may be the case where, through no fault of the State, the evidence put forth by it is insufficient C to allow the court to responsibly determine whether the exemptions claimed are valid, or where the validity of the exemptions claimed cannot responsibly be evaluated without reference to the information sought to be protected.

[47] It may also be in the interests of justice to invoke s 80 where the D probabilities are evenly balanced. Ordinarily, where the probabilities are evenly balanced, the rules of civil procedure would require a court to find against the holder of information as the bearer of the burden of proof. Where, however, a court is faced with a record that it acknowledges may or may not be protected, in whole or in part, from disclosure, and the doubt as to the validity of the exemptions claimed can be explained in E terms of the limitations placed upon the parties in access to information disputes in presenting and refuting evidence, it would be in the interests of justice for the court to invoke s 80 in order to responsibly decide the merits on the basis of the additional evidence provided by the record.[54]

F [48] This is not to say that s 80 should be invoked wherever there is doubt as to the validity of the exemptions claimed. A court may have sufficient evidence to responsibly decide, on the probabilities, that a record likely is or is not protected. Where s 80 is of critical importance is in cases where, because of the limitations the parties face in producing and refuting evidence relating to the specific contents of a record, the G court has insufficient evidence to responsibly come to a conclusion on the probabilities. Where there is doubt as to the validity of the exemptions claimed, and it is clear from the affidavits put forth by the parties that they are constrained in their ability, within the framework of PAIA, to lead evidence that may assist the court in responsibly determining the matter on the probabilities, s 80 should be invoked so that the court has H the evidence it needs to responsibly discharge its duty.

[49] The Supreme Court of Appeal was correct in holding that a court should not use its powers under s 80 as a 'substitute for the public body laying a proper basis for its refusal'.[55] It also cautioned that a court I 'should be hesitant to become a party to secrecy', because the trust that

the public places in courts extends from their functioning openly and A always giving reasons for their decisions.[56]

[50] By using its powers under s 80 to call for additional evidence in the form of the record, the court is neither supplementing the State's case nor making out a case for the requester. The object of the exercise is to B prevent courts from being forced into the role of mere spectators in an adversarial process that, because of the nature of access to information claims, may not produce the factual record necessary for courts to execute their judicial function responsibly. It may be necessary for a court, in responsibly carrying out its duty to make a finding on the probabilities, to take on the inquisitorial role that is open to it under s 80. C Where a court determines that it is in the interests of justice for it to invoke s 80, it does so in the public interest, for the public has an interest in information held by the State that is not exempt from disclosure being released, and the public likewise has an interest in information that Parliament determined should not be released, under Ch 4 of PAIA, properly being protected from disclosure.[57] D

[51] Other factors that could be relevant to courts in deciding whether it is in the interests of justice to invoke s 80 include the potential to resolve material disputes of fact that relate to whether the record falls within the exemption claimed, and whether a record that is protected may contain E portions that do not fall within the exemption claimed and that can be reasonably severed. I am mindful of the fact that the requester will often not be in a position to refute the allegations made by the State by virtue of the fact that the requester does not have access to the contents of the record

sought. A court may also consider it to be in the interests of justice to invoke s 80 in order to test the accuracy of the State's representations and thereby restore some degree of adversariness in the proceedings.[58] F

[52] The role of s 80 in our constitutional democracy must be stressed. Its very purpose is to test the argument for non-disclosure by using the record in question to decide the merits of the exemption claimed and the legality of the refusal to disclose the record. In this sense, it facilitates, G rather than obstructs, access to information. The very existence of the court's power to examine the record should, in itself, deter frivolous claims of exemptions. If courts are hesitant to use this powerful tool to examine the record independently in order to assess the validity of claims to exemptions, this may very well undermine the constitutional right of access to information. Quite apart from this, judicial access to the record H in cases of this kind is a common feature of other open democracies with well-developed and robust access to information jurisprudence.[59]

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A [53] In my view, the power of courts to examine the contested record under s 80 in access to information disputes is vital to the vindication of the right of access to information. Properly exercised, the power to examine the record will not undermine public trust in our courts. It is a fundamentally important instrument given to courts to assess claims of B exemption independently and thus protect the constitutional right of access to information.

[54] The next question to consider is whether, in the circumstances of this case, the provisions of s 80 should have been invoked, and, if so, C whether this court or the High Court should examine the report.

Should the provisions of s 80 have been invoked?

[55] The Supreme Court of Appeal observed: 'It might be that the report contains information that was received in confidence, and it might be that it was obtained or prepared for a purpose contemplated by s 44, but D that has not been established by acceptable evidence.'[60] In the light of the doubt expressed by the Supreme Court of Appeal as to the validity of the exemptions claimed, as well as its finding that the evidence proffered by the State was unacceptable to justify the exemptions it sought, it would have been in the interests of justice for s 80 to have been invoked. This is because: *(a)* the State alleged that its hands were tied by E the provisions of ss 25(3)*(b)* and 77(5)*(b)* in presenting evidence in support of its claim to exemptions; *(b)* M & G was not in a position to effectively challenge the evidence of the State, in particular with regard to the contents of the report and the personal knowledge the deponents asserted of the mandate of the judges who undertook the mission; and *(c)* there was the question of severability of the report, as the State F admitted that portions of it did not contain confidential information.

The allegation that the State's hands were tied

[56] In his affidavit before the High Court, the Deputy Information G Officer in the Presidency alleged difficulty in responding to certain of the averments made by M & G in its founding affidavit, citing ss 25(3)*(b)* and 77(5)*(b)* of PAIA and pointing out that '(i)f the contents of the report are disclosed in the course of traversing the said averments it would defeat the very reasons for its non-disclosure'.[61] After describing how the judges, in executing their mandate, 'held confidential discussions H with various representatives of the Republic of Zimbabwe and were supplied information in confidence by or on behalf of that state', he proceeded to explain that he could not give further detail as to how this

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was reflected in the contents of the report, again citing to ss 25(3)*(b)* and A 77(5)*(b)*.

[57] In its application for leave to appeal to the Supreme Court of Appeal, the State persisted in claiming that its hands were tied by ss 25(3)*(b)* and 77(5)*(b)* of PAIA in meeting its statutory burden. It B argued that the High Court erred in finding that it had not discharged its statutory burden, because 'providing further particularity would, contrary to the provisions of ss 25(3)*(b)* and 77(5)*(b)* of PAIA, disclose the very information that the statutory exemptions sought to protect from disclosure'. In this court, the State advanced, as one of its grounds of appeal, the fact that there was no clarity on the evidence that the State C could and should produce, in the light of ss 25 (3)*(b)* and 77(5)*(b)*, and urged us to provide clarity on this issue.

[58] In response to this court's directions dated 4 August 2011,[62] M & G argued that s 80 should only be invoked in 'extraordinary circumstances'. It submitted that extraordinary circumstances can arise where D the State is unable to discharge its burden of proof due to no fault on its part. It submitted that this will be the case where the State alleges that the record is so secret that its contents can only be dealt with in general terms that are unlikely to discharge its burden. I agree with M & G's submission that s 80 may properly be invoked where the record is so secret that its contents can only be dealt with in such general terms on E the papers as are insufficient to discharge the burden of proof. But, without conceding that the information it put forth was in fact insufficient to discharge its burden, this is precisely the claim that was made by the State in this case.

[59] Furthermore, neither the Deputy Information Officer nor the F Minister in the Presidency was personally involved in the events preceding the mission of the two judges to Zimbabwe. Their reliance on the exemptions provided in ss 41(1)*(b)*(i) and 44(1)*(a)* of PAIA had, perforce, to be based on their assessment of the contents of the report itself. Apart from this, the exemptions claimed are, in my view, not so G inherently improbable or implausible as to be rejected as necessarily untrue. It is not in dispute that the two judges went to Zimbabwe at the instance of the President. It seems more likely than not that they would have spoken to Zimbabwean state officials in the course of their mission and advised the President as to their findings. Although it does not necessarily follow that their meetings with Zimbabwean officials took H place on a confidential basis, or that their reporting-back to the President

Ngcobo CJ (Froneman J, Mogoeng J, Mthiyane AJ and Yacoob J concurring)

A was for the purpose of the formulation of policy, I do not think these possibilities can necessarily be excluded.

[60] In these circumstances, the allegation by the State that it was hamstrung by the provisions of ss 25(3)*(b)* and 77(5)*(b)* from presenting B further evidence in support of its claim to the exemptions asserted does not appear to me to be implausible. Therefore, to the extent that the State was hampered by its statutorily imposed inability to refer or rely on the contents of the report, the potential prejudice to the State was that it could not provide more specific evidence to justify the exemptions it C claimed. This, in my view, is sufficient to trigger the provisions of s 80.

[61] Where the validity of the claim of exemption cannot be responsibly evaluated without the aid of information beyond that contained in the affidavits and the record before the court, and the body refusing access to the record pleads that it cannot provide additional evidence to support D its claim to exemption without referring to protected contents in the record and thereby contravening the Act, it is proper for a court to resort to the provisions of s 80.

Inability of M & G to challenge the evidence

E [62] Both the Deputy Information Officer and the Minister in the Presidency concluded, based on their reading of the report, that it contained information given to the judges in confidence by Zimbabwean officials and that it was produced for the purpose of assisting the President in formulating policy. Insofar as the Deputy Information Officer and Minister put forth evidence that was based on their reading F of the report itself, M & G was severely constrained in its ability to directly challenge

their evidence. This is because M & G could not challenge the reading of a report it had never seen.

[63] The Director-General in the Presidency submitted an affidavit in G support of the decisions by the Deputy Information Officer and the Minister to refuse access to the report, and asserted personal knowledge of the judges' mandate. It does not seem improbable that the Director-General in the Presidency would have had personal knowledge of the judges' mandate, based on his position as a senior official in the Presidency at the time that the Zimbabwe mission was planned and H the judges were instructed. However, because the Director-General did not provide precise detail in his affidavit as to how his post afforded him the opportunity to have acquired personal knowledge of the judges' mandate, M & G was constrained in challenging his assertions relating to the purpose and conditions of the mission.

I [64] Given the constraints M & G faced in challenging the affidavit evidence put forth by the State, both in relation to State officials' reading of the report to which M & G did not have access, and in relation to the personal knowledge State officials asserted as to the judges' mandate, it would have been in the interests of justice for the High Court to invoke J s 80.

Ngcobo CJ (Froneman J, Mogoeng J, Mthiyane AJ and Yacoob J concurring)

Severability A

[65] Section 28 of PAIA requires that any information in a record that is not protected and that can reasonably be severed from the protected parts of the record be severed and disclosed.[63] There is no discretion to withhold information that is not protected. The unprotected material must be disclosed 'despite any other provision' of PAIA, unless it 'cannot B reasonably be severed' from the protected portions.

[66] The State admitted that portions of the report contain information that is not confidential. However, deponents to the affidavits provided on behalf of the State assert personal knowledge, based on their each having read the report in question, that the report is not severable. It does not C appear from the record whether, at any stage prior to litigation, the State considered the release of these portions of the report. Non-severability was asserted for the first time in the High Court. M & G was placed at a disadvantage in challenging this assertion, as it did not have access to the report. In these circumstances, the allegation of non-severability could not be decided without having regard to the report. D

[67] In all the circumstances, this is a case in which the High Court should have invoked the provisions of s 80. It therefore erred in not doing so. It remains to be considered whether this matter should be remitted to the High Court for it to apply the provisions of s 80. E

Disposal of the case

[68] I have concluded that the High Court should have invoked the provisions of s 80. However, the merits of the exemptions claimed, as well as the legality of the refusal to disclose the report, still need to be decided. These must now be decided in the light of the contents of the F report sought. In addition, s 80(3) deals with procedural matters relevant to the application of s 80, including receiving representations,[64] conducting the hearing,[65] and potentially prohibiting the publication of information in relation to the proceedings.[66] All these matters require further consideration and further issues may arise in the course of the hearing that may require further attention. These issues must be G considered by the High Court in the first instance.

[69] M & G has argued that remittal will necessarily entail wasted costs when 'the matter will in all likelihood end up before this court for final H

Ngcobo CJ (Froneman J, Mogoeng J, Mthiyane AJ and Yacoob J concurring)

A determination again'. It is not necessary to speculate on whether the matter will return to this court, or even to the Supreme Court of Appeal, for that matter. Suffice it to say, we have articulated the applicable legal principles and there is no reason to believe that these principles will not be properly applied by the High Court if the matter is remitted. Nor can B we say, at this stage, whether the Supreme Court of Appeal or this court will grant leave to appeal were the matter to appear before us again.

[70] In all the circumstances, the just and equitable order to make is to remit the matter to the High Court to enable it to examine the report pursuant to the provisions of s 80 and thereafter to decide the merits of the exemptions claimed and the lawfulness of the refusal to disclose the C record.

Costs

[71] It is just and equitable to order no costs in the High Court, the D Supreme Court of Appeal and this court.

Order

[72] The following order is made:

1. The appeal succeeds.
2. The orders of the High Court and the Supreme Court of Appeal E are set aside.
3. This case is remitted to the North Gauteng High Court, Pretoria, for that court to examine the record in terms of the provisions of s 80 of the Promotion of Access to Information Act 2 of 2000 and to determine the application under s 82 of the Promotion of Access to Information Act in the light of this judgment.

F 4. There is no order as to costs.

Judgment

Yacoob J:

[73] I have read the judgments of Ngcobo CJ and Cameron J and concur G in the conclusion reached by Ngcobo CJ. I also agree with all the reasoning in that judgment except that related to when a court should have recourse to the information sought. I accept though that the appropriate standard to be employed in exercising the discretion is the interests of justice.[1] The application of that standard drives me however to a conclusion that, in my view, is more invasive of the State power of H secrecy. I have followed the debate about the circumstances in which the interests of justice would require a court seized with an application concerning an exemption claimed in response to a request for a document with considerable interest and sometimes with some perplexity.

I [74] After careful consideration, I have concluded that it would ordinarily be impossible for me, or for any other judge, to come to any conclusion about an order that should be made in terms of s 82 of PAIA[2]

Ngcobo CJ (Froneman J, Mogoeng J, Mthiyane AJ and Yacoob J concurring)

without having regard to the contents of the document or record A concerned, and without carefully analysing it in relation to the claims made by both parties. I cannot understand how it is possible to perform the judicial function of making a s 82 order without examining the document, if that document is available to the court. I cannot associate myself with an approach that suggests that judges, by having recourse to B the documents, somehow become entangled into or associated with State secrecy.

[75] It is a reality that some things must be secret. More importantly, however, secrecy must be subjected to the tightest control. The judicial C duty that secrecy should be as limited as possible is one that is vital to the success of our democratic order. We cannot ignore this. We must do our judicial duty, however unpleasant it might be.

[76] In my view, therefore, unless there are circumstances in which a judicial officer is completely satisfied that it is possible to make an D appropriate order without recourse to the document (and I cannot now conceive of a situation of this kind), or unless the document is for some legitimate reason not available, the record must be carefully examined.

Judgment

Froneman J: E

[77] I concur in the judgment of Ngcobo CJ, except to the following extent: in my view, the interests of justice only call for additional evidence in the form of a record in circumstances where either of the parties is constrained in presenting evidence in relation to the dispute or where severability under s 28 of PAIA is at issue, as in this case. To the F extent that paras [45] – [47], [49] and [51] of the judgment go beyond that, I consider that to be unnecessary for deciding this matter.

Judgment

Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring): G

[78] What should a court do when government fails to justify a refusal to release information it holds to the public? That is the question before us. The Khampepe/Moseneke report on the 2002 Zimbabwe presidential election is at stake. The *Mail & Guardian* newspaper (*M & G*) asked for H it, and the Presidency said No. Both the High Court[1] and the Supreme Court of Appeal[2] found the refusal unjustified under the Promotion of Access to Information Act (PAIA).[3] That statute was enacted mainly to give effect to the constitutional right of access to information held by the

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Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring):

A State.[4] It puts the burden on the refuser to establish statutory justification for refusing access.[5] The High Court and the Supreme Court of Appeal accordingly ordered the Presidency to release the report.

[79] In my respectful view, those orders were correct, and this court's decision to set aside the B decisions of the High Court and Supreme Court of Appeal, and to remit the parties' dispute for readjudication, is wrong. In my view, the present application should succeed because the Presidency failed to justify its refusal of the record under PAIA, and further failed to provide a plausible basis for a plea that the statute made it C impossible for it to provide adequate reasons for its refusal. More generally, in my view the provisions that permit secret judicial examination of a disputed record should be invoked only where government has laid a plausible foundation for a plea that its hands are tied, or where government has laid a basis for claiming an exemption, but a court considers that doubt exists about its validity. Secret judicial examination D should, in other words, be used to amplify access.

[80] In explaining my conclusion, I first set out my reasons for finding the Presidency's evidence grievously lacking. Then I consider the outcome proposed in the judgment of Ngcobo CJ.

E Evidence

[81] No one disputes that then-President Mbeki sent two judges, Justice Khampepe[6] and Justice Moseneke, to Zimbabwe to report to him on constitutional and legal issues relating to the 2002 presidential election. The mission was cleared with then-Chief Justice Chaskalson, but its F precise terms, and how the judges fulfilled it, have never been disclosed.

[82] We know this: the official in the Presidency statutorily charged with dealing with PAIA requests, the deputy information officer,[7] Mr Trevor Fowler, gave two grounds for refusing *M & G*'s request. First, he said he G had 'thoroughly examined the contents of the report' and was of the view that disclosure 'will reveal information supplied in confidence by or on behalf of another state or an international organisation'. This

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Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring):

explanation merely recounted the wording of s 41(1)*(b)*(i).[8] Second, he A stated that PAIA entitled him to refuse a request 'if the record contains an opinion, advice, 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'. This likewise recounted the wording of s 44(1)*(a)*.[9] He recorded B that he refused the request 'in terms of sections 41(1)*(b)*(i) and 44(1)*(a)*'.

[83] PAIA requires an information officer who refuses a request to 'state adequate reasons for the refusal, including the provisions of this Act C relied upon'.[10] This means that a decision-maker must give adequate reasons in addition to stating the statute's provisions on which he or she relies. Mr Fowler did not do so. He merely recited the provisions of the statute.

Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring):

A [84] Mr Fowler made no reference in his reasons to the provisions of the statute that prohibit a decision-maker from making any reference to the content of the record when giving reasons for a refusal.[11]

[85] The newspaper took this refusal on internal appeal. The statutory B appeal authority within the Presidency was then-Minister Tshabalala-Msimang. Her response to the request echoed that of Mr Fowler. She said she was 'also of the view that the disclosure of the contents of the said report would reveal information envisaged in s 41 (1)*(b)*' and further that the request could be refused in terms of s 44(1)*(a)* of PAIA, whose provisions her letter also set out. As a result, she said, she had 'no option' C but to refuse the appeal.

[86] Minister Tshabalala-Msimang's reasons, like those of Mr Fowler, merely recited the provisions of the statute. They failed to provide adequate reasons in addition to stating the provisions of the statute relied on. She, too, made no reference to any difficulty in stating her reasons D arising from the statute's provisions precluding any reference to the content of the record when giving reasons for a refusal.[12]

[87] In response, *M & G* went to court.[13] The basis of its challenge is important. Its founding papers specify three grounds on which the newspaper maintained that the Presidency's refusal was without merit. E First, *M & G* said, 'the State is required to justify any claims to secrecy', since 'unwarranted and unjustified claims to secrecy undermine the very foundations upon which South Africa's constitutional democracy is built'. Second, the newspaper said the public have an interest in ensuring that government's grounds for refusing access to a document are F 'legitimate, transparent and justifiable under the Constitution'.

[88] The third reason is significant to the evidence the Presidency presented in response. *M & G* stated that Mr Fowler's and Minister Tshabalala-Msimang's grounds for refusal 'constitute unjustified bald assertions' which are 'manifestly without any substance or merit'.

G [89] So the terrain was clearly marked. In the face of *M & G*'s characterisation of the Presidency's stance, the task the statute set the Presidency was to show that its refusal complied with PAIA. Far from doing so, the Presidency's affidavits resorted to the same approach

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Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring):

Mr Fowler and Minister Tshabalala-Msimang took earlier. They largely A incanted the provisions of the statute.

[90] In his deposition, Mr Fowler alleged that the two judges were appointed 'as something in the nature of envoys' of the President to assess 'the constitutional and

legal challenges' in Zimbabwe, and to B report back to him directly and in confidence. He also stated that the President 'wanted legal experts to advise him on [Zimbabwe's] constitutional matters, and appointed the two Justices to undertake this diplomatic mission'. He stated that 'the Justices were received in Zimbabwe and granted interviews in their capacity as envoys of the President of South Africa', and that all who were party to these talks C thought they were confidential and in furtherance of diplomatic relations.

[91] He gave no ground for these assertions. Nor did he appear to have any. On the contrary, his affidavit indicated that he had assumed his duties in the Presidency only in 2004 — two years after the judges' D mission.

[92] The newspaper's founding affidavit claimed, no doubt provocatively, that it 'understood' that the report detailed 'material irregularities apparent in the electoral process, and the failure of Zimbabwe's legal system to permit a valid challenge to the results of the election'. The E affidavit also claimed that the report 'reportedly reflects a number of factors that rendered the election not free and fair'. It repeats this assertion a number of times. Mr Fowler did not deal directly with it. Instead, he stated that the newspaper's averments 'call for a disclosure of the contents of the report', which would defeat the Presidency's reasons for non-disclosure and which the statute prohibits. Here he invoked the F provisions of the statute requiring the exclusion of the contents of a record from the reasons for its refusal.

[93] Mr Fowler also invoked these provisions in responding to the newspaper's assertion that the statute had introduced a culture of justification and accountability, which required a public body to justify G properly any limitation. His response alluded to the provisions requiring that a requester be informed of a decision,[14] and again referred to the provisions requiring the decision-maker to provide adequate reasons, to exclude from them any reference to the content of the record, and to inform the requester of the right to take further steps.[15] H

[94] Mr Fowler's affidavit added one revealing detail. He said that when *M & G* requested the report in 2008, then-President Mbeki had been asked by the contesting parties in Zimbabwe to help find a solution to their political challenges, and had been appointed as a facilitator by the Southern African Development Community and the African Union. It I

Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring):

A was crucial to this role, Mr Fowler said, that former President Mbeki 'be and be seen as impartial'. Disclosure of the report, Mr Fowler added, would be 'detrimental to peace in Zimbabwe'. He did not explain how a report by two judges about an election six years earlier could be seen to affect Mr Mbeki's impartiality in 2008, or be detrimental to peace in Zimbabwe. More importantly, he nowhere invoked the statute's provision B that permits refusal of a request if the disclosure could reasonably be expected to cause prejudice to South Africa's international relations.[16]

[95] Then-Minister Tshabalala-Msimang also deposed to an affidavit. Hers, though much shorter, followed the form and substance of C Mr Fowler's. She, too, said that disclosing parts of the report was not possible 'without undermining the very reasons for not disclosing it'. She recorded her view that the provision of PAIA that requires disclosure in the public interest[17] was not applicable, and further that 'the harm that would result if the report was disclosed clearly outweighed any benefit in D disclosing it'.

[96] Significantly, she echoed the fear Mr Fowler signalled about events current in 2008 – 2009.[18] She said that 'the delicacy of the situation in Zimbabwe' and the 'important facilitating roles' played there by former President Mbeki and his successor would mean that disclosure 'would E probably have a serious debilitating effect'. Her refusal of *M & G's* appeal did not seek to place reliance in refusing the request on prejudice to South Africa's international relations.

[97] Neither Mr Fowler nor Minister Tshabalala-Msimang claimed to have any direct personal knowledge about the judges' mission or its terms. This gave especial importance to the third affidavit filed in F opposition to *M & G's* application. This was from Reverend Frank

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Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring):

Chikane. At the time of his affidavit, March 2009, he was Secretary of A the Cabinet, and had been Director-General of the Presidency, and its statutory information officer, until the end of October 2008. Since he indicated that he had served in the Presidency from President Mandela's time, there was no dispute that he held high administrative office there at the time of the judges' mission. B

[98] There was much contention during argument before us about the value of Mr Chikane's evidence. His affidavit was short, and terse. He said that he had 'personal knowledge' of aspects of the mission. These were that the judges were appointed 'as special envoys'; that they were C appointed on the grounds of their skill and position 'to assess the constitutional and legal matters' in the Zimbabwean elections; that their report 'was commissioned by the President and prepared for the purpose of assisting him with the formulation of policy and the taking of decisions pertaining to the situation in Zimbabwe'; and that on their return they were 'expected to report directly and in confidence to the President'. D

[99] Mr Chikane described the judges' visit to Zimbabwe as a 'diplomatic mission', and said that their exchanges 'included interactions with representatives of the government of Zimbabwe' who spoke to them in confidence. E

[100] Although he had served in the Presidency for many years, Mr Chikane gave no indication of how or from what he gained personal knowledge of the matters in issue. He gave no details as to any personal involvement in commissioning the judges or in arranging their mission or F of taking part in meetings, if any, during which the mission was arranged. Nor did he suggest that he had any first-hand knowledge of how or on what terms the judges were received in Zimbabwe or who they met.

[101] The Presidency appears to have abandoned in this court, as it did in argument before the Supreme Court of Appeal,[19] the suggestion it had G persistently maintained, that the two judges were 'envoys' or that they were on a 'diplomatic mission' to Zimbabwe. Rightly so. It would be surprising to find judges performing so plainly an executive function.[20] In his submissions in this court, counsel for the Presidency conceded that the judges' status as 'envoys' was irrelevant. H

[102] The grounds pressed before us were that the disclosure of the report would reveal information 'supplied in confidence by or on behalf of another state' under s 41 (1)*(b)*(i), and that it was prepared 'for the purpose of assisting to formulate a policy' under s 44(1)*(a)* . I

Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring):

A Information 'supplied in confidence by or on behalf of another state or international organisation'

[103] The difficulty with the 'confidential state information' ground is that there was no evidence at all to support it. Aside from the assertions by Mr Fowler and Minister Tshabalala-Msimang, which echoed the B statute's wording, that disclosure would reveal information supplied in confidence by or on behalf of another state, there was no evidence to indicate, even in general terms, who had supplied the information on behalf of the Zimbabwean government. And there was no direct evidence about whom the judges had met with in Zimbabwe.

C [104] Besides, counsel for the Presidency rightly conceded that the judges must also have talked to persons who did not supply confidential state information to them. PAIA makes it obligatory for a public body to disclose every part of a record that does

not contain information that may or must be refused, and can reasonably be severed from the parts D that do.[21] Why could the confidential state information not be redacted from the report? Mr Fowler and Minister Tshabalala-Msimang did not say. And why could those portions of the report that did not contain confidential state information not be released? Again, they did not say.

Policy formulation and claims of personal knowledge

E [105] Two difficulties beset the policy-formulation ground. First was its decidedly curious presentation in the evidence. Mr Fowler's affidavit said at two points that the report was used for policy formulation only *after* the Presidency had received it.[22] There is good authority[23] that to fall under PAIA's policy-formulation exemption the statute requires that a report must have been obtained for the specific purpose of policy F formulation. In other words, that must have been its object from the

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Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring):

start. The exemption does not cover a report, obtained for other A purposes, that is later roped in to help with policy formulation. During argument counsel for the Presidency conceded, rightly, that this is correct. Hence, if Mr Fowler's account is accurate, the policy-formulation ground cannot apply.[24]

[106] But the court is in any event left to grapple with the opaque effect B of Mr Chikane's claim that he had 'personal knowledge' about the purpose of the judges' mission. And this was the Presidency's second problem, for Mr Chikane's assertion that he had 'personal knowledge' that the report was commissioned for policy formulation is not evidence that it was. C

[107] As the Supreme Court of Appeal pointed out,[25] one can gain personal knowledge of an event in three very different ways: by experiencing it directly; by receiving a report that it happened (which is hearsay); or by deducing from other signs that it took place. Mr Chikane does not tell us in which of these ways he acquired personal knowledge. D This leaves a court unable to perform its most elementary function, which is to assess the quality, strength and reliability of his knowledge in determining whether the fact to which he deposes is true. The mere assertion that he has personal knowledge gives no help in that duty. It follows that his assertion is without value as evidence of the fact in issue. E

[108] And it is futile to urge, as counsel for the Presidency did, that it is overwhelmingly likely that Mr Chikane, as administrative head of the Presidency, had personal knowledge of the judges' mission. This is because a court cannot find that an event happened just because it is probable that a witness knew it happened. The court must know why and how the witness claims to have personal knowledge of it, so that it F can itself assess the probity and reliability of the witness's knowledge of the event.

[109] So in the case of every assertion to personal knowledge the court has to ask: why does the witness say he knows it? Evidence is not G

Cameron J (Jafta J, Nkabinde J and Van der Westhuizen J concurring):

A constituted by a probability that a witness is able to provide it. The witness must provide the evidence. The assertion of personal knowledge about it is not evidence of it.[26]

[110] There is a further point. It is no more nor less probable that B Mr Chikane knew of the purpose of this particular mission than that he knew of anything else that happened during the time he worked in the Presidency. And he cannot have known everything that happened there.[27] Hence it is impossible for the court to determine whether Mr Chikane knew the nature of the judges' mission unless he says why C he claims knowledge of it.

[111] It has long been established in money disputes that a witness who claims personal knowledge of a cause of action in summary judgment proceedings must

'either set out the circumstances from which the court would be justified in coming to the conclusion that the D facts are within his knowledge, or it must appear from the nature of his evidence that the facts are within his knowledge'.[28] It seems evident, though it may be necessary to state, that these are not ordinary commercial proceedings, but a determination involving the constitutional right of access to government-held information.

[112] The Supreme Court of Appeal was thus correct that Mr Chikane's E statement was not evidence at all, but was 'no more than bald assertion'.[29] That court was in my view also correct to remark on the entire absence of persuasive evidence from the Presidency's depositions. The court rightly noted that the Presidency's case amounts to 'little more than rote recitation of the relevant sections and bald assertions that the

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report falls within their terms'.[30] The witnesses offered not reasons, but A 'perfunctory conclusions'.[31] This, the court said, provided a stark contrast with the culture of accountability and transparency that our constitutional era promised.[32] Indeed, the Supreme Court of Appeal likened the approach in the affidavits of the Presidency's witnesses to that under apartheid, where government officials exercising wide powers were able simply to assert that they had fulfilled the requirements of the B statute, without offering any evidential basis for this.[33]

The 'hands-tied' plea

[113] What are we to make of Mr Fowler's complaint that he was C hamstrung by the statute's provisions[34] that preclude reference to the contents of the disputed record in providing reasons for its refusal? There may be circumstances where a plea of this nature will raise credible issues requiring the court to consider whether it should itself, under the powers the statute vests in it, examine the record in camera and without the parties' presence. That is not the case here. The plea fails to meet even D a baseline standard to warrant further probing.

[114] First, there are substantial reasons for approaching Mr Fowler's invocation of the 'hands-tied' argument with reserve. There was no mention of it when the request was refused. It appears to have been E added as an afterthought when the opposing affidavits were drafted. And his reliance on the argument must be seen in the light of the affidavits' most prominent feature — their formulaic incantation of the statute's provisions. That diminishes its plausibility.

[115] There is a second reason for not being swayed by the 'hands-tied' F plea. It is the Presidency's failure to explain why evidence that seems to have been readily available was not produced.

[116] The person who mandated the judges to go to Zimbabwe was then-President Mbeki. President Motlanthe, who held office when *M & G* went to court in January 2009, supplied an affidavit. President G Zuma, who held office when the Presidency applied to appeal to this court in January 2011, supplied an affidavit. So there was no inhibition against presidential deposition. Neither former President Motlanthe nor President Zuma could cast light on the judges' mission. President Mbeki could, but there was no affidavit from him. So the question is — why did President Mbeki not testify? Was he asked or not asked? If asked, did he H refuse? Or if not asked, why?

[117] Perhaps even more telling was the absence of evidence from the two judges. They, like former President Mbeki, are living and seemingly I

A available. Why did they not testify? Were they asked? If not, why? A simple affidavit from any of them may have put a quick end to the issues.

[118] These questions necessarily raise a further difficulty. Would the B evidence of the judges and former President Mbeki have supported the grounds of exemption the

Presidency claimed? That testimony from none of them was proffered raises unavoidable questions about what they might have said if asked. This bears on the plausibility of the 'hands-tied' argument. The Presidency's hands were not tied. It could have obtained direct evidence from any one of the three people most intimately C involved in the mission. It failed to do so. More even, it failed to explain why.

[119] The evidence the Presidency failed to present from the former President who commissioned the report, and the judges who wrote it, D need not have referred to the contents of the report. It could have recounted quite simply whether one of the reasons the judges were sent to Zimbabwe was to assist in policy formulation, or whether the disclosure of their report would reveal information supplied in confidence by the state of Zimbabwe.

E [120] The 'hands-tied' argument must at least be plausibly raised before the court considers what it should do in response. That was not done here. I should explain that this is not to demand that the State in providing adequate reasons for refusing a request for information must produce 'the best evidence'. It is simply to point out the patent holes in the evidence the Presidency did put forward, to point out that these holes F were not explained, and to conclude that this precludes plausible invocation of the 'hands-tied' argument.

[121] What we are left with is thus a set of depositions that plainly failed to satisfy the test the statute prescribes, namely to discharge the burden G of establishing that the refusal of the report was justified. In these circumstances, the order granted by the High Court, and confirmed by the Supreme Court of Appeal, was equally plainly right. It should be confirmed and the appeal dismissed with costs.

[122] It follows from this conclusion that the question does not arise H whether the Presidency should have severed any part of the report in accordance with the statute's injunctions.[35] Nor does the question arise as to what this court should do when there is uncertainty about how the

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matter should be decided. Its outcome is in my view quite clear. The A newspaper's application should succeed.

Secret judicial examination of the disputed record

[123] It is nevertheless necessary to consider the course proposed in the B judgment of Ngcobo CJ. The judgment affirms the ambit and importance of the right of access to information;[36] notes that disclosure is the rule and exemption is the exception;[37] observes that in comparable foreign jurisdictions, the state must show that the record is covered by the exemption claimed;[38] requires government to produce evidence to show that, on the probabilities, the information falls within the C exemption;[39] and disclaims recitation of statutory language and ipse dixit formulaism[40] — but nevertheless decides on remittal so that the High Court can invoke s 80 of the statute. In my respectful view this is wrong.

[124] Section 80 permits a court in all circumstances to examine the D disputed record itself, but the examination must be secret and the parties excluded.[41] This provision can indeed, as Ngcobo CJ states, be employed to test claims of secrecy and to facilitate, rather than obstruct,

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A access to information.[42] But its provisions should be invoked with care. *M & G* urged that judicial examination of the disputed record (a 'judicial peek')[43] should be resorted to only in exceptional circumstances. I agree. There are two reasons for this conclusion.

B [125] First, a cautious approach to s 80 accords with the structure of the statute. The Constitution creates an entitlement to information held by government, which the

statute has limited under the Bill of Rights. The structure of PAIA is to stipulate the process required to claim access, and to enumerate the instances where it may be refused. The statute creates an overriding judicial power to examine the record, but goes on to C provide explicitly that the burden of establishing that an exemption is properly invoked lies on the party claiming it. If the object of the statute were to create a novel form of proceeding in access disputes, and invest courts with inquisitorial powers for ready use in disputes, its provisions would not have included so plain an imposition of the burden on the D holder of information.

[126] Both the onus and the judicial examination provisions must be given effect, but within their appropriate fields of application. Judicial examination should not be a substitute for requiring government to discharge its burden of showing that the statute's exemptions applied. E Still less should it be invoked to avoid an order of disclosure when government has failed to establish its case under the statute.

[127] The provision should in my view be invoked only when government plausibly asserts the hands-tied argument or a ground of exemption, F but doubt exists whether the exemption is rightly claimed.[44] The provision should, in other words, be used to amplify access, and not to occlude it. It should only be a last resort.[45] It should not be used to help

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government make its case when it has failed to discharge the burden the A statute rightly places on it.[46]

[128] Second, the very provisions of s 80 make it plain that the power it confers should be of rare recourse. The provision makes the court a party to the secrecy claimed, and prohibits it from disclosing the disputed B record to any person, 'including the parties to the proceedings concerned'. In effect, two fundamental principles of the administration of justice are here upended: first, the adversary nature of the parties' dispute, in which the court is a disinterested arbiter, is suspended; and, second, the indispensable attribute of the administration of justice, its openness, is shrouded. These are consequences that we should be C reluctant to countenance too readily.

[129] Secret in camera examination of disputed records requires courts to lay aside the foundations of their precious-won authority. As the United States Circuit Court of Appeals for the District of Columbia has D stated, a 'denial of confrontation creates suspicion of unfairness and is inconsistent with our traditions'.[47] The blunt risk is that the parties' dispute will be decided on the basis of a court's secret conclusions from a secret process.[48] That may sometimes be necessary. The power the statute creates is for cases of necessity. But the risks inherent in resorting to secret judicial examination are so grave that it should be avoided if at E all possible. The Supreme Court of Appeal rightly said of this:

> 'Courts earn the trust of the public by conducting their business openly and with reasons for their decisions. I think a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust. There will no doubt be cases where a court might properly make use of those powers but they are no substitute for F the public body laying a proper basis for its refusal.'[49]

[130] Nor should the public ever fear that courts may assist in suppressing information to which the Constitution says they are entitled. To give secret judicial examination of disputed records a central place in G deciding claims to exemption, instead of enforcing the burden government rightly bears to justify withholding information, is in my view a grave error.

A [131] The statute itself provides for the outcome where the refuser fails to justify refusal of the record. It is that the record be released.

Conclusion

[132] In these circumstances the court should not hesitate to let the B Constitution and the statute take effect. The report should be released.

Applicants' Attorneys: *State Attorney*.

C Respondent's Attorneys: *Webber Wenzel*.

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1 Act 2 of 2000. For the text of s 11, see para [7] below.
2 The request was initially refused by the Deputy Information Officer in the Presidency, Mr Trevor Fowler. The request was subsequently refused, on internal appeal, by the Minister in the Presidency, the late Dr Mantombazana Edmie Tshabalala – Msimang.
3 *M & G Ltd and Another v President of the Republic of South Africa and Others* (GNP case No 1242/09, 4 June 2010, [2010] ZAGPPHC 43), unreported, at 13.
4 *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) (2011 (4) BCLR 363) (SCA judgment) at para 55.
5 This court granted the application for leave to appeal by way of an order dated 1 February 2011.
6 For the full text of s 81, see para [13] below.
7 In making this argument, the State drew attention to ss 25(3)*(b)* and 77(5)*(b)* of PAIA, which stipulate that the officers refusing the request (in terms of s 25) and upholding the refusal on appeal (in terms of s 77) must 'exclude, from such reasons, any reference to the content of the record'. The constitutionality of these provisions is not in issue here and I express no opinion on their constitutionality. See [56] – [60] below.
8 Section 80 empowers courts considering applications brought under PAIA to conduct an in camera review of the record in question. See [38] below.
9 2009 (6) SA 323 (CC) (2009 (11) BCLR 1075; [2009] ZACC 21).
10 Id in paras 62 – 63.
11 See para [7] above.
12 See s 1*(d)* of the Constitution.
13 See s 16(1)*(b)* of the Constitution.
14 See s 19(3)*(a)* of the Constitution.
15 See preamble to PAIA.
16 Section 41 of PAIA.
17 Section 42 of PAIA.
18 Section 44(1)*(a)* of PAIA.
19 See *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) (2006 (4) BCLR 473; [2006] 1 All SA 352) in paras 24 – 26.
20 Section 39(1)*(c)* provides that courts 'may consider foreign law' when interpreting the Bill of Rights. In this case, it is appropriate for this court to make reference to foreign law in considering the proper application of PAIA because of the direct effect our interpretation of PAIA has on the scope of the right of access to information articulated in s 32 of the Constitution.
21 See USC \s 552 (FOIA) at *(a)* (4)(B) (*de novo* review by court) and *(b)* (exemptions).
22 See USC \s 552 at *(a)* (4)(B) (burden is on the agency to sustain its action).
23 See *Hunt v Central Intelligence Agency* 981 F 2d 1116, 1119 (9th Cir 1992); *Stein v Department of Justice and Federal Bureau of Investigation* 662 F 2d 1245, 1253 (7th Cir 1981).
24 See *Times Journal Co v Department of Air Force* 793 F Supp 1, 3 (D DC 1991); *Santos v Drug Enforcement Agency, Office of Information and Privacy* 357 F Supp 2d 33, 37 (D DC 2004); *Doyle v Federal Bureau of Investigation* 722 F 2d 554, 555 (9th Cir 1983); and *Yeager v Drug Enforcement Administration* 678 F 2d 315, 320 (DC Cir 1982).
25 See *National Treasury Employees Union v United States Customs Service* 602 F Supp 469, 472 (D DC 1984).
26 See *State of North Dakota ex rel Olson v Andrus* 581 F 2d 177, 179 (8th Cir 1978).
27 *Ollestad v Kelley* 573 F 2d 1109, 1110 (9th Cir 1978).
28 608 F 2d 1381 (DC Cir 1979).
29 Id at 1384. For guidelines articulated by the District of Columbia Circuit Court of Appeal in respect of a court's exercise of discretion to conduct in camera inspection of documents, see below.
30 RSC, 1985, c A – 1 (Access to Information Act).
31 See s 41 of the Access to Information Act.
32 See s 48 of the Access to Information Act.
33 Section 45 of the Access to Information Act provides that applications for court review of refusals shall be heard and determined in summary proceedings and s 50 deals with court orders where reasonable grounds for refusal are not found.
34 *Canada (Information Commissioner) v Canada (Prime Minister)* [1993] 1 FC 427 (FCA) at 439.
35 *Canada (Information Commissioner) v Atlantic Canada Opportunities Agency* [1999] 250 NR 314 (177 FTR 159) at para 3.
36 *Wyeth-Ayerst Canada Inc v Canada (Attorney General)* [2003] FCA 257 (305 NR 317) at para 21.
37 Act 3 of 1982. The Australian Freedom of Information Act provides for two levels of review once an information request has been refused by a government agency. The requesting party can lodge a request for review by the Information Commissioner (IC), and if the IC upholds the refusal then the requesting party

can appeal the IC's decision to the Administrative Appeals Tribunal. See Parts VII (Review by Information Commissioner) and VIIA (Review by the Tribunal). At both levels, the refusing agency bears the burden of showing that its refusal was justified. See ss 55D (Procedure in IC Review — onus) and 61 (Onus).

38 See *McKinnon v Secretary, Department of Treasury* 228 CLR 423 at 428 (*per* Gleeson CJ and Kirby J), 445 (*per* Hayne J) and 468 (*per* Callinan and Haydon JJ).

39 Id.

40 When questioned during oral argument, counsel for the State conceded that the mere statement by an information officer that a record falls within the exemptions claimed is insufficient, without more, to discharge the State's burden under s 81(3).

41 See para [8] above.

42 SCA judgment above n4 at para 38.

43 1975 (2) SA 514 (D).

44 Id at 516A – B. The approach taken by the court in *Love* was affirmed by the Appellate Division in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 424A – D, and is still applied in assessing whether a deponent can reasonably depose to the facts with regard to which he claims to have personal knowledge. See, for example, *FirstRand Bank Ltd v Meyer* (ECP case No 3483/10, 17 March 2011, [2011] ZAECPEHC 8), unreported, in para 14.

45 See para [25] above.

46 See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G – 635D.

47 See *Arieff v United States Department of Navy* 712 F 2d 1462, 1470 – 1 (DC Cir 1983) (holding that ex parte and in camera review should only be used where absolutely necessary, and such absolute necessity exists where: '(1) the validity of the government's assertion of exemption cannot be evaluated without information beyond that contained in the public affidavits and in the records themselves, and (2) public disclosure of that information would compromise the secrecy asserted').

48 Above n28 at 1387. See also *Ray v Turner* 587 F 2d 1187, 1195 (DC Cir 1978) (holding that courts should use their discretion to engage in in camera review where inspection of the record is necessary to make a responsible *de novo* determination on the claims of exemption) and 1212 (finding that in camera review is appropriate where there is a dispute of fact as to the nature or contents of the documents sought); *Navasky v Central Intelligence Agency* 499 F Supp 269, 272 (SDNY 1980) (holding that in camera review 'is essential to responsible de novo determination' where the evidence put forth by the State 'is insufficient to allow the court to determine whether its nature is such as to justify nondisclosure under the claimed exemption'); and *Lawyers Committee for Human Rights v Immigration and Naturalization Service* 721 F Supp 552, 566 (SDNY 1989) (holding that '*in camera* review is necessary when the validity of the government assertion of exemptions cannot realistically be evaluated without information other than that contained in the affidavits'), citing *Arieff* above n47. In *Currie v Internal Revenue Service* 704 F 2d 523, 531 (11th Cir 1983), the Eleventh Circuit Court of Appeals noted that the burden placed on courts by in camera review is less onerous where, as in the present matter, 'the disputed documents are relatively brief, few in number, and where there are few claimed exemptions.'

49 See s 46 of the Canadian Access to Information Act above n30.

50 *Rubin v Canada Mortgage and Housing Corp* [1989] 1 FC 265 CFCA ((1988) 52 DLR 4th 671 (CA)) at 276.

51 Similarly, in South Africa, courts are required under s 82 of PAIA to make an order that is just and equitable.

52 *Canada (Minister of Environment) v Canada (Information Commissioner)* [2000] FC case No A-761-99 (FCA), judgment delivered from the bench, 6 April 2000, at 6.

53 See [34] – [35] and [43] above.

54 See *Ray v Turner* above n48 at 1195 (noting that in camera review of a record is preferable to a ruling against the State merely because the evidence on affidavit places the case in doubt or evenly balanced).

55 SCA judgment above n4 at para 52.

56 Id.

57 See para [11] above.

58 Compare *Ray v Turner* above n48 at 1212 (finding that 'an in camera inspection increases the "adversariness" of the proceeding — or at least provides a minimal substitute for true "adversariness" — by allowing the court to test the accuracy of the agency's representations').

59 See paras [39] – [41] above.

60 SCA judgment above n4 at para 53.

61 Sections 25(3)*(b)* and 77(5)*(b)* of PAIA provide that, in furnishing reasons for refusing access to a record, the officers refusing the request (in terms of s 25) and upholding the refusal on appeal (in terms of s 77) must 'exclude, from such reasons, any reference to the content of the record'. The Supreme Court of Appeal correctly held that this restriction 'must have been intended to apply as much when the public body seeks to justify its refusal in court proceedings.' See SCA judgment above n4 at para 50.

62 On 4 August 2011 this court directed the parties to lodge written argument considering, amongst other things: *(a)* the proper approach, in the light of s 80, when a court is faced with uncertainty as to whether a record falls within the exemptions claimed; *(b)* the standard that a court should apply in deciding whether to invoke s 80; *(c)* the relevance of a dispute of fact as to the severability of the record in applying such standard; and *(d)* whether this court should remit the matter to the High Court for reconsideration in the light of the legal principles that this court may announce for the first time in this judgment.

63 Section 28(1) provides:

'If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which —

(a) does not contain; and

(b) can reasonably be severed from any part that contains,

any such information must, despite any other provision of this Act, be disclosed.'

64 Section 80(3)*(a)*.

65 Section 80(3)*(b)*.
66 Section 80(3)*(c)*.
1 Judgment of Ngcobo CJ at [45].
2 The Promotion of Access to Information Act 2 of 2000.
1 *M & G Ltd and Another v President of the Republic of South Africa and Others* (GNP case No 1242/09, 4 June 2010, [2010] ZAGPPHC 43), unreported.
2 *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) (2011 (4) BCLR 363).
3 Act 2 of 2000.
4 Section 32 of the Bill of Rights is set out in [6] above.
5 Section 11(1) of PAIA provides that, in the absence of a statutorily sanctioned ground for refusal, a requester 'must' be given access to a record of a public body, provided the statute's procedural requirements have been met. Section 81(3) provides that the burden of establishing that a refusal of a request for access complies with the Act 'rests on the party claiming that it so complies'.
6 Then judge of the South Gauteng High Court, Johannesburg.
7 The effect of PAIA's definitions is that a public body's information officer is its chief executive officer or equivalent, and the national department's information officer is its Director-General, head, executive director or equivalent. Section 17(1) requires every public body to designate as many deputy information officers 'as are necessary to render the public body as accessible as reasonably possible for requesters of its records'.
8 Section 41(1) provides:
'(1) The information officer of a public body may refuse a request for access to a record of the body if its disclosure —
(a) could reasonably be expected to cause prejudice to —
(i) the defence of the Republic;
(ii) the security of the Republic; or
(iii) subject to subsection (3), the international relations of the Republic; or
(b) would reveal information —
(i) supplied in confidence by or on behalf of another State or an international organisation;
(ii) supplied by or on behalf of the Republic to another State or an international organisation in terms of an arrangement or international agreement, contemplated in section 231 of the Constitution, with that State or organisation which requires the information to be held in confidence; or
(iii) required to be held in confidence by an international agreement or customary international law contemplated in section 231 or 232, respectively, of the Constitution.'
9 Section 44(1)*(a)* provides:
'. . . the information officer of a public body may refuse a request for access to a record of the body —
(a) if the record contains —
(i) an opinion, advice, report or recommendation obtained or prepared; or
(ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting,
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'.
10 Section 25(3)*(a)*.
11 Section 25(3)*(b)* provides that an information officer who refuses access must exclude from the reasons stated 'any reference to the content of the record'. Section 77(5)*(b)* is the parallel provision for internal appeals.
12 Section 77(5)*(b)* provides that a decision-maker on an internal appeal who refuses access must exclude from the reasons stated 'any reference to the content of the record'.
13 Section 78(1) of PAIA provides:
'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.'
14 Mr Fowler mentioned s 56(1)*(b)*, which requires a head of a private body to whom a request is made to notify the requester of the decision. The parallel provision for public bodies is s 25(1)*(b)*.
15 Section 25(3)*(a)*, *(b)* and *(c)*.
16 See s 41(1)*(a)* (iii) above n8.
17 Section 46 of PAIA provides:
'Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)*(a)* or *(b)*, 38*(a)* or *(b)*, 39(1) *(a)* or *(b)*, 40, 41(1)*(a)* or *(b)*, 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if —
(a) the disclosure of the record would reveal evidence of —
(i) a substantial contravention of, or failure to comply with, the law; or
(ii) an imminent and serious public safety or environmental risk; and
(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'
18 The M & G formally asked for the report on 17 June 2008. Mr Fowler refused it on 22 July 2008 when President Mbeki still held office. The appeal was dismissed on 13 November 2008, by which time President Mbeki was no longer in office. The litigation challenge was lodged on 13 January 2009. The opposing affidavits of the officials in the Presidency were dated 18 – 19 March 2009.
19 *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) (2011 (4) BCLR 363) at para 51.
20 For this reason, the Supreme Court of Appeal rightly noted that it would require clear and substantiated evidence to establish that the judges assumed a diplomatic role. Id in para 49.
21 Section 28 of PAIA is headed 'Severability' and provides:
'(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which —

(a) does not contain; and
(b) can reasonably be severed from any part that contains,
any such information must, despite any other provision of this Act, be disclosed.
(2) If a request for access to —
(a) a part of a record is granted; and
(b) the other part of the record is refused,
as contemplated in subsection (1), the provisions of section 25(2) apply to paragraph *(a)* of this subsection and the provisions of section 25(3) apply to paragraph *(b)* of this subsection.'

22 Mr Fowler said that President Mbeki 'was able to utilise the report to assist him in the formulation of policy' and that this purpose 'arose once the President had sight of the report'. Seemingly underscoring that this sequence was not a slip, Mr Fowler's affidavit later repeated that the report was obtained to inform President Mbeki about issues in Zimbabwe — 'and later after receiving the report, to assist in the formulation of policies'.

23 *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)* 2005 (2) SA 110 (SCA) ([2005] 1 All SA 559) at paras 16 – 17.

24 *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) (2011 (4) BCLR 363) at para 34 where the Supreme Court of Appeal said this of Mr Fowler's evidence on this aspect:

'The section does not render a report subject to secrecy if it is "reasonably conceivable" that it has been of assistance in formulating policy etc. It does not even render it subject to secrecy if it "would have been of assistance". Nor even if the President "was able to utilise the report to assist him". It is subject to secrecy only if it was obtained or prepared for that purpose. And it is only in the world that exists beyond the looking glass that the purpose for which a report was obtained or prepared is capable of "[arising] once the [reader] had sight of the report".'

25 Id in para 37.

26 A witness's claim that he has personal knowledge that the sun shone in Pretoria on a specific day is not evidence that it did. It is evidence only that he claims personal knowledge that it did. It would be evidence of sunshine on that day only if he explains that he was himself in Pretoria and saw the sun shining; or that he was told that the sun was shining; or that he inferred from meteorological records (or other oblique facts) that the sun was shining. That Pretoria is the witness's normal place of residence, and that he was therefore 'probably' there on the specified day takes the matter no further. Nor does the fact that the sun is known to shine on many days a year in Pretoria, and that it therefore 'probably' shines on any particular day, since it may have rained. The question is whether the sun shone on the particular day in issue and on this the claim to personal knowledge is by itself worthless. All this is elementary, but in view of the argument urged on us, necessary to state.

27 *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) (2011 (4) BCLR 363) at para 39 where Nugent JA noted that there is 'no reason to assume that the Director-General in the Presidency is privy to everything the President does'.

28 *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C) at 245E. See also *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP) at paras 7 – 8; and *FirstRand Bank Ltd v Beyer* 2011 (1) SA 196 (GNP) at paras 8, 9 and 12.

29 *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) (2011 (4) BCLR 363) at para 38.

30 Id in para 20.

31 Id in para 30.

32 Id in paras 9 – 11.

33 Id in paras 18 – 19.

34 Section 25(3)*(b)* and s 77(5)*(b)*.

35 Section 28(1) provides:

'(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which —
(a) does not contain; and
(b) can reasonably be severed from any part that contains,
any such information must, despite any other provision of this Act, be disclosed.'

36 See para [8] above.

37 See para [9] above.

38 See para [20] above.

39 See id.

40 See para [24] above.

41 Section 80 provides:

'(1) Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds.
(2) Any court contemplated in subsection (1) may not disclose to any person, including the parties to the proceedings concerned, other than the public or private body referred to in subsection (1) —
(a) any record of a public or private body which, on a request for access, may or must be refused in terms of this Act; or
(b) if the information officer of a public body, or the relevant authority of that body on internal appeal, in refusing to grant access to a record in terms of section 39(3) or 41(4), refuses to confirm or deny the existence or non-existence of the record, any information as to whether the record exists.
(3) Any court contemplated in subsection (1) may —
(a) receive representations ex parte;
(b) conduct hearings in camera; and
(c) prohibit the publication of such information in relation to the proceedings as the court determines,

including information in relation to the parties to the proceedings and the contents of orders made by the court in the proceedings.'

42 See paras [51] and [53] above.

43 The judgment of the Supreme Court of Appeal ascribes responsibility for this label to counsel for the M & G. *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) (2011 (4) BCLR 363) in para 52.

44 Compare *Weissman v Central Intelligence Agency* 565 F 2d 692, 698 (DC Cir 1977) where a first-instance court had found that the respondent agency had established grounds for exemption, but the citizen claimant asserted that the court was obliged to conduct an in camera examination before sustaining the claim to exemption. The Circuit Court of Appeals for the District of Columbia affirmed the decision that the exemption had been established, taking the opportunity to warn against over-ready resort to judicial examination of the disputed record: 'Where it is clear from the record that an agency has not exempted whole documents merely because they contained some exempt material, it is unnecessary and often unwise for a court to undertake such an examination.' (Footnote omitted.)

45 See *Phillippi v Central Intelligence Agency* 546 F 2d 1009, 1013 (DC Cir 1976) where the Circuit Court of Appeal for the District of Columbia emphasised that courts should not resort to judicial examination of the disputed record until they have created as complete a public record as possible. *Weissman* (at 697) went further, to say that courts should only engage in judicial examination of the disputed record as a 'last resort'.

46 The power to conduct *de novo* review of classification decisions contested in litigation under the Freedom of Information Act was vested in the federal courts of the United States by an amendment to USC § 552 enacted in 1974. 'National Security and the Public's Right to Know: A New Role for the Courts under the Freedom of Information Act' (1974 – 1975) 123 *University of Pennsylvania Law Review* 1438, 1447.

47 *Weissman v Central Intelligence Agency* 565 F 2d 692, 697 (DC Cir 1977).

48 See generally Askin 'Secret Justice and the Adversary Process' (1991) 18 *Hastings Constitutional Law Quarterly* 745.

49 *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) (2011 (4) BCLR 363) at para 52.

TANTOUSH v REFUGEE APPEAL BOARD AND OTHERS 2008 (1) SA 232 (T)

Citation 2008 (1) SA 232 (T)

Case No 13182/06

Court Transvaal Provincial Division

Judge Murphy J

Heard August 14, 2007

Judgment September 11, 2007

Counsel Anton Katz (with Adv Du Plessis) for the applicant
NM Arendse SC (with O Matjila) for the respondents

Annotations Link to Case Annotations

Flynote : Sleutelwoorde

Immigration - Refugee - Application for refugee status and asylum - Exclusions from - Reasonable belief existing that applicant having committed crime not of political nature which, if committed in South C Africa, would be punishable by imprisonment (s 4(1)*(b)* of Refugees Act 130 of 1998) - Only serious crimes contemplated - Theft not falling into category justifying exclusion.

Immigration - Refugee - Application for refugee status and asylum - Requirements - Well-founded fear of persecution - Standard of proof - Applicant required to prove reasonable possibility of persecution.

Immigration - Refugee - Application for refugee status and asylum - Refusal - Review - On D ground of bias - Decision taken as result of external influence - Irregularity vitiating entire proceedings - Decision set aside.

Immigration - Refugee - Application for refugee status and asylum - Refusal - Appeal to Refugee Appeal Board (RAB) - Dismissal of - Review - On ground of bias - Reasonable apprehension of bias on part of members of RAB - Apprehension supported by strenuous opposition by E RAB to application for review - Irregularity vitiating entire proceedings - Decision set aside.

Immigration - Refugee - Application for refugee status and asylum - Refusal - Appeal to Refugee Appeal Board (RAB) - Dismissal of - Review - On ground of material mistake F of law - Misapprehension as to crimes justifying exclusion from refugee status (s 4(1)*(b)* of Refugees Act 130 of 1998) - Section contemplating only serious crimes - Application refused on ground that applicant reasonably suspected of having committed theft - Theft not serious crime - Not justifying exclusion - Irregularity vitiating entire proceedings - Decision set aside.

Immigration - Refugee - Application for refugee status and asylum - Refusal - Appeal to Refugee Appeal G Board (RAB) - Dismissal of - Review - On ground of material mistake of law - Misapprehension as to functions and powers of RAB - RAB approaching hearing of appeal as hearing *de novo* of application - Though RAB having wide appellate jurisdiction, hearing by RAB not hearing *de novo* - Misapprehension not having materially influenced decision - Decision not reviewable on that ground.

Immigration - Refugee - Application for refugee status and asylum - Refusal - Appeal to Refugee Appeal H Board (RAB) - Dismissal of - Review - On ground of material mistake of law - Standard of proof - Well-founded fear of persecution - RAB having required applicant to prove real risk on balance of probabilities - Correct standard reasonable possibility of

persecution - Irregularity not having resulted in failure properly to exercise discretion - Decision set aside. I

Immigration - Refugee - Application for refugee status and asylum - Refusal - Appeal to Refugee Appeal Board (RAB) - Functions of RAB - Having wide appellate jurisdiction in sense of being able to make own enquiries and gather own evidence - Hearing by RAB not, however, hearing *de novo* J

Headnote : Kopnota

The applicant made application in the High Court for the review and setting aside, in terms of s 6 of the Promotion of Administrative A Justice Act 3 of 2000 (PAJA), of the decision of the fifth respondent to refuse his application for refugee status and asylum under the Refugees Act 130 of 1998 and the decision of the first respondent, on appeal against the fifth respondent's decision, to confirm the fifth respondent's decision. The applicant's grounds of review were the alleged procedural unfairness of the respective proceedings and certain material errors of fact and law. The B material errors of law alleged were: (1) the first respondent's assumption that the hearing of the appeal was a hearing *de novo* of the application for refugee status and asylum; (2) the first respondent's requiring proof by the applicant of a real risk of persecution in order to qualify for refugee status; and (3) the first respondent's finding that the crime of which the applicant was suspected, namely, theft, fell into a disqualifying category, C ie was a *serious* crime as contemplated by s 4(1)*(b)* of Refugees Act 130 of 1998. The applicant also sought an order declaring that he was entitled to refugee status and asylum in terms of ss 2 and 3 of the Act. The respondents denied the alleged procedural unfairness and mistakes of fact and law. The respondents also contended that the applicant failed to qualify for refugee status or asylum for two reasons: first, because he failed to satisfy the D statutory criteria for eligibility; and second, because he was excluded from refugee status in terms of s 4(1)*(b)* of the Act on account of there being reason to believe that he had committed a crime which was not of a political nature and which, if committed in South Africa, would be punishable by imprisonment. E

Held, in respect of the fifth respondent's decision, that the applicant was justified in deducing that the fifth respondent's decision was the result of external influence (by Interpol officials), that the decision had been dictated to her, and that her impartiality and independence had been compromised. This wholly vitiated the decision and was not a procedural irregularity of the kind that could be cured on appeal. On that ground alone the decision had to be set aside under s 6(2)*(e)*(iv) of PAJA. F (Paragraph [81] at 260D - F.)

Held, further, as to the first respondent's decision, that there was a reasonable apprehension that some of its members would not be impartial in deciding the applicant's case. (Paragraph [84] at 261H.)

Held, further, that the first respondent's strenuous opposition to the present application compromised its independence and added force to the applicant's legitimate or reasonable G apprehension of bias. (Paragraph [86] at 262F - G.)

Held, further, that in the circumstances the first respondent could be reasonably suspected of bias as intended in s 6(2)*(a)*(iii) of PAJA. On that ground alone its decision fell to be set aside under s 8 of PAJA. (Paragraph [88] at 263C - D.) H

Held, further, as to (1), that since the Refugees Act conferred wide appellate jurisdiction on the first respondent so that it was entitled to make its own enquiries and even gather its own evidence if necessary, it had to reconsider the decision appealed against. (Paragraphs [90] and [92] at 263F - G and 264D - E.)

Held, further, that the second respondent (the chairman of the first respondent) had therefore been mistaken in law in I approaching the hearing of the appeal as a hearing *de novo*. It did not, however, materially influence the first respondent's decision, and accordingly its decision did not fall to be set aside on that ground. (Paragraph [93] at 264F - I.)

Held, further, as to (2), that the first respondent's finding that the applicant was required to prove a real risk of persecution on a balance of probabilities J

was not correct. The appropriate standard was one of 'a reasonable possibility of persecution'. (Paragraph [97] at 266B - C.) A
Held, further, that the first respondent's use of the normal standard of proof was a material error: it had resulted in the first respondent not properly exercising its discretion. (Paragraph [99] at 266H.) B
Held, further, that the first respondent had also committed a number of irregularities in its assessment of the applicant's credibility. (Paragraph [103] at 268G - H.)
Held, further, on a proper assessment of the applicant's credibility and the evidence as a whole, that the first respondent might reasonably have concluded that the applicant faced a reasonable possibility of persecution. (Paragraph [106] at 269G - H.) C
Held, further, as to (3), that the provisions of s 4(1)*(b)* of the Refugees Act did not explicitly introduce a requirement of *seriousness* beyond the condition that the crime had to warrant a sentence of imprisonment. However, having regard to the provisions and intention of the UN Convention Relating to the Status of Refugees as mandated by s 6(1) of the Refugees Act and s 39(1)*(b)* of the Constitution, only serious crimes justified exclusion or disqualification. (Paragraphs [112] and [114] at 271H - 272D.) D
Held, further, that theft did not fall into the category of serious crimes. (Paragraph [115] at 272E - G.)
Held, further, that it followed that both the first and fifth respondents had been wrong when they excluded the applicant from refugee status on the ground that he was reasonably suspected of having committed theft. This mistake had materially influenced their E respective decisions and, on that ground, fell to be reviewed and set aside. (Paragraph [116] at 272G - I.)
Held, further, that exceptional circumstances existed in the present case that justified the court's substitution of its own decision for that of the respondents. (Paragraph [127] at 275H - I.)
Held, further, that the applicant had to be granted refugee status and there was no basis for excluding him under s 4 of the Refugees Act. F (Paragraph [137] at 278E - F.)
Held, accordingly, that (1) the first respondent's decision to reject the applicant's appeal had to be set aside because it was unconstitutional; (2) the fifth respondent's decision to reject the applicant's application for refugee status and asylum was unconstitutional and had to be set aside; and (3) the applicant was a G refugee who was entitled to asylum in South Africa as contemplated by ss 2 and 3 of the Refugees Act. (Paragraph [139] at 278H - J.)

Cases Considered

Annotations

Reported cases H

Southern African cases

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687): referred to

Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others 1999 (1) SA 324 (Ck) ([1997] 4 All SA 363): dictum at 353F - 353I applied I

Commissioner, Competition Commission v General Council of the Bar of South Africa and Others 2002 (6) SA 606 (SCA) ([2002] 4 All SA 145): dictum in paras [14] - [15] applied

Fang v Refugee Appeal Board and Others 2007 (2) SA 447 (T): applied

Gauteng Gambling Board v Silver Star Development Ltd and Others 2005 (4) SA 67 (SCA): dictum in para [28] applied. J

Gerhardt v State President and Others 1989 (2) SA 499 (T): dictum at 504G applied A

Hurley and Another v Minister of Law and Order and Another 1985 (4) SA 709 (D): dictum at 717A applied

Johannesburg City Council v Administrator, Transvaal, and Another 1969 (2) SA 72 (T): dictum at 75H - 77C applied

Kaunda and Others v President of the Republic of South Africa and Others 2005 (4) SA 235 (CC) (2004 (10) BCLR B 1009): dictum in para [123] applied

Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA) (2004 (2) BCLR 120): dictum in para [25] applied

Minister of Law and Order v Kader 1991 (1) SA 41 (A): dictum at 51E - G applied

Native Commissioner and Union Government v Nthako 1931 TPD 234: dictum at 242 applied C

Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality 1991 (3) SA 98 (C): referred to

Ruyobeza and Another v Minister of Home Affairs and Others 2003 (5) SA 51 (C) (2003 (8) BCLR 920): compared

Sigaba v Minister of Defence and Police and Another 1980 (3) SA 535 (Tk): referred to D

Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union 1995 (1) SA 742 (A): not followed

Tikly and Others v Johannes NO and Others 1963 (2) SA 588 (T): referred to

Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T): referred to E

Trust Bank van Afrika Bpk v Lief and Another 1963 (4) SA 752 (T): applied.

Foreign cases

Immigration and Naturalization Service v Cardoza-Tonseca 480 US 421 (1987): dictum at 440 applied F

Leary v National Union of Vehicle Builders [1970] 2 All ER 713 (Ch): dictum at 720*c* applied.

Unreported cases

Southern African cases

Van Garderen NO v Refugee Appeal Board (TPD case No 30720/2006, 19 June 2007): applied. G

Foreign cases

DD and AS v Secretary of State for the Home Department (Appeal Nos SC/42 and 50/2005, 27 April 2007): dictum in para [33] applied. H

Statutes Considered

Statutes

The Constitution of the Republic of South Africa, 1996, s 39(1)*(b)*: see *Juta's Statutes of South Africa 2006/7* vol 5 at 1-28

The Promotion of Administrative Justice Act 3 of 2000, ss 6, 6(2)*(a)*(iii), 6(2)*(e)*(iv) and 8: see *Juta's Statutes of South Africa 2006/7* vol 5 at 1-251 I

The Refugees Act 130 of 1998, ss 2, 3, 4(1)*(b)* and 6(1): see *Juta's Statutes of South Africa 2004/5* vol 5 at 2-22 and *Juta's Statutes of South Africa 2006/7* vol 5 at 2-30.

Conventions

The UN Convention Relating to the Status of Refugees: see www.unhchr.ch/html/menu3/b/o_c_ref.htm. J

Case Information

Application for the review and setting aside of decisions to refuse an application for refugee status and asylum and to dismiss an A appeal against that refusal, both taken under the Refugees Act 130 of 1998. The facts appear from the reasons for judgment.

Anton Katz (with Adv *Du Plessis*) for the applicant.

NM Arendse SC (with *O Matjila*) for the respondents. B

Cur adv vult.

Postea (September 11).

Judgment

Murphy J: C

[1] The applicant has made application, in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) read with s 33 of the Constitution, to review and set aside two decisions relating to his quest for refugee status and asylum under the Refugees Act 130 of 1998 (the Act). D

[2] The applicant's application for refugee status was first rejected on 11 March 2005 by the fifth respondent, the Refugee Status Determination Officer (RSDO). He appealed against this decision to the first respondent, the Refugee Appeal Board (RAB). On 12 December 2005 the RAB handed down a decision in which a majority of its members dismissed the appeal. The majority decision was handed down by E the chairperson of the RAB, the second respondent. Advocate MM Hassim handed down a minority decision in which he held that he would have upheld the appeal.

[3] The applicant now seeks to have both decisions set aside and requests this court in terms of F s 8(1)*(c)*(ii)*(aa)* of PAJA, read with s 172(1)*(b)* of the Constitution, to correct the decisions of the RSDO and RAB by substituting them with a decision declaring that the applicant is entitled to refugee status and asylum in terms of ss 2 and 3 of the Act. Only the first and second respondents filed opposing affidavits. I will refer to them collectively as the G respondents. The Minister and the Director-General of Home Affairs (the third and fourth respondents) and the RSDO have not filed opposing affidavits.

[4] Section 8(1)*(c)*(ii)*(aa)* of PAJA is to the effect that a court in proceedings for judicial review under PAJA H may grant any order that is just and equitable, including orders setting aside the administrative action and substituting or varying it, instead of remitting the matter under s 8(1)*(c)*(i) for reconsideration by the original decision-maker, when exceptional circumstances justify substitution or variation. Section 172 (1)*(b)* of the Constitution grants a court the power to make any order that is just and equitable when deciding a I constitutional matter.

[5] I will return to the specific grounds of review in due course. The crux of the applicant's case, though, is that the proceedings before both the RSDO and the RAB were attended by procedural unfairness, were further vitiated by material errors of both fact and law and that . J

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substitution is the only remedy in the light of the stance taken by both administrative bodies in the earlier proceedings and the A RAB in this review application.

[6] In terms of s 3*(a)* of the Act a person qualifies for refugee status if that person owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is B outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country or is unwilling to return to it. Section 4 excludes from refugee status those who commit certain criminal acts or enjoy the protection of other countries. Applications for asylum are processed first by a RSDO, an C officer of the Department of Home Affairs located at a Refugee Reception Office, with appropriate training and experience. In terms of s 21 the application must be

made in person to a Refugee Reception Officer. Pending the outcome of the application the applicant is issued with an asylum seeker's permit (s 22). The application is determined by the RSDO, and where rejected it is appealable to either the Standing D Committee for Refugee Affairs or the RAB, depending on the reason for refusal.

[7] The respondents contend that the applicant does not qualify for refugee status for two reasons. Firstly, because he has failed to satisfy the statutory criteria for eligibility. And, secondly, because he is excluded from refugee status in terms of E s 4(1)*(b)* of the Refugees Act on account of there being reason to believe that he has committed a crime which is not of a political nature and which, if committed in South Africa, would be punishable by imprisonment. They also deny that the proceedings (or at least those before the RAB) were tainted by unfairness or were vitiated F by material errors of law or fact.

The applicant's personal history and the background to his arrival in South Africa

[8] The following facts regarding the applicant's life and the circumstances of his arrival in South Africa, taken from his G uncontradicted averments in the founding papers and the transcript of his testimony before the RAB, can be regarded as common cause.

[9] The applicant is a Libyan national who left Libya about 20 years ago, in 1987. Since then he has spent most of his time in Pakistan. As a student he was opposed to the policies and practices of H the government of Libya then (as now) under the control of Colonel Qadhafi. He became involved in political activity while a student at Bright Star University in Libya during 1983 to 1987. His activities at that time seem to have been fairly low-key and of a limited nature. His political consciousness was sparked by Libya's war against Chad, which he described as 'anti-humanity'. He spoke out against the war in the I mosque he attended and in meetings at the university. His activities extended to agitation for greater political freedoms and fair elections. After graduating with a degree in mechanical engineering he returned to his home district near Tripoli. There, together with his best friend, Khalid Hingari, he secretly J

MURPHY J

wrote political pamphlets agitating against the government that were distributed at night. Hingari was subsequently arrested in A 1988 and imprisoned for political conduct. He died in 1996 in Abu Salim prison during an incident documented by Amnesty International as involving the mass killing of perhaps as many as 1 200 political detainees. I will refer to this incident more fully later. B

[10] Before his involvement with Hingari, the applicant twice came to the attention of the revolutionary committee at Bright Star University, once in 1985 and once in 1987. During that time the Libyan government held 'people's assemblies' convened by revolutionary committees and aimed at achieving hegemony in respect of its socialist policies. The applicant regarded them as 'propaganda meetings that C were supposed to indicate that the government had a legitimate consensus on issues when in fact it was making authoritarian and dictatorial decisions'. He claims that he was forced to attend these meetings and to keep quiet about his political opinions because people who did not attend were tortured and a 'negative' political opinion was imputed to them. D

[11] Throughout the period of 1983 to 1987 the applicant nevertheless continued to attend student political meetings at night. His student group was a loose association, did not have a specific name, nor was it a political party. E

[12] The applicant's first brush with the revolutionary committee occurred in 1983, before he enrolled at Bright Star, after he had publicly declared his opposition to the war with Chad and the policy of compulsory military service for teenagers, during the *Jumaah* service (the weekly congregational gathering on Fridays at midday) at his local mosque. When questioned by the F revolutionary committee he lied in order to protect himself, giving a false account of what he in fact had said by telling them that he had simply raised questions about the war and had merely stated that the revolutionary

committee should inform the people about the reasons for the war with Chad. His true opinion, then and now, was that the war was illegitimate because it was aimed exclusively at the annexation of the G Uzzo province in Chad, where large deposits of uranium had been discovered.

[13] After this encounter the applicant became more circumspect in his political activities and public pronouncements. However, he remained politically motivated and along with his fellow students listened surreptitiously on the radio to *Al Jabba Al Watania Li* H *Inqaad Libya*, an exiled political party that broadcast messages and propaganda opposed to the policies of Colonel Qadhafi. The applicant's attorney at the RAB hearing translated the Arabic name as 'the National Foundation for the Salvation of Libya'. I

[14] Despite his low profile the revolutionary committee at Bright Star briefly detained him and some of his fellow students for the purposes of interrogation. He mentioned two of his fellow students by name: Abdul Qader Shar Maddu, currently in prison in Libya for his political activities, and Salah Khuwayldi who has been granted refugee status and J

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asylum in Europe. During his interrogation he was warned not to hold political opinions opposing the government and was told that A religious dissidence would not be tolerated. Once again, during his interrogation he lied to the revolutionary committee by professing to be a supporter of the Qadhafi government.

[15] Although the evidence on the point was not elaborated upon in the founding papers, or in the testimony given before the RAB, there B is more than a suggestion that the applicant belonged to a mosque that had attracted the attention of the Libyan authorities as one preaching religious dissidence. It also emerged during the RAB hearing that the applicant's name had appeared on an internet website, referred to as C 'Libjust', established, maintained and controlled by the Libyan government for some time until it recently became defunct. The information contained on the website reflected the applicant as being a member of the Libyan Islamic Fighting Group (LIFG), who had received military training in Afghanistan. The applicant denied that he was a member of the LIFG, that he had ever received military training or that D he had ever been associated with any terrorist group. In response to a question by one of the members of the RAB concerning how he became involved in politics, the applicant replied:

> When you have people in the school, they are Egyptian teachers. They were involved in the Muslim Brotherhood groups. If the teachers saw E that a student was clever, they took him aside (*sic*).

When asked whether he had been persuaded to join the Muslim Brotherhood groups, he answered:

> Yes, when I was sitting with these teachers, they opened my mind.

The second respondent took up this issue and the following exchange took place: F

> *Second respondent:* When the teachers in your school were opening your mind, what did they tell you?
>
> *Applicant:* They told me that I must open my mind. About religion.
>
> *Second respondent:* How did politics come into this?
>
> *Applicant:* You cannot separate politics and religion in Islam. G
>
> *Second respondent:* Gaddafi (*sic*) is called a prophet of God. But you say he did not show religion?
>
> *Applicant:* He did not respect religion.
>
> *Second respondent:* So he is a bad Muslim?
>
> *Applicant:* Of course he is a bad Muslim.

[16] The significance of this exchange is that it clearly positions the applicant in the Islamist tradition opposed to Colonel I Qadhafi. The character of that enmity unfortunately was not fully explored. One assumes it was predicated upon a perceived

intolerance by Qadhafi towards the teachings and doctrine of the Muslim Brotherhood and insofar as the applicant appears implicitly to reject Colonel Qadhafi's claim to prophethood, if indeed he has made such a claim, then also upon the foundational precept (*kalima*) of Islam that the Prophet Mohammed is the last prophet of God.

[17] There is no evidence before me explaining or accounting for the stance taken by the Qadhafi government towards the Muslim Brotherhood. J

MURPHY J

Suffice to say, it is common knowledge, of which judicial notice may legitimately be taken, that the Muslim Brotherhood A *Jamiat al-Ikhwan Muslimun*) originated in Egypt in 1928 and has spread throughout the Middle East. It propagates a traditionalist view of Islam that there can be no separation between secular, political, spiritual or religious life. It has global aims, and some have described it as having a jihadist agenda, whatever that may mean. B Its influence is significant and its activities have brought it into conflict with governments in the region.

[18] Despite his denial of membership of the LIFG, the applicant, as mentioned, was identified by the Libyan government, on the Libjust website, as a member, associate or supporter of the LIFG. By his own admission, while still in Libya, he listened to, approved of C and was influenced by the radio broadcasts of exiled political groupings. There is no direct evidence before me about the LIFG, its aims, methods and activities. Nevertheless, significant information about it has come to light in a matter recently adjudicated by the Special Immigration Appeals Commission (the SIAC) in the United Kingdom, a body equivalent in status to the UK High Court. It will be D convenient at this point to digress from the applicant's life story in order to consider some of its findings, specifically those apropos the LIFG, and to comment on the legitimacy of relying upon its findings for the purposes of determining this application. E

[19] Courts are generally reluctant to rely upon the opinion or findings of a court in a foreign jurisdiction about factual issues not ventilated, tried or tested before them. All the same, it is not unusual in human rights and refugee cases for courts to take judicial notice of various facts of an historical, political or sociological character, or to consult works of reference or reports of reputable F agencies concerned with the protection and promotion of human rights. In *Kaunda and Others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) ([2004] 10 BCLR 1009) in para 123 Chaskalson CJ, commenting on reports by Amnesty International and the International Bar Association on the human rights situation in G Equatorial Guinea, said as follows:

> Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis only of these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such H investigations were made and reports given is itself relevant in the circumstances of this case.

These dicta have relevance beyond the narrow inquiry into whether it is permissible to rely on the findings of the SIAC in relation to the activities of the LIFG. They sanction reliance upon the decision of the SIAC, and the reports referred to in the decision, when assessing the I general human rights situation in Libya, which I do later in this judgment.

[20] The relevant decision of the SIAC is *DD and AS v The Secretary of State for the Home Department* (appeal Nos SC/42 and 50/2005, dated. J

MURPHY J

27 April 2007). It concerned an appeal by two Libyan nationals against the refusal by the Secretary of State to grant them A refugee status and asylum. Both appellants were alleged to be members of the LIFG, described by the SIAC as an organisation involved in providing extensive support to a wide range of Islamist extremists loosely

affiliated to al-Qa'eda networks, who had been engaged in terrorist activity for a substantial period of time.

[21] The evidence of the UK Secretary of State was that the LIFG is an Islamist extremist organisation which started in the Afghanistan/Pakistan border area in 1990 with strong Taleban connections and many members who had significant connections to al-Qa'eda operatives. Its aim was to overthrow the Qadhafi government and replace it with an Islamic State. It has carried out attacks against the Libyan State, but has been rebuffed with a fierce and severe military response. Many of its members have been killed, imprisoned or have fled Libya. The dispersal of its membership has led to a broadening of its outlook and an embracing of the pan-Islamic, global jihadist outlook of al-Qa'eda. Expert opinion before the SIAC suggests it has lost effectiveness since 9/11 with the recent arrest of some of its members in the UK described as 'a symbolic defeat for the remnants of a fading organisation'.

[22] Nonetheless, Mr Justice Ouseley, the chairman of the SIAC, reached the following conclusion about the LIFG:

> In general, it is our view that there are close links between Al Qa'eda and many senior LIFG members; the closest links were forged and exist outside the UK. Those who hold global jihadist views generally have the links to Al Qa'eda and still seek to oppose the Qadhafi regime by means which include violence. They co-operate with and support other groups in a broader anti-western agenda and in actions directed against what they all see as non-Islamic states notably in the Middle East and North Africa. There has been a clear shift in emphasis in recent years, caused in part by changes in leadership forced by arrests. Those with Al Qa'eda views are in the ascendancy and some of those of other views have left the LIFG or have become marginalized. The difficulties of operating within Libya, and the contacts among the Islamists of many nationalities dispersed throughout the west and elsewhere have encouraged a more global outlook. Those of that outlook represent a clear danger to the national security of the UK.

[23] The SIAC went on to draw three other important conclusions about the LIFG. Firstly, the Libyan government has a clear interest in defeating the violent opposition of the LIFG to it. Secondly, despite its al-Qa'eda global outlook, the LIFG has not abandoned its aims in Libya. And finally, it was not possible to conclude from the evidence that the mere fact of LIFG membership shows that an individual is necessarily a global jihadist or al-Qa'eda supporter. Some LIFG members support al-Qa'eda, others do not. The focus always has to be on what the individual has done and may do.

[24] Returning now to the applicant's personal story. It will be recalled that he admitted to an association with the Muslim Brotherhood, to listening to the broadcasts of the exiled *Al Jabba Al Watania Li Inqaad*

MURPHY J

Libya in the mid-1980s and to being inspired and influenced by their message. Although he denied being a member of the LIFG, he was not asked if he was an *associate* or *supporter* of the LIFG. He could not have been a member of the LIFG while in Libya prior to leaving in 1988, because, according to the SIAC, the LIFG only came into existence in 1990 when it was founded in the tribal areas on the Pakistan/Afghanistan border. There is no evidence touching upon the relationship, if any, between *Al Jabba Al Watania Li Inqaad Libya* and the LIFG.

[25] The applicant left Libya during the first half of 1988, shortly after his friend and mentor Khalid Hingari was arrested on being found in his car with pamphlets he was intending to distribute. When the applicant heard of his friend's fate he immediately went into hiding in Benghazi and learned later that members of the revolutionary committee had been to his family home looking for him. As already mentioned, Hingari remained in prison until his death in 1996 during the incident at the Abu Salim prison.

[26] Shortly after Hingari's arrest, the applicant obtained a visa to leave Libya, exited Libya via Tripoli airport and proceeded on pilgrimage (*umra*) to Mecca in Saudi Arabia. The facility with which he obtained a visa and left is strangely inconsistent with his depiction of being sought by and on the run from the revolutionary committee. He

claimed he was able to do this because Libyan security E officials 'were not sophisticated or educated at that time' and he was 'able to utilise this fact to avoid detection'.

[27] He remained in Mecca for about four months, from Ramadan to Hajj. He had originally hoped to pursue Islamic studies in Saudi Arabia, but when this did not seem possible he considered other F options. He met an Egyptian man at the Medina *masjid*, whom he did not identify by name, but who assisted him with finances and a visa to travel to Peshawar in Pakistan, where he was set up with a job as Director of the Islamic Heritage Foundation, a body based in Kuwait with offices in Pakistan. Thus the applicant happened to find himself G in the very place that the LIFG was set up shortly before its establishment. Peshawar, it is well known, is the main city in the area of Pakistan bordering Afghanistan and Iran, the so-called Federally Administered Tribal Areas. Society in its immediate precincts is organised along tribal and traditionalist lines. One may safely take notice of the fact that it is an area in which the Taleban and H al-Qa'eda enjoy support amongst the inhabitants, and the writ of the Pakistani government is of limited effectiveness.

[28] The applicant remained in Peshawar for almost 13 years, from 1988 until 2001, working for the Foundation. The Libyans claim he spent some of that time actively engaged in the conflicts in Afghanistan. During that time he never sought Pakistani residence or I citizenship. He operated totally illegally by obtaining fraudulent visa extensions from counterfeiters in Peshawar. When his passport expired he obtained a counterfeit one. The explanation was tendered on his behalf in argument that there was no compulsion upon him to regularise his status because J

MURPHY J

he benefited from the protection of the tribal elders in the region. He acknowledged that he did not always act lawfully in securing A visas and passports but submitted that his conduct was no bar to his claim for asylum.

[29] After the attacks in New York on 11 September 2001, the Pakistani government closed down the offices of the Foundation in Peshawar. The applicant offers no explanation for why it did so. One B can only surmise that it was motivated most probably by its undertakings to the government of the USA to curtail the activities of persons associated with al-Qa'eda and the Taleban. The applicant avers though that the Foundation still exists and its bank accounts have not been frozen as a result of it being deemed a terrorist C organisation. I assume that the Foundation continues to exist in Kuwait, but that its activities in the northwest of Pakistan, if not terminated, have been appreciably curtailed.

[30] As a result of the Pakistani government's decision to close the Foundation, the applicant found himself without a job and somewhat discomforted because the Pakistani government, ostensibly in D response to US pressure, began persecuting Arabs indiscriminately and irrespective of their affiliations. Being an Arab he fled to Iran by road. There he was picked up in Zaidan, a town just beyond the Pakistan border, and held in detention with 80 other Arab refugees for a period E of six months.

[31] In Iran he was able to negotiate his release on the condition that he left the country. In his testimony before the RAB he explained that a Libyan national, by the name of Mohammed El Saqui, came to Iran from the UK specifically to assist a group of Libyans held in detention after fleeing Pakistan. It is not clear whether El Saqui F represented an exiled political movement or the Libyan government. The fact that the applicant referred to him as 'a brother' indicates that he was most likely an exiled opponent of the Libyan government of similar Islamic persuasion as the applicant. El Saqui's intervention seemingly led to the Iranian authorities posing the Libyans with a choice: either they could remain in relatively humane conditions of G detention in Iran or they could leave the country. The applicant chose the latter option and left Iran with his family, his wife and children having flown to Iran immediately prior to his crossing to Zaidan by road. From there he went with his family to Malaysia. Fearful that the Malaysian authorities might repatriate him to Libya he fraudulently H obtained a false

South African passport. His plan at that stage, so he claims, was to seek asylum in Australia or New Zealand, where he believed it would be easier to enter with a South African passport. He was arrested in Jakarta, Indonesia, while on a visit there, and taken into custody. He remained in a deportation holding facility in I Indonesia for over two months. During his interrogation he claimed to be a South African, of Moroccan origin, who had gained citizenship through marriage. In spite of the passport containing information to the contrary, reflecting the applicant as born in Cape Town, the Indonesian authorities deported him to South Africa J

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[32] On his arrival here, on 1 November 2003, he was A immediately arrested for being in possession of a fraudulent passport. During his detention South African and foreign intelligence officials interrogated him. He was eventually released and applied for asylum. On 5 February 2004 Interpol again arrested him on an extradition request by the Libyan authorities relating to a charge of theft. The applicant is of the view that the extradition request came about as a B direct result of his application for asylum and maintained that the charge was trumped up in a transparent attempt to exclude him from refugee status in terms of the provisions of s 4(1)*(b)* of the Refugees Act. The offence was allegedly committed in 1985, three years before his departure from Libya, and there was no reference to it C on the Libjust website which stated merely that he was sought because of his association with the LIFG. I will discuss the evidence relating to this critical issue when considering the decision of the RAB. The applicant remained in prison until his release on 20 April 2004 and is currently on a temporary asylum seeker's permit. He says he has D lived a law-abiding existence in Johannesburg since then.

[33] The second respondent, in an opposing affidavit deposed to on behalf of the first respondent, the RAB, confirmed that the applicant's account of his life between 1988 and 2003 is in conformity with that placed before the RAB as evidence. However, he averred that E he personally was unable to verify any of the allegations and stated that the RAB was 'deeply concerned' about the applicant's 'self-confessed ability to lie, deceive and to commit bribery, fraud and corruption'. As will be seen presently, the RAB's concerns about the applicant's credibility played a central part in its decision. Be that as it may, there is no other evidence contradicting the F applicant's story.

The proceedings before the RSDO

[34] I turn now to the events and circumstances surrounding the decision of the RSDO. The applicant requested asylum immediately upon G being arrested at OR Tambo International Airport on 1 November 2003. A formal application was made on 19 December 2003 and the applicant was issued with an asylum seeker's permit in terms of s 22 of the Act. For reasons not explained, the authorities continued unlawfully to detain the applicant. Only after he had threatened suicide and an urgent application for his release was mooted, did the authorities release him on 7 January 2004. He was arrested again H on 5 February 2004 on the extradition request. The extradition request from Libya most likely arose as a consequence of South African police causing an Interpol diffusion to be issued. Libya has no extradition agreement with South Africa. Accordingly, in terms of the Extradition Act 67 of 1967, an extradition to Libya may only proceed if I the President consents to the extradition. Despite apparently being seized with the request for extradition, the President has elected not to consent to the extradition, and the respondents have provided no explanation or indication of any knowledge on their part as to why he has declined to do so J

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[35] During the time he was in custody on the extradition warrant, South African Interpol officials collected the applicant from A prison on 26 March 2004 and without notice to his legal representatives took him to the office of the Department of Home

Affairs in Marabastad, Pretoria, where he appeared before the fifth respondent, Ms Magi Sawa, the relevant RSDO. Because of the intercession of someone at the prison where the applicant was held, the B applicant's attorney was able to intervene timeously and challenge the conduct of the Interpol officials. Prior to the attorney's arrival the RSDO informed the applicant that she had a decision ready for him. She said that she was under a lot of pressure from Interpol to give a 'negative' decision, stating that they called her every day twice a day to ask her to render a decision against him. Nevertheless, in C response to the submissions of the attorneys, she agreed to delay the decision. A subsequent interview was held in April 2004. The RSDO informed the applicant's attorneys in August 2004 that she had taken a decision but that an official in the Home Affairs Department had requested the applicant's file. The applicant was informed of the D RSDO's negative status determination only on 11 March 2005.

[36] The fifth respondent did not deliver an opposing affidavit. Hence, the allegations that she admitted to being put under pressure by Interpol and senior officials in the Department have not been denied, nor the fact that Interpol officials sought to be present E during the interview until the objection of the applicant's attorneys. The contention that she acted under dictation and without the requisite impartiality has also not been disavowed. In his answering affidavit, the chairperson of the RAB acknowledged that he had no knowledge of these allegations, but submitted that they are irrelevant for the F purposes of the application, because, as he saw it, only the RAB decision ought to be in contention.

[37] In the written reasons for her decision the RSDO made the following pertinent findings, pivotal to her ruling:

- Investigations conducted by Interpol and the Politburo in Libya pointed to the fact that the applicant fled Libya for fear of G criminal prosecution after committing the crime of robbery.
- A simple engagement and involvement in student political activity 'cannot be proportionate to the punishment of death'. Consequently, the applicant's claim of fear of persecution was unfounded. H
- The applicant could, and should, have been declared a refugee in Pakistan.
- There were no facts to back up his claim that Arabs were persecuted in Pakistan after 9/11.
- The applicant obtained a South African passport fraudulently and consequently his deportation to South Africa from Indonesia is illegal (presumably under South African law). I
- In terms of international law (the exact provision of which not being stated) the applicant automatically became a Pakistani citizen by getting married to a Pakistani woman. (The applicant is in fact married to an Algerian woman.) J

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[38] Relying on these facts and considerations, some of which, it can be seen straightaway, are wrong or of little or no relevance, A the RSDO concluded that the applicant had not discharged the burden of proof resting on him, found that the applicant did not have a well-founded fear of persecution as contemplated in s 3 of the Act and further held that 'the applicant's claim is unfounded as it relates to a criminal activity as opposed to a political activity'. B

The proceedings before the RAB

[39] The applicant lodged an appeal some time in 2005 in terms of s 26(1) of the Act, which provides that any asylum seeker may lodge an appeal with the RAB in the manner and within the period provided forC C in the rules if the RSDO has rejected the application in terms of s 24(3)*(c)*. It is common cause that the RSDO in this instance rejected the application for asylum in terms of that provision. At the conclusion of the

hearing before the RSDO the latter is required to grant asylum (s 24(3)*(a)*); to reject the application as manifestly unfounded, abusive or fraudulent (s 24(3)*(b)*); to reject the application as unfounded (s 24(3)*(c)*); or to refer any question of law to the Standing Committee (s 24(3)*(d)*). The RAB is established in terms of s 12 of the Act and is required in terms of s 12(3) to function without any bias and to be independent. As will become evident later, the nature of the RAB's jurisdiction and the manner of its functioning were contentious issues between the parties. Its powers in appeals though are clearly stipulated in s 26(2). The RAB may after hearing an appeal 'confirm, set aside or substitute' any decision taken by an RSDO in terms of s 24(3).

[40] The RAB met twice to hear evidence and deliberate the applicant's appeal. The first meeting took place on 6 July 2005 and the second on 2 November 2005. The transcription of the first meeting reveals that it commenced with the second respondent making certain opening remarks read from a prepared document devised with the laudable objective of informing an appellant of the legal issues at stake and the method and approach of the RAB. The following remarks have assumed particular relevance in this case:

> We know that one of the officials at the Department of Home Affairs has declined your application for refugee status. We have looked at the reasons for this. But the Board as such makes its own independent assessment of the facts and we do not look at the reasons that the Board (*sic*: he meant the RSDO) rejected your application. Thus, you do not need to prove that the prior ruling was wrong. This is a fresh, or a *de novo* hearing. Today, we will listen to you as if this was your first hearing.

[41] After the opening remarks, the applicant was led by his attorney and set out the story of his life between 1983 and 2003 in broad detail. The three members of the RAB intervened where they felt it necessary or desirable with probing questions or inquiries aimed at elucidation or elaboration. I have already referred to the most relevant aspects of the applicant's testimony before the RAB, so it is unnecessary to repeat it

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[42] Besides providing oral evidence, the applicant furnished the RAB with a large bundle of documentary evidence that included various affidavits and letters of support from Libyan refugees throughout the world, including a letter from His Royal Highness Mohammed El-Hassan El-Sinoussi, the Crown Prince of Libya, supporting the applicant's claim to a well-founded fear of persecution. In addition, he handed in letters from exiled Libyan pressure groups, such as Libya Watch and Human Rights Solidarity.

[43] One document of notable relevance was the printout of the write-up on the applicant on the Libjust.com website: http: // libjust.com/ details9.htm, now non-operational. The printout is in Arabic and depicts a photograph of the applicant. It is accompanied by a translation set out in an email from AAS Media addressed to the applicant's attorney dated 16 February 2004 . The name of the author of the email and the translation is not stated. The authenticity and reliability of the translation have not been challenged and hence should be accepted as accurate. The relevant portions of it read as follows:

> On 10.01.2001 the US Treasury Secretary, Paul O'Neil, announced a freeze on accounts of 'Abdul-Muhsin Al-Libi', director of the Islamic Heritage Revival Office in Peshawar. The US Treasury Department said that the Libyan national 'Abdul-Muhsin' was 'inflating the numbers of orphans in his lists in order to obtain more funds from the Kuwaiti association, to transfer to the al-Qaeda organisation, and that he is sending funds and message to Bin Laden'. The information on him includes the following:
>
> - Name: Ibrahim Ali AbuBaker Tantoush
> - Nickname: Abdul-Muhsin
> - Born: 1964 at al-Aziziya (translator: 40km south of Tripoli)
> - Mother's Name: al Magtoufah Ali Ziyadah
> - Qualifications: B Sc Petroleum Engineering

- Wife's name: Mannouba Boughouffah / Algerian, and they have 5 children
- Address in Libya: Sayyad District - Libya G

Notes:

In 1988 He left al-Jamahiriyah (Libya) for Saudi Arabia and then to Pakistan and Afghanistan where he received several military course at military training camps belonging to al-Qaeda, and participated in the Afghan war.

During 1990 - 1998 he worked for the Kuwaiti Islamic Heritage Revival H Association, as a Director of the Association's bureau in Peshawar.

Pakistani authorities raided his home but he managed to escape inside Afghanistan.

The person concerned belongs to the so-called the Islamic Fighting Group, banned internationally under Security Council Resolution on Afghanistan (AF 169 A) SC 7222 dated 26.11.2001. I

He was head of the Group's members in Pakistan and Afghanistan, and during his period in the service of the Kuwaiti Islamic Heritage Association, he offered financial assistance to the Group he is affiliated to.

Participated in al-Qaeda meetings held in Kabul following the 11 September incidents and he was at that time living in Jalal Abad. J

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He divorced his wife and asked her to return to Algeria with her five children. A

During July 2002 the person concerned was seen at domestic flights at Karachi airport arriving on an internal flight inside Pakistan.

[44] The website, it has not been denied, was an officially sponsored website of the Libyan government. B

[45] Another document submitted to the RAB was taken from the website of 'Libya Watch for Human Rights': www.libya-watch.org. It is headed: 'Urgent Appeal for Action Re: Mr Ibrahim Ali Tantoush-Libyan National.' This organisation portrays itself as 'an independent human rights organisation concerned with monitoring and reporting human rights abuses in Libya . . . concerned with upholding C and defending the human rights of the Libyan people'. It goes on to offer the following endorsement:

> We can confirm that Mr Ibrahim Ali Tantoush . . . a Libyan citizen and currently an asylum seeker in South Africa, is a well-known Libyan dissident. D

After setting out his personal history, which accords with the applicant's account to the RAB, it concludes:

> Mr Tantoush's return to Libya would no doubt result in his arrest and subsequent interrogation by the Libyan authorities leaving him in very grave danger and physical harm, especially, when considering the track record of the Libyan regime's treatment of political opponents. E

[46] In addition to the letters and affidavits of support, the RAB was furnished with Amnesty International's Country Condition Reports in respect of Libya for each year between 2000 and 2005, as well as the US State Department's Country Reports for Libya 2003 and 2004. F

[47] In para 8.1 of the index of the bundle of documents handed in at the first hearing there is a reference to the Amnesty International Country Condition Report of Pakistan 2003 with the annotation that it supports the applicant's claim that Arab men were arbitrarily detained in and deported from Pakistan after 9/11. It is evident from the transcript of the hearing of 6 July 2005 that G reference was made to this document and the attention of the members of the RAB was drawn to it by the applicant's attorney in support of the proposition that the applicant was a victim of this discrimination and anti-Arab sentiment at the hands of the Pakistani government. Unfortunately, the report is not included in the record filed in terms H of rule 53(3), with the result that I have had no insight into its contents.

[48] At the end of the hearing on 6 July 2005 the second respondent stated that he preferred to adjourn the hearing because he wanted to conduct further investigations with regard to the extradition warrant and hear the evidence of Inspector Mendes of Interpol. It is common cause that in the period between the two I hearings the second respondent had discussions with Mendes without the applicant or his representatives

being present. The applicant's attorney, when this came to her knowledge, objected. She informed the second respondent that she regarded it as unfair and prejudicial that he was having discussions with Interpol, J

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of which she was not kept informed. The second respondent's rejoinder to this criticism in the answering A affidavit is somewhat contradictory and confusing. In the first instance he admitted to having spoken to Mendes several times but claimed he was entitled to do so in terms of the legislation. Section 26(3)*(a)* of the Act provides that before reaching a decision the RAB may of its own accord make further inquiry or investigation. B However, later he qualified this by stating that his discussions with Mendes were at all material times restricted to the question of his availability to present himself before the RAB and that he had never discussed with Mendes the merits of the applicant's claim or any evidence to be presented by Mendes. Notably there is no confirmatory C affidavit from Mendes.

[49] The assertion of perceived bias acquired an added dimension on the morning of the second hearing of the RAB on 2 November 2005. In his founding affidavit the applicant described how on arrival at the RAB he and his representatives waited for 20 minutes before the hearing commenced while the second respondent was in discussion D with Interpol officials in his office. He became apprehensive that the second respondent was being unduly influenced by Interpol and is of the view that this breakaway meeting was prejudicial to his application. The second respondent in the answering affidavit replied that there was no basis upon which the applicant could impugn the conduct of the RAB as having been influenced by pressure exerted by E officials of Interpol and that the allegations of bias or acting under dictation were sweeping and lacking in particularity. He denied being unduly influenced by Interpol. Nevertheless, he did admit to having separate discussions with the Interpol officials, but said they were confined to introductions and an exchange of courtesies. He explained F that the Interpol officials arrived prior to the hearing and proceeded to introduce themselves to members of the RAB before the applicant and his legal representatives arrived.

[50] The applicant in reply took up the challenge and responded to the allegation that his criticisms were sweeping, lacking in particularity and unfounded. He explained that he had arrived with his G legal representatives at about the same time as the Interpol officials and reiterated that the meeting between the members of the RAB and Interpol had lasted for 20 minutes, stating that he found it hard to understand how it could have taken that long for the Interpol officials merely to introduce themselves to the members of the RAB. In support of H his version he filed a confirmatory affidavit of Ms Rubena Peer, a candidate attorney, who in November 2005 had been employed by the applicant's attorneys doing research work on a voluntary basis. She arrived at the offices of the RAB on that morning together with counsel and two attorneys from the Wits Law Clinic. On their arrival they met Mendes, whom they know, and briefly exchanged greetings. The applicant I and his representatives sat in the reception area of the RAB on couches situated on the right-hand side of the room, while the Interpol officials sat on the couches located on the left hand side of the room. The second respondent then entered the reception area, invited the Interpol officials into his office and proceeded J

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to consult with them for approximately 20 minutes. One of the attorneys, Ms Bhamjee, noted aloud that the consultation was irregular A and a point could be taken to that effect on review. They were shortly afterwards led by the receptionist into the hearing room. On their way there Ms Peer noticed that the consultation was still underway. Ms Peer stated in the affidavit that she was deposing to it in response to the B second respondent's assertion in the answering affidavit that the allegations regarding this incident were sweeping and lacking in particularity.

[51] As these averments were made in the replying affidavit the second respondent strictly speaking had no entitlement to respond to them and in the normal course they could not be denied or explained by the respondents. Nevertheless, if the allegations by Ms Peer C were untrue, or if an adequate explanation were possible, leave of the court could and should have been sought to answer them - see *Sigaba v Minister of Defence and Police and Another* 1980 (3) SA 535 (Tk) at 550F. The respondents did not request to be given an opportunity to deal with these averments. D Their failure to do so tilts the probabilities towards the applicant's version that the consultation occurred, that it lasted 20 minutes and that Ms Bhamjee objected. Whether the inference of actual bias may be drawn in the light of the second respondent's denial thereof is a matter to which I will return later. E

[52] At the commencement of the second hearing, the second respondent placed on record that the purpose of the hearing was to record the evidence from Superintendent Mendes regarding the criminal matter. By that he meant the request for extradition of the applicant by Libya - based on the allegation that the applicant had committed either theft or robbery in Libya in 1985. Mendes testified F that after the arrest of the applicant at the airport, an international diffusion, together with the applicant's fingerprints, photograph and personal information, were sent to Interpol in Paris and disseminated worldwide. His office received in reply a lot of feedback from a lot of countries. Most of the responses were negative, in the sense that the applicant was unknown to them. He, however, received a G confirmation from Libya that the applicant was wanted for the *theft* of gold. Interpol South Africa also obtained his correct name, details and passport number from Kuwait, which also confirmed that he was an engineer. The theft charge related to the theft of gold from a factory some 800 kilometres from the applicant's normal place of residence in 1985. Mendes sought clarification and established that the death penalty would not apply to such a crime in H Libya and that the applicant faced a sentence of no more than seven years' imprisonment. Mendes confirmed that his office was awaiting the President's decision on extradition and that it was not his duty to go behind the warrant or to consider its veracity. His responsibility was confined to ensuring the warrant complied with formal procedures and I therefore he had not fully investigated the allegations in the warrant.

[53] Mendes was questioned by counsel about the issue of a so-called 'red notice'. The line of questioning started with counsel inquiring whether a red notice had in fact been issued. From Mendes' answers it J

is clear that a distinction is drawn between a diffusion and a red notice. The purpose of a diffusion is to identify a fugitive. A When the second respondent requested Mendes to clarify the notion of a red notice, he responded as follows:

> A red notice is issued by a country where a person is wanted for a crime committed, not by us. Libya in this matter had to issue the red notice. The fact that he was not circulated does not mean that he was B not wanted. Some are not circulated, and some are - or me, if it is not a serious crime, I will not send a diffusion if I know around which the area the person may be (*sic*). The red notice would in this matter be issued by Libya to head office in France. And France would permit the notice to be sent around to all C countries.

[54] There are two facets to this evidence. In the first place it clarifies the distinction between a diffusion and a red notice. The former is issued by the intelligence or law enforcement authorities of the jurisdiction where a fugitive or asylum seeker is held in order to garner information about him. A red notice is issued by the country seeking a fugitive from justice, either by the local intelligence or D law enforcement agency, and is then sent to Interpol in Paris who authorises its circulation throughout the world. The second facet is that Mendes was clearly under the impression that Libya had not in fact circulated a red notice in respect of the applicant, as appears from his assertion that the fact that one had not been circulated did not E mean the applicant was not wanted. As he indicated, he would normally not send one, or a diffusion for that matter, in cases where the crime was not serious.

[55] Averments made in the answering affidavit by the second respondent reveal that he misunderstood the evidence of Mendes on this aspect. His understanding was that Libya had in fact issued a red F notice and sent it to Interpol in Paris and that it (rather than just a diffusion) had been sent around the world. Although there is no explicit reference to a red notice in the written decision of the second respondent, his averment in the affidavit, the general tenor of the reasoning in his judgment and his ultimate conclusion strongly G suggest that his mistaken assumption was a consideration or factor influencing his decision that the applicant was excluded from refugee status on account of criminal conduct. The applicant's interpretation of the evidence (with which I agree) is that Libya had not in fact issued a red notice. He relies on this, and such was put to Mendes, to contend that the failure of Libya to have issued a red notice between H 1985 and 2003 is indicative of the fact that the charges were trumped up in response to the diffusion and a deliberate attempt to thwart the asylum proceedings.

[56] There are contradictory statements on record about whether the criminal charge related to theft or robbery, the latter being more serious on account of the element of violence. The seriousness of an I offence is a criterion applicable to the exclusion from refugee status. The request for extradition, in a *note verbale* issued by the People's Bureau of The Great Socialist People's Libyan Arab Jamahiriya to the South African Department of Foreign Affairs, states that the applicant is: J

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> (A) Libyan national who is wanted by the judicial authorities in Libya in terms of case (*sic*) pending against him before the A Libyan courts pursuant to Articles 2 and 3 of the Libyan Criminal Code No 446 - 444 for theft of a quantity of gold.

The *note verbale* is dated 11 February 2004. The warrant of arrest issued by the senior magistrate in terms of s 5(1)*(b)* of the Extradition Act 67 of 1962 on 3 B February 2004, presumably on the basis of an informal request, states that the magistrate was in receipt of information that the applicant was wanted for the offence of theft of gold. Mendes throughout his testimony also referred only to a charge of theft. And the second respondent in his decision held there was reason to believe the applicant was guilty of theft. Accordingly the reference to the crime C of robbery in the decision of the RSDO, and in other documents alluded to in argument before me, are insufficient to conclude that the Libyan authorities are pursuing the applicant on a charge of robbery.

[57] After hearing argument on 2 November 2005 the proceedings of the RAB were adjourned. The RAB handed down its decision on 12 December 2005. As mentioned, the majority (Mr Damstra, Mr D Mohale and Ms Morobe) concurred in the decision of Mr Damstra, the second respondent, with Adv Hassim dissenting in a separate written decision.

[58] The majority confirmed the decision of the RSDO rejecting the application for asylum on the grounds that the applicant did not qualify for refugee status in terms of s 4(1)*(b)* of the E Act. It found also, in the alternative, that the applicant was not a credible witness and that his evidence ought not to be accepted. The implications of this latter finding were not enlarged upon by the majority, but reading the decision as a whole it seems they were of the opinion that his lack of credibility meant he had failed to establish F on a balance of probabilities that he had a well-founded fear of being persecuted by reason of his religion, political opinion or membership of a particular social group should he be compelled to return to Libya.

[59] The dissenting minority opinion took a different tack. Advocate Hassim disagreed with the majority's finding on credibility. G While he was constrained to accept that the applicant had lied, committed fraud and used deception to acquire visas, passports and the like, over a period of almost 20 years (the main basis for the majority impugning the applicant's credibility) he was not inclined to reject the applicant's version on that account alone. Firstly, he felt the H evidence relating to the applicant's travel documents was not a material aspect of his claim and thus an insufficient basis to

reject his version of his life and his fear of persecution. Nor, he felt, was the applicant given a proper opportunity by the majority of the RAB to deal with any adverse inferences they sought to draw from his past deceptions. As he saw it, the applicant's lying, bribery and fraud I were done for political reasons and were the means of his survival. He accordingly found that the applicant was 'credible in relation to all core issues relating to his claim'. With that, he reviewed the evidence of the applicant's life, his activities before and after leaving Libya, and concluded that there was a reasonable likelihood that the J

applicant had fled Libya in an attempt to avoid being persecuted for his political opinion. He also found, for reasons upon A which I will expand later, that the charge of theft was trumped up, and taken together with the information on the Libjust website such indicated, in his estimation, that the Libyan authorities would act against the applicant were he forced to return to Libya. The reports of Amnesty International, he felt, provided overwhelming evidence that B political dissidents face persecution in Libya, and in view of that there was a real risk of the appellant facing the same if he were to be returned to Libya.

[60] I will come back to other relevant aspects of the two opinions when I discuss the specific review grounds. Before doing that, it is necessary first to set out more fully the relevant legal C provisions governing the status and rights of refugees in our law, which I paraphrased earlier in this judgment. They were of obvious importance to the decisions of the RSDO and the RAB, and in the final analysis will be dispositive of this application. D

The legal position in relation to refugees

[61] On 6 September 1993 the South African government and the United Nations High Commissioner for Refugees (UNHCR) concluded an agreement in relation to the policy regarding asylum seekers and E refugees in South Africa. After that, in 1996, South Africa acceded to the United Nations Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol. In the same year, South Africa became party to the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Protection of 1969. In order to give effect to these newly acquired international obligations, Parliament enacted F the Refugees Act 130 of 1998. The Act provides a new regime and seeks to reflect the principles contained in the various international instruments. The treaties have thus been incorporated into domestic law.

[62] The key provisions of the Act for the purpose of the present matter are ss 2, 3 and 4, to which I have already referred. G They read as follows:

> **2 General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances**
>
> Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, H extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where -
>
> *(a)* he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or I membership of a particular social group; or
>
> *(b)* his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country. J

> **3 Refugee status**
>
> Subject to ch 3, a person qualifies for refugee status for the purposes of this Act if that person - A
>
> *(a)* owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the

protection of that country, or, not having a B nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual C residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in para *(a)* or *(b)*.

4 Exclusion from refugee status

(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she - D

(a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or

(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or E

(c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or

(d) enjoys the protection of any other country in which he or she has taken residence.

[63] Section 3 is the operative provision in determining refugee status. It must be read together with s 2 that entrenches the F international law obligation of *nonrefoulement*. Section 6 provides that the Act must be interpreted and applied with due regard to the two Conventions, the Protocol, the Universal Declaration of Human Rights and 'any other relevant convention or international G agreement to which the Republic is or becomes a party'.

[64] In our constitutional dispensation the Bill of Rights is applicable equally to foreigners (and hence asylum seekers) as it is to citizens. In *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) (2004 (2) BCLR 120) in para 25 the H Supreme Court of Appeal held:

> Human dignity has no nationality. It is inherent in all people - citizens and non-citizens alike - simply because they are human. And while that person happens to be in this country - for whatever reason - it must be respected, and is protected, by s 10 of the Bill of Rights. I

[65] In terms of s 8(1) of the Constitution the duties imposed by the Bill of Rights are binding on the RSDO and the RAB, both being organs of State exercising public power and performing a public function. By the same token, their decisions are administrative action as defined in s 1(i) of PAJA. Likewise, to the extent that they are obliged to interpret J

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legislation and the Bill of Rights they must promote the spirit, purport and objects of the Bill of Rights and consider A international law, in terms of s 39 of the Constitution.

The grounds of review

[66] The applicant grounds his various causes of action on the relevant provisions of s 6 of PAJA, which for all intents and purposes concretely embodies the constitutional right to just administrative B action, and codifies and supplants the common-law grounds for judicial review - *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) para 25. C

[67] In para 19 of his founding affidavit the applicant submitted that the decision of the RAB to reject his appeal should be set aside because:

19.1.1 I was not afforded a fair hearing on the matter;

19.1.2 the appeal board was not properly constituted and it was not authorized to hear my appeal;

19.1.3 the decision was materially influenced by errors of law; D

19.1.4 the decision was not rationally connected to the information before the decision-maker;

19.1.5 the decision was taken because irrelevant considerations were taken into account and relevant factors were not considered;

19.1.6 the decision was so unreasonable that no reasonable decision-maker could have come to the same decision; and E

19.1.7 the decision was unconstitutional and unlawful.

19.1.8 the decision maker showed bias and prejudice towards me.

[68] He made similar general submissions with regard to the decision of the RSDO, except there is no allegation that the RSDO was not properly constituted. F

[69] Mr *Arendse*, who appeared for the respondents, seized upon the generality of the grounds and submitted that insufficient factual and legal basis for the attack had been made out in the papers. Relief can only be granted in an application where the order sought is clearly indicated in the founding and other affidavits and is established by satisfactory evidence in the G papers. The basis for relief must be fully canvassed and the party against whom such relief is to be granted must be fully apprised that relief in a particular form is being sought and be given the fullest opportunity of dealing with the claim - *Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 112D - F. Similarly, it is well established that applicants are obliged to make out their case in the H founding affidavit and the prevailing practice is to strike out matters in replying affidavits which should have appeared in founding affidavits - *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 368H. I

[70] At first glance there is some merit in Mr *Arendse*'s submission, especially insofar as it concerns the attack upon the decision of the RSDO. Beyond the allegation that the RSDO acted under the dictation of Interpol officials, few other facts are alleged or averments made in the supporting affidavit regarding the other review grounds of alleged J

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unfairness, irrationality and unreasonableness. The point loses some of its force, however, when regard is had to the A supplementary affidavit filed in terms of rule 53 (4), which added to the supporting affidavit once the rule 53 record had been filed. There the applicant made much of the fact that the record delivered was inadequate for the reason that it comprised one set of documents, and not two. The applicant accordingly maintained that the failure or B inability of the first and fifth respondents to file separate and distinct records was clear evidence of their failure to apply their minds properly. If the decision-makers were not able to identify what documentation was served before them and which documents (such as the Amnesty International reports) were taken into account when making the decision impugned, that in and of itself, he argued, would be a reason C to set aside the decisions. The allegation is made that the RSDO failed to take into account the documentation and thus failed to apply her mind to the application and ignored relevant information. Because the fifth respondent did not file an answering affidavit she has not D denied these allegations. The unanswered allegations of acting under dictation and a failure to properly consider the application therefore do indeed establish sufficient basis for the relief sought on the grounds that the RSDO violated the applicant's constitutional and statutory rights to reasonable, rational and procedurally fair administrative action. (It was intimated in argument that the denials of the second respondent might be extended to the fifth respondent. That cannot be so. One person cannot make an affidavit E on behalf of another. The second respondent can only depose to matters in his own knowledge - *Gerhardt v State President and Others* 1989 (2) SA 499 (T) at 504G.)

[71] I am similarly, if not more, persuaded that a proper factual basis was laid in the supporting affidavit and the F supplementary affidavit for the relief sought in relation to the RAB decision. Beyond the general grounds, the applicant averred that the two bases of the impugned decision were vitiated either by procedural unfairness, material errors of law and fact, and a failure of the RAB to apply its mind to the relevant considerations in the documentation provided to it, particularly that relating to the human rights G situation in Libya. In paras 172 and 173 of the supporting affidavit the applicant complained firstly that his credibility was rejected in circumstances where he

was not cross-examined and no evidence, which he was apprised of, was led suggesting that his version of events was false, and secondly that the finding by the majority that he did not I qualify for refugee status because of s 4(1)*(b)* of the Act was wrong in law and fact. His expressed approval of the minority decision amounts to an alignment with the factual findings of Adv Hassim that the charges were trumped up and were not enough to exclude him from refugee status. Added to that there are several other statements interspersed throughout both affidavits alleging variously bias, irrationality and a failure of discretion. There can be little question that the first and second respondents were fully apprised that relief in a particular form was being sought and that they had the fullest opportunity to deal with it in their answering affidavit. Moreover, as I have already intimated, where new material was introduced in reply, the J

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respondents could have relied upon the principle enunciated in *Sigaba v Minister of Defence and Police and* A *Another* (supra) to seek leave to file additional affidavits in the sure likelihood that such leave would have been granted.

The human rights situation in Libya B

[72] In the supplementary affidavit the applicant placed much emphasis on the fact that he furnished the RAB, among other documentation, with the Amnesty International Country Condition Reports in support of his belief that he will suffer persecution on account of his political opinion if forced to return to Libya. Referring to the absence of any noteworthy discussion of this material in the majority C decision, and its exclusion from the rule 53 record, he underlined that this relevant information was for the most part ignored by the first and fifth respondents. His assertion is not denied by either the RAB or the RSDO. It must therefore be held that such information was in fact ignored. The fuller implications of that for the reviewability of the decision, if not immediately self-evident, will become clear later. D I turn now though to consider the content of that information.

[73] Serendipitously, the same evidence was placed before the SIAC earlier this year in *DD and AS v Secretary of State for the Home Department* (supra). As in the present case the commission had to decide whether the two appellants, both Libyans, could lawfully E be returned to Libya. The appellants argued that, due to their political views, they held a well-founded fear of being persecuted if they were returned. Despite finding that both appellants were extremists with links to al-Qa'eda, supportive of terrorist violence and a threat to UK national security, and thus not protected by the F refugee conventions, the SIAC refused to sanction their return to Libya on the grounds that to do so would involve a breach of the UK's obligations under the European Convention for Human Rights, in particular the provisions prescribing detention, torture and unfair trials. The judgment includes a detailed, analytical and objective synthesis of the general human rights situation prevailing in Libya at the present time. It is drawn from and paraphrases a variety of G authoritative and reputable sources, including the Country Condition Reports of Amnesty International and the US State Department which were furnished to the RAB in this matter.

[74] It is unnecessary to regurgitate the full analysis and conclusions of the SIAC. The judgment is of public record. It is H permissible to refer to it and take cognisance of its findings in accordance with the principle stated in *Kaunda and Others v President of the Republic of South Africa and Others* (supra). Reference will be made to the pertinent conclusions of relevance to this case. That most of the background material on Libya is not I controversial is reflected in an Operational Guidance Note issued by the UK Home Office in October 2006 for use by its decision-makers. It is cited in para 137 of the judgment and states:

> The following human rights problems were reported in 2005: inability of citizens to change the government; torture, poor prison conditions; J

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> impunity; arbitrary arrest and incommunicado detention; lengthy political detention; denial of fair public trial; infringement A of privacy rights, severe restriction of civil liberties - freedom of speech, press, assembly and association; restriction of freedom of religion; corruption and lack of government transparency; societal discrimination against women, ethnic minorities, and foreign workers; trafficking in persons and restriction of labour rights. B

The Guidance Note concludes:

> The Libyan government continues to be repressive of any dissent and opposition. Islamic activities are generally not allowed to operate on any substantial scale within the country. If it is accepted that the claimant has in the past been involved in opposition political activity C or is a radical Islamic activist for one of the opposition political or Islamic groups mentioned above then there is a real risk they will encounter state-sponsored ill-treatment amounting to persecution within the terms of the 1951 Convention. The grant of asylum in such cases is therefore likely to be appropriate.

[75] The SIAC held that these statements can safely be assumed to D reflect the UK government's views of the state of affairs in Libya.

[76] The US State Department Report for 2005 records that although Libyan law prohibits torture, security personnel routinely tortured prisoners during interrogations or as punishment. The reported methods of torture include chaining to a wall for hours, clubbing, electric shock, breaking fingers and allowing the joints to heal E without medical care, suffocating with plastic bags, deprivation of food and water, hanging by the wrists, suspension from a pole, cigarette burns, threats of dog attacks, and beatings on the soles of the feet.

[77] With regard to the rights to fair trial and detention the SIAC referred to a text of Professor Mansour El-Kikhia describing the F People's Court as a distinctively unjust feature of the criminal justice system. Introduced in 1988 (the year the applicant fled Libya), it was separate from the mainstream judiciary. It was totally unaccountable, hearings were held in private, often in the absence of defendants, with no right to a lawyer or notification of the G charge. It is notorious for its politically motivated judgments and biased trials. Notwithstanding its formal abolition in 2005, Human Rights Watch has reported that an ad hoc revolutionary court was used recently in the retrial of 85 Muslim Brotherhood members. H

[78] One feature of trial-related practice is incommunicado detention. Many political detainees, including Islamists, were so held for unlimited periods and often in unknown places, mainly in Abu Salim prison (SIAC judgment para 152). It will be recalled that the applicant's undisputed testimony is that his friend and mentor, Khalid Hingari, was killed in Abu Salim prison. According to the SIAC, Abu I Salim is located in a compound of the Military Police in a suburb of Tripoli and has an unusual status among Libyan prisons: it is run by the Internal Security Organisation and not the Ministry of Justice. In practice it operates independently and reports to Colonel Qadhafi. In April 2004 Colonel Qadhafi acknowledged that killings had taken place at Abu Salim. J

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The applicant claims 800 were killed. Others have put the figure at 1 200. There is evidence that riots broke out at the prison in A October 2006 as well. In that instance the authorities were more restrained with only one prisoner being killed, but with many others being injured, mostly from bullet wounds.

[79] The following conclusions of the SIAC (paras 301 - 305) are B relevant to assessing the current human rights situation in Libya:

- Torture is extensively used against political opponents, among whom Islamist extremists and LIFG members are the most hated by the Libyan Government, the Security Organisations and above all by Colonel Qadhafi. It is practised for the purposes of obtaining C confessions for use in trials against the confessor or other defendants; it is used in intelligence gathering. There is also evidence that it is used for punishment.

- The judicial system is clearly marked by a lack of judicial independence, stemming both from the practice and acceptance of political interference and hostile attitudes towards the government's political opponents.
- The system of government is designed to procure the survival of the current government, and it does so by repressing the expression and organisation of dissent in a variety of ways, whether that dissent is that of a secular non-violent opponent or that of the violent Islamist.

The reviewability of the RSDO decision

[80] I turn now to consider the reviewability of the decision of the RSDO. In the answering affidavit the RAB contended that it is only the decision of the RAB which falls to be reviewed. The RAB holds the standpoint that the appeal to the RAB in terms of s 26 of the Act constitutes a hearing *de novo* and on that account the applicant should be precluded from reviewing the decision of the RSDO. The view is not entirely accurate. It is obvious that the appeal to the RAB is an appeal in the wide sense, seeing as the provisions of s 26(3) permit the RAB before reaching its decision to invite representations from the UNHCR and to call for additional evidence from other sources. That the RAB is an appellate body, as opposed to a body of original jurisdiction, is also beyond doubt, if only by virtue of its designation and its powers in s 26(2) 'to confirm, set aside or substitute' - such customarily being appeal powers. But these characteristics alone should not operate to justify a denial of natural justice by the 'trial' body. As Megarry J put it in *Leary v National Union of Vehicle Builders* [1970] 2 All ER 713 (Ch) at 720*c*:

> If a man has never had a fair trial by the appropriate trial body, is it open to an appellate body to discard its appellate functions and itself give the man the fair trial that he has never had? I very much doubt the existence of any such doctrine.

The principle in *Leary* was considered to have been stated too categorically by Nicholas AJA (as he then was) in *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union* 1995 (1) SA 742 (A) at 756I - J where he held in essence that no general rule can be laid down in this

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regard. Much depends on the context: the nature of the adjudicative process and the extent of irregularity. As Botha J put it in *Van Garderen NO v Refugee Appeal Board* (unreported decision, TPD case No 30720/2006 of 19 June 2007):

> Irregularities committed by the RSDO are relevant to the extent that they have not been overtaken by or cured in the proceedings before the RAB.

[81] The undisputed evidence is that Interpol brought pressure to bear on the RSDO to render a negative decision in respect of the applicant's application for asylum. On 26 March 2004 the applicant was taken by two officers from Interpol to the RSDO who told him on arrival that she had a decision ready for him and that Interpol had insisted that she prepare a negative decision. None of this has been denied by the respondents. Section 6(2)*(a)*(iii) of PAJA provides that a court has the power to judicially review an administrative action if the administrator who took it was biased or reasonably suspected of bias. The evidence indicates that the applicant was justified in reasonably apprehending that the negative decision rendered by the RSDO was the result of external influence, that she took the decision acting under dictation and thereby wholly compromised her impartiality and independence, even though she afforded the applicant a further opportunity to make representations. A defect of this kind wholly vitiates the decision and is not a procedural irregularity of the kind that can be cured on appeal. It is a total failure of the proper exercise of an independent and impartial discretion. On that ground alone the decision of the RSDO must be set aside. Not only is the decision tainted by bias it is also reviewable under s 6(2)*(e)*(iv) of PAJA on account of the decision having been taken because of the unauthorised or unwarranted dictates of another person.

[82] Although the applicant in his founding papers challenged the decision of the RSDO on the grounds that irrelevant considerations were taken into account and relevant considerations not considered, the point was not pressed in argument. The fact that he might or should have sought or obtained refugee status in Pakistan is not relevant to G the inquiry mandated by s 3 of the Act. On receipt of the application for asylum the RSDO was obliged to conduct an investigation into whether the applicant had a well-founded fear of persecution in Libya and because of that fear is outside of Libya and is unable or unwilling to avail himself of the protection of Libya, the country of his nationality. Similarly that she regarded his involvement to be limited H to 'a simple engagement and involvement in student political activity' for which the death penalty did not apply, means that she gave not much consideration to his association with the Muslim Brotherhood while he was in Libya or to his activities and associations in Pakistan, Afghanistan and Iran between 1988 and 2001, and I particularly his flight from Pakistan after 9/11.

[83] By focusing her attention in a limited way upon the credibility of the applicant's reasons for leaving Pakistan, the RSDO appears not to have given consideration to any risk of torture, detention or an unfair trial that J

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the applicant might face in Libya. The applicant's submission in the supplementary affidavit that she ignored the A documentation handed to her in support of that contention has not been denied. The absence of any specific reference to the Country Condition Reports in her written decision lends credence to the inference that she paid them little heed. Finally, her questionable declaration that the applicant's deportation from Indonesia was illegal would seem also B to be an irrelevant consideration, albeit that the extent of its influence upon her is uncertain. All these factors taken together leave little doubt that her decision was fatally vitiated by irregularity and must be set aside.

The reviewability of the decision of the RAB C

[84] The applicant contends that the decision of the RAB was similarly flawed by bias and procedural irregularity. The allegation of bias has two legs. It is not in dispute that on the morning of the second hearing the second respondent met separately with Interpol officials. The second respondent is correct that, in terms of s 26(3)*(c)* and *(d)*, the RAB has the right to D request the attendance of any person able to provide it with relevant information and of its own accord may make further inquiry or investigation. As I have said, the failure by the second respondent to seek leave to file additional affidavits in response to the version put up by the applicant's attorneys leave me persuaded that the meeting with Interpol endured for about 20 minutes and went beyond E introductions and an exchange of courtesies. Still, there is no conclusive evidence that the second respondent acted under dictation. Nor that he was put on guard by any complaint that the RSDO had acted under dictation. Where the second respondent erred, however, is that when he convened the hearing he failed to place on F record the content of his prior discussions with Interpol and did not afford the applicant's legal representatives an opportunity to raise any issues in that regard. His conduct and omissions do not justify a finding that he was actually biased in the sense that he approached the issues with a mind which was in fact prejudiced or not open to conviction. Regretfully though, the shortcomings in his conduct gave G rise to a reasonable perception of bias that might have been overcome had he explained to the applicant the powers of the RAB under s 26(3) and disclosed the content of the separate discussions and his purpose in holding them. The events of the morning of the second hearing gave rise to a reasonable apprehension that some of the members of the RAB H might not bring an impartial mind to bear on the adjudication of the case, especially when the applicant and his legal representatives were further aware that the second respondent had been engaged in telephonic discussions with Mendes prior to the hearing, the content of which had not been disclosed to them. I

[85] The perception of bias is strengthened to some degree by the strenuous opposition put up by the first and second respondents to this application. The RAB is an adjudicative tribunal. All its members are members of the International Association of Refugee Law Judges. They are administrators tasked with quasi-judicial functions. J

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[86] Rule 7 of the Rules of the Refugee Appeal Board (enacted in terms of s 14(2) of the Act and promulgated in GG 25470 of 26 A September 2003) provides that in any appeal before it the appellant and the Department of Home Affairs are the parties to the appeal. The Minister and Director-General of Home Affairs were cited and served as the third and fourth respondents in this review application, but from the record I am unable to ascertain any involvement of the B Department of Home Affairs in the appeal before the RAB. The State attorney delivered a notice of intention to oppose on behalf of all the respondents, including the Minister and the Director-General. However, only the second respondent deposed to an answering affidavit and did so explicitly on behalf of the RAB and himself. In para 3 of the affidavit he makes the following rather curious C statement:

> I depose hereto only on behalf of the first and second respondents. I am advised that the third and fourth respondents oppose this application on the basis that they are jointly responsible for institutions and processes established under the Act. I am advised that the third and fourth respondents are duty bound to protect the integrity of the first respondent. D

Whatever the beneficial aspects of the structural relationship between the RAB and the Department of Home Affairs, there is more than one problem with this approach. Firstly, s 12(3) of the Act provides that the Appeal Board must function without bias and must be E independent. Not only must it be impartial in its decision-making, it must also be structurally independent. Secondly, once again, the second respondent cannot make an affidavit on behalf of the Minister or the Director-General. They, not he, are required to set forth the basis of their opposition to the application - *Gerhardt v State President and Others* (supra). Thirdly, and most importantly for the purposes of F the present discussion, the strenuous opposition conducted by the RAB, the adjudicative functionary, on behalf of one of the parties to the appeal before it, the Department of Home Affairs, the successful party, compromises its independence and adds force to the applicant's legitimate or reasonable apprehension of bias. G

[87] In *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others* 1999 (1) SA 324 (Ck) ([1997] 4 All SA 363) at 353F - I (SA) Pickard JP made the following comments, with which I respectfully agree, in relation to opposition put up by a tender board: H

> The perception of bias may quite possibly be enhanced by another factor which appeared to the Court to be somewhat unusual.
>
> Unlike what normally occurs in review matters of this nature, the tribunal (the Board) has in this case offered extremely strenuous opposition to the review proceedings. I have great difficulty in understanding why. I
>
> It is almost standard practice that an independent tribunal such as the Tender Board would in review proceedings comply with the requirements of rule 53 of the Uniform Rules of Court by making available the record of its proceedings and its reasons and such other documentation as the Court may need to adjudicate upon the matter and, if necessary, to file an affidavit setting out the circumstances under which the . J

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> decision was arrived at. It seems, however, unusual to me that an independent tribunal such as the Tender Board should file A such comprehensive and lengthy papers and offer such stringent opposition by employing senior counsel and the like to argue their case. More often than not independent tribunals, having done their duty in terms of the provisions of rule 53, take the attitude that they abide the decision of the Court and leave the other matters to the interested parties to dispute before the Court. . . . Regrettably B this attitude of the Board in this case may well be to some extent support for a suggestion that they are not entirely independent and disinterested.

[88] Taking these facts and circumstances together I am persuaded that the applicant has made out more than a prima facie case that the RAB was reasonably suspected of bias within the meaning of s 6(2)*(a)*(iii) of PAJA. The RAB's assertions of fairness C and the absence of actual bias fail to address satisfactorily the reasonable apprehension of bias on the part of the applicant. On that ground alone its decision falls to be set aside under s 8 of PAJA. D

[89] The applicant has challenged the decision of the RAB on other procedural grounds, most important among them being one relating to the finding regarding the applicant's credibility, the procedural dimension of the issue being the failure by the RAB to raise its concerns or assumptions in respect of credibility during the hearing in order to give the applicant an opportunity to deal with it. I will discuss this aspect together with the substantive issue later. At this E stage it may be said that any procedural defect of this kind invariably will colour the quality of the substantive decision.

[90] The applicant has trenchantly criticised the RAB's misinterpretation of the nature of its functions as an appellate body. As already expl`ained, because of the RAB's powers to gather additional F evidence, the intention of the legislature was to confer upon the RAB an appellate jurisdiction in the wide sense, meaning that it is not bound to pronounce upon the merits within the four corners of the record of the RSDO. An ordinary appeal is one where the appellate body is confined to the record of the body appealed against. A wide appeal G is one in which the appellate body may make its own enquiries and even gather its own evidence if necessary - *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 592A - E. In both kinds of appeal the primary function is one of reconsideration of the merits of the decision in order to determine whether it was right or wrong, or perhaps vitiated by an irregularity to the extent that H there has been a failure of justice. Where the appellate body is placed in exactly the same position as the original decision-maker it will be able to correct lesser irregularities and will enjoy a power of rehearing *de novo*.

[91] In para 12.3 of his answering affidavit, the second respondent stated: I

> The hearing of an appeal by the Board is in the nature of a *de novo* hearing. In other words, the decision of the RSDO is not the subject of the hearing at all. For all intents and purposes, whatever happened before the RSDO is ignored. None of the evidence and/or information . J

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> placed before the RSDO is placed before the Board, unless there is agreement with appellant's legal representative that in order A to save time or narrow the issues, the new information/evidence before the RSDO should also serve before the Board. The latter was not the case here.

He made like comments in his opening remarks at the commencement of B both hearings.

[92] I agree with Mr *Katz*, counsel for the applicant, that the second respondent has misconstrued and misstated the function of the RAB. The scheme of the application process is clearly formulated in the Act. Where the RSDO rejects an application for asylum in terms of s 24(3)*(c)*, the asylum seeker may lodge an C appeal against that decision to the RAB in terms of s 26(1). Section 26(2) provides that the RAB, after hearing the appeal, may confirm, set aside or substitute the decision of the RSDO. The interplay between the wording of s 24(3)*(c)* and s 26 makes it clear that a reconsideration of the RSDO decision is required. The RAB must determine the asylum seeker's appeal by reconsidering the RSDO D decision, which decision it may confirm, set aside or substitute. Notwithstanding the fact that the Act envisages an appeal in the wide sense, the RAB is still required to have regard to the proceedings and the evidence adduced before the RSDO. Any failure to do that opens it to the charge that it ignored relevant considerations. E

[93] Mr *Katz* goes further than that. He submitted that the RAB's failure to consider the correctness of the RSDO decision meant it had committed a material error of law and had acted beyond the powers conferred by the Act with the result that its decision falls to be set aside on those grounds under s 6(2)*(a)* and s 6(2)*(f)*(i) of PAJA. I accept

without hesitation that the second respondent has made an error of F law causing him not to appreciate the true nature of the discretion or power conferred upon him. But I do not accept that as a result of his misconception he failed to exercise the discretion or power conferred upon him. Because of that, his error was not material or reviewable. The record shows that despite his statements and mistaken assumption he G reviewed relevant evidence, entertained the submissions of the applicant and confirmed the RSDO's decision to reject the application. As I have said, the RAB seems not to have had the benefit of any evidence or submissions from the Department of Home Affairs. It did though elicit the evidence of Interpol, something it was entirely within its rights to do in terms of s 26(3). Accordingly, I am not of H the view that the error *materially* influenced the decision as to make it reviewable, nor do I accept that the decision was, as a result of the misconception, one not authorised by the empowering provision. The decision to confirm the RSDO decision, though perhaps not adequately informed by the earlier proceedings, was authorised. I That said, there may be value in adding a note of caution: had the misconception not occurred the RAB might have looked at the RSDO decision more carefully and by being alerted to its deficiencies would have structured its own decision with fuller cognisance of relevant considerations that ultimately it appears to have ignored. J

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[94] The second error of law alleged by the applicant has different consequences. It relates to the appropriate standard of proof A applicable in the determination of whether an applicant has a 'well-founded fear' of persecution in order to qualify for refugee status under s 3*(a)* of the Act. Whether or not the applicant had a well-founded fear was the primary question for determination before the RSDO. Although she mentioned 'the objective background information' on Libya, she did not analyse or discuss it, B and concluded that the applicant had no well-founded fear of persecution because his political life was restricted to 'a simple engagement and involvement in student political activity'. It was this finding that the RAB was called upon in the first instance to reconsider. However, the tenor and line of reasoning pursued in the second respondent's written decision indicates that he was C primarily concerned to determine whether the exclusion clause in s 4(1)*(b)* of the Act applied to disqualify the applicant from refugee status. Though it might have been better to have determined the threshold question first, there is nothing inherently wrong with such an approach. It does, however, offer an explanation for D and insight into the line the second respondent followed in determining whether the applicant had a well-founded fear of persecution.

[95] After setting out the background information, the applicant's account of his life story and the law, the second respondent commenced his analysis and his reasons for his findings E with the following remark:

> The Board will confine its findings in this matter to whether the exclusion clause is applicable and the appellant's credibility in order to determine if the appellant qualifies for refugee status.

Nowhere in his decision did he explicitly pose the question whether the applicant had a well-founded fear of persecution in Libya, nor did he indicate an intention to reconsider the finding of the RSDO that the F applicant had failed to discharge the onus upon him to prove a well-founded fear of persecution.

[96] The closest the second respondent came to the question is in para 50 when, after finding that the exclusion clause did indeed apply, he stated: G

> Counsel for the appellant has submitted, and this is the crux of the appellant's case, that his reason for fleeing Libya is based on political opinion. Should this be decided on in the alternative the Board, before it can determine the principal issues in this matter, must first make an assessment of the appellant's credibility. H

He went on to say that the credibility of an appellant is usually the main factor in establishing whether there exists a well-founded fear of persecution. In para 52 he then found:

> The standard of proof for assessing evidence is on a balance of probabilities. In the matter *Orelien v Canada (Member of Employment and Immigration)* [1992] IFC 592 (CA) at 605 it was I stated: 'One cannot be satisfied that the evidence is credible or trustworthy unless satisfied that it is probably so, not just possibly so.'

Earlier in his judgment, after referring to the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* and the fact that the J

burden of proof lies on the asylum seeker, he said that '(t)he standard of proof is *real risk* and must be A considered in light of all the circumstances, ie past persecution and a forward-looking appraisal of risk'.

[97] The RAB's finding that the applicant was required to prove a real risk on a balance of probabilities is not correct. The appropriate standard is one of 'a reasonable possibility of persecution' - see *Immigration and Naturalization* B *Service v Cardoza-Tonseca* 480 US 421 (1987) at 440. Two decisions of this division have concluded similarly, namely *Fang v Refugee Appeal Board and Others* 2007 (2) SA 447 (T) and *Van Garderen NO v Refugee Appeal Board* (supra). In the latter Botha J stated:

> In my view by simply referring to the normal civil standard, the RAB C imposed too onerous a burden of proof. It is clear . . . that allowance must be made for the difficulties that an expatriate applicant may have to produce proof. It is also clear that there is a duty on the examiner himself to gather evidence.

Later in the judgment the learned judge added:

> All this confirmed my view that the normal onus in civil proceedings is inappropriate in refugee cases. The inquiry has an inquisitorial D element. The burden is mitigated by a lower standard of proof and a liberal application of the benefit of doubt principle.

[98] These dicta, with which I respectfully agree, are premised upon the provisions of paras 196 and 197 of the *UNHCR Handbook*, which read: E

> 196. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and F there may be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should be given the benefit of the doubt.
>
> 197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. G Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

[99] The application by the RAB of the normal civil standard was thus an error of law and one which caused it not to exercise its H discretion properly. The materiality of the error is interwoven with the approach the RAB took to the evidence, and particularly the credibility of the applicant.

[100] In para 33 of his decision the second respondent mentioned that he had due regard to the objective background I information on Libya as well as the documentary evidence tendered by the appellant and Mendes on behalf of Interpol. There is no discussion of 'the objective background information' in the judgment, nor any reference to the specific findings in the Country Condition Reports, by way of a 'forward looking appraisal of risk' of the prospects of torture, detention and unfair trials. J

The second respondent focused rather on four affidavits of support, to none of which he attached much weight or significance. A One of the affidavits makes mention of the Libjust website and included the profile of the applicant on it. Given the damning

content of the write-up, the second respondent's assessment of it is puzzling. He dismissed its relevance by simply stating: B

> Presently the current Libjust.com website is a British commercial website and bears no relevancy to the appellant.

[101] Having effectively discounted the evidence of the applicant's associates in exile in Europe, the second respondent turned to examine the credibility of the applicant. His reasoning is set out in paras 53 - 59 of his decision as follows: C

> [53] The Board is not impressed with the appellant's testimony. By his own admissions he is a liar and a person who does not hesitate to commit fraud and bribery to suit his own needs and purposes. It is one thing to lie or to commit fraud in order to flee from a country where one is facing persecution but it is quite another to continue with lies, bribery and fraud when this is not required in D order to protect yourself for a period of approximately fifteen years.
>
> [54] When the appellant travelled from Saudi Arabia to Pakistan he obtained a visa from the Pakistani authorities to enter Pakistan. He could very easily have obtained an extension of this permit or visa to E remain in Pakistan but instead the appellant chose to have fraudulent entries made in his passport. When his passport's validity expired the appellant had it extended by way of a fraudulent entry in his passport and when his passport could not be extended any longer he acquired a false Libyan passport.
>
> [55] Although the Canadian Federal Court of Appeal in *Marcel Simon Chang Tak v Minister of Employment and* F *Immigration* A-196-87, March 8, 1988 recognised that failure to make a claim for refugee status does not raise an issue of credibility if it can be explained, such failure can show the implausibility of an appellant's evidence. *In casu* when asked why he did not apply for refugee status in Pakistan the appellant replied that he did not think it was necessary. Wherever the appellant went after leaving G Pakistan he failed to apply for asylum despite the position he found himself in according to his evidence. The Board does not accept this as being reasonable and finds this implausible.
>
> [56] Before leaving Pakistan the appellant obtained false Moroccan passports for himself and his family. His wife was not a wanted person and presumably possessed a valid Algerian passport. The H appellant was not asked why his wife needed a false Moroccan passport seeing that she did not travel with him to Iran and the question goes begging unfortunately.
>
> [57] To enter Iran the appellant bribed his way in. Instead of applying for asylum the appellant was prepared to be incarcerated for six months by the Iran authorities. After being released and flying to I Malaysia and Indonesia the appellant acquired a false South African passport to allegedly enable him to travel to Australia or New Zealand.
>
> [58] It is evident from the appellant's testimony that he is not a person who is used to the truth. For a period of approximately 15 years the J

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> appellant elected to lie, bribe and commit fraud to further his life-style when he had ample opportunity to legalise his position A by applying for asylum in a number of countries before being deported to South Africa. The appellant's evidence is implausible. The Board does not accept that the appellant is telling the truth now and consequently finds that he is not a credible witness. In the light thereof the Board does not need to analyse the evidence further in order to reach its decision. B
>
> [59] The Board finds that the appellant has not discharged the burden of proof which rested on him.

[102] The applicant cannot deny, nor has he attempted to, that he survived the past 20 years through lying, bribery and deception. The exclusive source of the testimony establishing his web of lies and deceit is the applicant himself. He truthfully told the RAB about the C nature and extent of his dishonesty. His evidence on that score was candid, consistent and coherent. Two preliminary observations can be made here: firstly the fact that the applicant has in the past lied to the authorities in Pakistan, Iran, Malaysia, Indonesia, South Africa and Libya does not per se exclude him from refugee status in terms of D s 4 of the Act or any other provision or principle of law. Secondly, the fact that a witness has been untruthful on one or other aspect on another occasion does not mean that he was untruthful in relation to the enquiry at hand, or that his entire testimony should be rejected on E account of any admitted untruth. The credibility and reliability of his testimony for the purpose of establishing whether he has a well-founded fear of persecution must be weighed looking at the inherent probabilities, the presence or absence of external or internal contradictions, its consistency or otherwise with the other evidence, his candour and overall performance in testifying, and so on. The objective facts must be examined to decide if a well-founded fear F exists. And for that purpose it will usually not be enough to rely

almost exclusively on the evidence of the asylum seeker only to reject his claim of fear of persecution because he has previously lied while living, for whatever reasons, on the margins or in the shadows of a legal existence.

[103] Within the context of a review of the RAB decision, as opposed to an appeal, there are a number of difficulties, amounting to G irregularities, with the RAB's assessment of the applicant's credibility and the consequences of it.

[104] Firstly, when viewed against the objective facts available about the applicant's life, his associations after leaving Libya and H the human rights situation currently prevailing in Libya, it seems that an overreliance on the applicant's life of deception operated to exclude consideration of other more relevant factors. Secondly, the applicant was never apprised during the hearing that his past dishonesty would be used to make an adverse finding to discount the I credibility and reliability of the account he gave of his life, activities and associations that underpinned his apprehension of persecution. Thirdly, the failure to have previously sought refugee status does not raise a credibility issue, and in fact amounts to an irrelevant consideration, if it can be explained, as it was, by the absence of any need of protection against *refoulement*. The need J

for refugee status became most compelling for the applicant on fleeing from Pakistan after 9/11. Before that he received informal A protection from the tribal chiefs who exert considerable influence and control in the Peshawar area. Fourthly, the assessment of credibility was predicated exclusively on the historical account provided by the applicant. The applicant was not cross-examined on his credibility so as to expose any inconsistency, contradiction or incoherence in that B historical account. The RAB accepted the applicant's version about his lies and fraud, but did not explain why it rejected other aspects such as his association with the Muslim Brotherhood, *Al Jabba Al Watania Li Inqaad Libya* and Khalid Hingari, and the damning account of his activities described on the internet. C

[105] In the supporting and supplementary affidavits the applicant challenged the credibility finding stating that it was inexplicable, bearing in mind that he was not cross-examined, that no countervailing evidence of any kind was presented to the RAB and that his version stood uncontradicted. The only response to this in the answering affidavit is the statement that the negative credibility D finding was based on the applicant's own testimony. In his replying affidavit the applicant admitted to lying in order to avoid being sent back to Libya where he faced persecution, but stated that the second respondent was not in a position to deny his version. He invited the members of the RAB to explain to the court, prior to the hearing of E the application, exactly what allegations they disbelieved. The second respondent did not take up the invitation, and accordingly one is compelled to accept that the applicant was in fact associated with the Muslim Brotherhood, *Al Jabba Al Watania Li Inqaad Libya* and Khalid Hingari while in Libya and that he did what he said he did in F Pakistan and while on the move thereafter.

[106] Had the RAB given careful consideration to this evidence, as well as the fact that the applicant arrived in Peshawar at exactly the time the LIFG was established there, shortly after the intensification of political repression in Libya, in 1988, as evidenced by the establishment of the People's Court in that year, that the G Pakistanis had shut down the Foundation of which he was the Director and that he had been on the run ever since, it might reasonably have concluded, having regard to the past patterns of persecution, and taking a forward-looking appraisal of risk, that the applicant faced a reasonable possibility of persecution. In the final analysis, the H impression is inescapable. The misplaced over-reliance on its questionable and procedurally flawed credibility finding and the application of the incorrect standard of proof caused the RAB to ignore the more relevant considerations of the human rights situation, the objective evidence of the applicant's association with the Libyan Islamist opposition and the obvious risk such entailed for him if returned to Libya. I

[107] The finding of Adv Hassim that the applicant's deception was probably done for political reasons and could not reasonably be used to make an adverse credibility finding for the purpose of assessing whether he had a well-founded fear of persecution accords with the applicant's J

own explanation. The fact that he has so lied, and his reasons for doing so, ironically perhaps, are relevant considerations A to be kept in account in assessing his apprehension. He lied, bribed and deceived precisely because he had an apprehension that he would be persecuted if returned. The majority of the RAB ignored this.

[108] Mr *Arendse* has pressed upon me the admonition not to blur the lines between appeal and review by indulging in a B review of substantive reasonableness. The applicant, he argued, was, in effect, seeking an appeal on the merits. In review proceedings, he submitted correctly, deference towards the RAB decision, and its institutional specialist nature, is essential. Such deference is certainly salutary when reviewing the exercise of power or functions C under s 6(2)*(h)* of PAJA on the grounds of reasonableness, when the courts should take care not to usurp the functions of administrative agencies - *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (supra) in para 45. However, the grounds of review raised by the applicant in this matter do not target the substantive reasonableness or the rational D relationship between the purpose, evidence and reasons for the decision. They are directed more at the dialectical aspects of the decision-making process, the issues of natural justice and the failure to consider relevant considerations. The applicant's case is that the decision-making process was flawed. The fact that an irregular process most likely produced an irrational or unreasonable decision cannot be E avoided. But that is not the challenge posed by the applicant and hence there is no need to examine whether the decision cleared the minimum threshold requirement of rationality or reasonableness, and, if so, to defer to it. The decision is dialectically flawed and that is sufficient to set it aside. F

The criminal charge of theft and exclusion from refugee status under s 4(1)*(b)* of the Act

[109] The applicant has challenged the RAB's finding that he is excluded from refugee status in terms of s 4(1)*(b)* of the Act on two fronts: firstly that it made an error in law in finding that G the alleged crime fell into the disqualifying category; and secondly it was factually mistaken in finding that there was reason to believe that the applicant had committed the crime when it was in fact trumped up in response to the application for asylum. H

[110] Section 4(1)*(b)* provides that a person does not qualify for refugee status for the purposes of the Act if *there is reason to believe* that he or she has committed a crime which is not of a political nature and which if committed in South Africa would be punishable by imprisonment. The crime allegedly committed by the applicant in 1985 was designated in the supporting documentation, particularly the *note verbale*, to be the crime of 'theft'. I The RSDO without much elaboration stated in her reasons: 'The Applicant's claim is unfounded as it relates to a criminal activity as opposed to a political activity.' The RAB provided a clearer and fuller consideration of the question, and its conclusions on the matter form the principal reason for its decision to reject the applicant's claim. J

For understandable reasons it relied largely, if not exclusively, on the evidence of Mendes. It held that the request made A by Libya to Interpol to apprehend the appellant for the crime of 'theft of gold' was 'irrefutable evidence' and that:

> Accordingly the Board has no other option but to find that there is reason to believe that the appellant committed a non-political crime of B such a serious nature that if it had been committed in the

Republic it would be punishable by imprisonment. Section 4(1)*(b)* of the Act is thus applicable and the Board finds that the appellant does not qualify for refugee status.

[111] There is ample precedent on the approach a court or tribunal should follow when deciding whether 'there is reason to believe' that C an objective state of affairs exists. The phrase places a much lighter burden of proof on a party than, for instance, 'a court is satisfied' - *Trust Bank van Afrika Bpk v Lief and Another* 1963 (4) SA 752 (T). The reason to believe must be constituted by facts giving rise to such belief, and a blind belief or a belief based on such information or hearsay evidence as a reasonable D man ought or could not give credence to, does not suffice - *Native Commissioner and Union Government v Nthako* 1931 TPD 234 at 242. There must be facts before the court or tribunal on which it can conclude that the applicant for asylum committed a non-political crime punishable by imprisonment in South Africa. One must ask therefore whether the facts put up by Mendes, and E regarded as irrefutable evidence by the RAB, were sufficient to constitute a reasonable belief that the crime had been committed. Put in another way, for there to be a reason to believe a crime was committed there must be a belief based upon reason and an objective factual basis for the reason. It will not be enough that the second F respondent thought he had reason to believe - *Hurley and Another v Minister of Law and Order and Another* 1985 (4) SA 709 (D) at 717A. The phrase thus imposes a jurisdictional precondition that there must exist a reasonable basis for the factual conclusion that the applicant committed a crime before the discretion to exclude can be exercised. Absent a reasonable basis, the exercise of power must be set aside. G

[112] The first point taken by the applicant is that the alleged crime does not fall into the category of *serious* crimes contemplated by s 4(1)*(b)*. The provisions of s 4(1)*(b)* do not explicitly introduce a requirement of *seriousness* beyond the condition that the crime must warrant a sentence of imprisonment. Though counsel did not make the argument, H the point could be taken that the specific inclusion of the prerequisite of a sanction of imprisonment excluded *ex contrariis* any other requirement or dimension of seriousness, such as the nature of the crime or an element of violence - *inclusio unius est alterius exclusio*. Counsel for the applicant, however, has urged for a more I contextual approach by having regard to the provisions and intention of the treaty, that is, the UN Convention Relating to the Status of Refugees. The approach is expressly mandated by s 6(1) of the Act providing that the Act must be interpreted and applied with due regard to the Convention, and s 39(1)*(b)* of the Constitution obliging courts when interpreting the Bill of Rights to J

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consider international law. Article 1F of the Convention deals with exclusion on the grounds of criminality. The relevant A provisions read:

> The provisions of this Convention shall not apply to any person with respect to whom there are *serious reasons for considering* B that:
>
> *(a)* . . .
>
> *(b)* he has committed a *serious* non-political crime outside the country of refuge prior to his admission to that country as a refugee. . . .

[113] In passing, it is noteworthy that the condition precedent of 'serious grounds for considering' sets the bar somewhat higher than the standard of 'reason to believe' in the Act. The evidence supporting the belief should be compelling, and hence courts and tribunals in South Africa should consider giving meaning to the latter C with reference to and reliance upon the former.

[114] Returning to the issue at hand, the expressed intention in the *ipssima verba* is that only serious crimes justify exclusion or disqualification. In Hathaway *The Rights of Refugees Under International Law* (2005) at 349 the learned author, an D acknowledged expert in the field, in relation to art 1F*(b)* comments as follows:

> Serious criminality in this context is normally understood to mean acts that involve violence against persons, such as homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery.

[115] The theft of gold would not fall into the category justifying exclusion; but theft in which violence or the threat of E violence is used to induce the possessor of the gold to submit to its taking, and where that is achieved through the aggravating circumstance of a firearm (armed robbery) would. Documents accompanying the warrant and the *note verbale* introduced by Mendes during his testimony, forming part of the rule 53 record, reveal that Libyan law F draws a distinction between theft and aggravated theft. The latter is committed, by using violence against things and contemplates the use of weapons. The *note verbale* does not refer to aggravated theft, only theft.

[116] It follows accordingly that both the RSDO and RAB applied the incorrect test of 'seriousness' to exclude the applicant from G refugee status, meaning that the rejection of the applicant's application for refugee status was materially influenced by an error of law resulting in the power of exclusion being improperly exercised, for, among other reasons, there was no reason to believe that a serious crime had been committed. Since the Libyan government has not alleged H the commission of violence, and Mendes did not testify to the use of any violence, there is no reason to believe that a serious crime was committed. The decisions of both the RSDO and the RAB consequently fall to be set aside under s 6(2)*(a)* of PAJA as well.

[117] Mr *Katz* also advanced the argument that because the alleged theft was committed during May 1985 it may not be I prosecuted in South Africa because of the 20-year prescription period laid down in s 18 of the Criminal Procedure Act of 1977. It followed, in his view, that the offence was not punishable in South African law and that the relevant precondition in s 4(1)*(b)* was thus absent. Section 18 of the Criminal Procedure J

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Act provides that 'the right to institute a prosecution for any offence' (other than specified serious offences) lapses after A the expiration of a period of 20 years from the time when the offence was committed. In view of the decision to which I have come, it is unnecessary to pronounce definitively on whether the right to prosecute had lapsed under our law. The evidence on the steps taken by the Libyan authorities is in any event not full or clear. For what it is worth, I B tend to agree with Mr *Arendse*, given the date of the *note verbale* issued in 2004, that the Libyans must have taken at least some steps at that time to constitute prosecution. A decision on the part of the prosecuting authorities, conveyed to the accused in a formal manner that he is to be prosecuted, would to my mind amount to the institution of a prosecution - *Minister of Law and Order v Kader* C 1991 (1) SA 41 (A) at 51E - G. That means the prosecution by the Libyan authorities was most likely instituted within the 20-year period.

[118] Finally, I think there is much to support the applicant's contention that the charge against him was trumped-up by the Libyan authorities so that the applicant would be refused asylum and returned D to Libya. The majority decision of the RAB failed entirely to deal with the evidence and allegations in that regard. Under cross-examination Mendes conceded that he was not in a position to critically analyse the documentation received from Libya and that he was not in a position to gainsay the applicant's evidence about his fear of persecution. Nor E could he explain why the South African authorities had not consented to Libya's request for the applicant's extradition.

[119] The RAB's almost exclusive reliance on the evidence of Mendes as irrefutable amounted to it failing to give consideration to two pertinent facts that raise a doubt about whether the crime was F committed, and coincidentally add to the reasonable possibility that the applicant risks persecution. The first is that if Libya was indeed serious about the allegations concerning the gold theft it would have issued a red notice to Interpol. The second is that there is no reference on the Libjust website to the fact that the applicant was sought for that particular crime. Much of the information in the G write-up on the applicant is accurate. If the applicant was a genuine theft suspect, one would have expected to see a reference to that effect.

[120] Moreover, the pronouncements on the general human rights situation by the SIAC, Amnesty International and Human Rights Watch add H credence to the trumping up of charges by the Libyan authorities as a distinct possibility. The SIAC drew attention to the spurious case against the Bulgarian nurses (that lasted for eight years and which has attracted international condemnation), known as 'the Benghazi trial'. I These accused were charged with deliberately infecting children with the HIV virus. During the trial Luc Mentagnier, the co-discoverer of the HIV virus, testified that the children were probably infected as a result of poor hygiene and many had been infected before the arrival of the foreign medics. Despite that, the accused were convicted and sentenced to death on charges quite evidently trumped up. Even though he was in J

possession of all this information the second respondent did not discuss it or appear to take it into consideration in any A meaningful way. In the result, his belief that the crime was committed was not based on reason or an objective factual basis. There is no reasonable basis for his factual conclusion.

[121] In his dissenting decision Adv Hassim went to considerable length to explain why he believed the charge against the applicant was B trumped up and why his colleagues had erred in their finding that the crime had been committed. Paragraphs 49 - 51 of his decision are illuminating. They read:

> [49] The bundle of documents submitted by the Libyan authorities C includes a detailed investigation diary relating to case 134/1985 opened in 1985. It also includes a diary of investigation opened by the Libya authorities on 17 December 2003 outlining how a certain Mr Abdelbari Abdallah Husien Al Failung returned from exile and gave details relating to his contact with the appellant while together in overseas. Mr Abdelbari clearly states that the Appellant mentioned that he [the appellant] was involved in the gold theft in 1985. This D investigation continued until 20 December 2003. Thereafter the matter was referred to the office of the Attorney General on 29 December 2003. A warrant of arrest dated 28 December 2003 was issued for the immediate arrest of the appellant. What is interesting to note that it was only after this investigation which commenced on 17 December 2003 did the Libyans authorities allege that they came E to know that the appellant was the person involved in the criminal offence of gold theft that allegedly took place in 1985. Strangely a letter from the Libyan Embassy in Pretoria, South Africa dated 11 December 2003 [a copy of the letter was submitted to the Board by Interpol, Wits Law clinic as well as the Department of Home Affairs] clearly states that the appellant is a Libyan national and is wanted in F Libya for a criminal charge of robbery to finance terrorist activities.
>
> [50] Therefore, to summarise, the Libyan government according to its own evidence in the warrant of extradition documents clearly states that the first occasion it had any knowledge whatsoever of the Appellant Mr Tantoush having committed the crime of gold theft was on G 17 December 2003 when Mr Abdelbari was questioned yet strangely its offices in Pretoria issued a letter on 11 December 2003 stating he is wanted for the offence of gold theft to fund terrorist activities. It is a manifest contradiction in their testimony. It is critical to peruse the aforementioned documents submitted in this matter by the Libyan authorities in order to deduce that the charges H against the appellant were indeed fabricated.
>
> [51] This evidence clearly shows that there was an apparent engineering of documents in a desperate attempt to have the appellant extradited to Libya on the basis of a trumped up charge. I

[122] The logic and rationality of this reasoning is persuasive. What is surprising is that the majority decision made no effort to give a different gloss to the contradictory evidence referred to or the inference drawn, leading me to deduce that the majority for reasons unknown preferred to ignore it. J

[123] In a note filed subsequent to the hearing Mr A *Arendse* made two points about this issue. Firstly he pointed out that counsel had not cross-examined Mendes on the documentation, and secondly the diary referred to had in fact been opened on 16 May 1985. I am not sure that the second point disposes of the finding that the Libyans stated they, first knew that the appellant committed the crime on 17 December 2003, but that the Pretoria embassy had B earlier issued a letter on 11 December 2003 saying that he was wanted. As for the first point, Mendes admitted knowing nothing

about the merits and Adv Hassim in any event reached his conclusion on his own analysis of the documentary evidence. The only relevant facet of all of this, in the context of the present review, is that the failure C by the majority to deal with the contradictory evidence raises a further question as to the reasonableness of its belief that a crime had been committed.

[124] For all the foregoing reasons the decisions of the RAB and the RSDO on the operation of the exclusion clause must be set aside. D

Substitution

[125] In addition to setting aside the decisions, the applicant seeks to have this court substitute them and grant the applicant refugee status. As mentioned at the beginning, s 8(1)*(c)*(ii)*(aa)* of PAJA empowers a court in E exceptional circumstances to substitute its own decision for that of the administrative body instead of remitting it for reconsideration.

[126] In deciding whether to substitute a court normally considers whether further delay will cause an applicant unjustifiable prejudice, whether the original decision-maker has exhibited bias and incompetence, and whether remitting the matter will result in a F foregone conclusion. Furthermore, the court should practically be in a position to take the decision. Considerations of fairness may in a given case also require the court to make the decision itself provided it is able to do so - *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* G 2002 (6) SA 606 (SCA) ([2002] 4 All SA 145) in paras 14 - 15; *Gauteng Gambling Board v Silver Star Development Ltd and Others* 2005 (4) SA 67 (SCA) in para 28; and *Johannesburg City Council v Administrator, Transvaal, and Another* 1969 (2) SA 72 (T) at 75H - 77C. H

[127] Exceptional circumstances justifying substitution exist in this instance. Both the decision-makers a quo exhibited bias and the uncertainty surrounding the appellant's fate should not be allowed to continue indefinitely. In *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C) (2003 (8) BCLR 920) at 65C - H (SA) the prejudice caused by delay was considered to be an exceptional circumstance sufficient to justify substitution. I

[128] Most importantly, from the evidence before me I am able to determine whether the applicant has a well-founded fear of persecution, and in view of what has gone before fairness dictates that I do so. J

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[129] The uncontradicted evidence is that the applicant was influenced in Libya by the teachings of the Muslim Brotherhood, aligned A with *Al Jabba Al Watania Li Inqaad Libya* and participated in the dissemination of anti-Qadhafi propaganda. He left Libya in 1988. Libya witnessed an intensification of political repression in 1988 with the introduction of the People's Court by the security apparatus. Although the court was abolished in 2005, there is evidence that quite B recently 85 members of the Muslim Brotherhood are on trial before an ad hoc revolutionary court (see para 148 of the *SIAC* judgment).

[130] While the applicant disavows any connection to the LIFG, frankly I doubt he has furnished the complete picture. He arrived in Pakistan at the very place the LIFG was established, at the very time C it was established. He worked for an organisation that the Pakistani government closed down immediately after 9/11. He was forced to flee Pakistan in the face of a crackdown by Pakistani authorities aimed primarily at al-Qa'eda elements and their associates, which according to Amnesty International was extended indiscriminately to D persons of Arab origin on the northwestern frontier. Before arriving in Pakistan and after leaving it, the applicant was financially assisted by Libyan and Egyptian exiles. There may be truth in his statement that he benefited from Muslim charity (*zakat*); more likely he was assisted by compatriots who shared his political and religious convictions. In 1989 he was helped with his move from Saudi Arabia to E Pakistan and given a job in an Islamist foundation. After fleeing with others

to Iran in 2001, Libyans negotiated his release and facilitated his move to Malaysia and Indonesia, where Islamist opposition has given rise to security concerns, such perhaps being a factor in his arrest there. From these facts a legitimate and plausible inference might be F drawn that if not actually a member or associate of the LIFG or its affiliates, the applicant is perceived to be so aligned, and as the page from the Libjust website and the trumped-up charges reveal, that perception persists in Libya.

[131] However, in fairness, it must be kept in mind that the applicant's denial of membership of the LIFG or that he has engaged in G terrorist activities stands uncontradicted. Mendes confirmed that he was not aware of any allegations of terrorism against the applicant. During his initial interrogation in South Africa, both US and British intelligence officers were in attendance. Had there been any evidence of terrorist activity, no doubt the Department would have put that H information before the RAB in order to exclude the applicant from refugee status under s 4(1)*(a)* or *(c)* because there was reason to believe he had committed a crime against peace or was guilty of acts contrary to the objects and principles of the UNO or the OAU. The fact that there may be reasonable grounds to suspect that he might have associated with elements of the LIFG is not sufficient to I show that he is an al-Qa'eda supporter or a threat to national security here or elsewhere. The observations of Mr Justice Ouseley in *DD and AS v The Secretary of State for the Home Department* (supra) in para 33 on this point are worth repeating. He said: J

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> We accept that it is not possible to conclude from the evidence that the mere fact of LIFG membership shows that an individual is A necessarily a global jihadist or Al Qa'eda supporter. The real focus of the analysis of that aspect of the national security risk is not therefore simply on whether the individual is an LIFG member, but is on what an individual LIFG member has done and may do in the future, taking account of what is known of his outlook and with whom he associates. B

[132] In the face of the applicant's uncontested denial of membership or association, there is therefore at most, in the light of his history, a reasonable suspicion that he might have been associated, and as such not even a prima facie case. In support of that suspicion is the strong possibility that, facing an uncertain future C and the prospect of returning to Libya, he thought best to put some distance between himself and the LIFG by admitting only to a less dangerous involvement. Whatever the case, one fact is certain: his recent travails through Iran, Malaysia and Indonesia on fleeing Pakistan suggest he has not escaped the taint or stigma arising from a perceived association with the LIFG and al-Qa'eda. One imagines he knows that all too well, and that is why he is afraid to be sent back D to Libya. He has a well-founded fear of being persecuted for his political and religious affiliations.

[133] The fact that the applicant is a member of a loose grouping of political and religious dissidents whose members are regularly detained, tortured and unfairly prosecuted in Libya, and that E he faces trumped-up charges, renders it axiomatic that on his return to Libya he will be detained in an institution like Abu Salim, where there is a real risk, more than a reasonable possibility, that he will be subjected to cruel and inhumane treatment. F

[134] Section 6(1)*(d)* of the Act requires the Act to be interpreted and applied with due regard to any other relevant conventions or international agreements to which the Republic is or becomes a party. By 'due regard' is meant the giving of serious consideration. Article 3 of the Convention Against Torture, to which South Africa became a party on 10 December 1998, provides: G

> 1. No State party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State H concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

[135] The *nonrefoulement* obligation under both the Torture Convention and s 2 of the Act are central to the question of substitution, if only on account of the RAB not having given due regard to it. Objectively there is a consistent pattern of gross, flagrant and I perhaps mass violation of human rights in Libya; and subjectively the evidence establishes conclusively that the applicant has engaged in activity within and outside of Libya over the past 20 years, including his application for asylum, which makes him vulnerable to the risk of being placed in danger of torture J

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were he to be returned to Libya. The primacy of the *nonrefoulement* obligation was underscored by the ultimate A conclusion of the SIAC in *DD and AS v The Secretary of State for the Home Department* (supra). It held that DD was not entitled to refugee status under the Refugee Convention because of his terrorist activities, but despite the risk he posed to UK national security he could not be returned because of the *nonrefoulement* B obligation. It closed at para 430 of the judgment with the following salutary declaration:

> We have given this decision anxious consideration in view of the risks which the Appellants could face were they returned (to Libya), and those which the UK, and individuals who can legitimately look to it for protection of their human rights, would face if they were not. We C must judge the matter . . . by considering only the risks which the Appellants could face on return, no matter how grave and violent the risks which, having chosen to come here, they pose to the UK, its interests abroad, and its wider interest. Those interests at risk include fundamental human rights. D

[136] There is no evidence that the applicant poses any grave or violent risk to South Africa, but like the SIAC, the courts and relevant authorities here are equally if not more constrained by the wider interest of our treaty and constitutional obligations to avoid *refoulement* in the face of the risk of torture. E

[137] For all those reasons, the applicant should be granted refugee status and there is no basis for excluding him under s 4 of the Act on account of there being no reason to believe he is guilty of any of the proscribed conduct.

[138] Before finalising this matter I would like to express my appreciation to counsel, Mr *Katz* and Mr *Du* F *Plessis* for the applicant, and Mr *Arendse SC* with Mr *Matjila* for the respondents, who produced most comprehensive and well-documented argument supported cogently with the relevant authorities. Their combined efforts have been of great service to the court. G

[139] In the result, the following order is made:

1. The decision of the Refugee Appeal Board taken on or about 12 December 2005, rejecting the applicant's appeal in terms of s 26 of the Refugees Act 130 of 1998 against the decision of the Refugee Status Determination Officer in a letter made known to the H applicant on 15 March 2006, in which his application for refugee status and asylum was denied, is declared to be inconsistent with the Constitution of 1996, unlawful and invalid; and is hereby reviewed and set aside.
2. The decision of the Refugee Status Determination Officer taken in March 2005, rejecting the applicant's application for refugee I status and asylum, is declared to be inconsistent with the Constitution of 1996, unlawful and invalid; and is hereby reviewed and set aside.
3. The applicant is declared a refugee who is entitled to asylum in South Africa as contemplated by ss 2 and 3 of the Refugees Act. J

MURPHY J

4. The respondents shall bear the costs of this application, including the costs of two counsel, jointly and severally, the one A paying the other to be absolved.

Applicant's counsel instructed by *Wits Law Clinic*, Johannesburg; *Lawyers for Human Rights*, Pretoria. B

C

TIKLY AND OTHERS v JOHANNES NO AND OTHERS 1963 (2) SA 588 (T)

Citation	1963 (2) SA 588 (T)
Court	Transvaal Provincial Division
Judge	Trollip J
Heard	February 28, 1963
Judgment	March 28, 1963
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

D Land - Group Areas Development Act, 69 of 1955, as amended - Affected property - Determination of basic value of - Appeal to revision court under sec. 19 (5) - Nature of - Complete re-hearing and re-determination.

Headnote : Kopnota

An appeal to the revision court in terms of section 19 (5) of the Group Areas Development Act, 69 of 1955, as amended by section 15 of Act 81 of E 1959, from a determination of the final basic value of affected property in terms of section 19 (4) *(a)* of the Act, consists of a complete re-hearing and re-determination by the revision court of the basic value: 'appeal' is used in the section in the wide sense, i.e. in the sense of a complete re-hearing of, and fresh determination on the merits of the matter, with or without additional evidence or information. All parties concerned have the fullest right to adduce evidence in respect of the F basic value which is the subject of the appeal. The revision court can have regard to the fact that the valuators have determined the basic value at a particular figure, and that it is a valuation to which the revision court can have regard if there is no other evidence placed before it contradicting it. The weight to be attached to the valuators' valuation by the revision court in its determination of the basic value in terms of section 19 (5) of the Act is for the revision court itself to decide. After hearing evidence the revision court has to make its own determination of the basic value on all the evidence adduced before it. G

Case Information

Application for a declaratory order. The facts appear from the reasons for judgment.

W. Oshry, Q.C. (with him *G. Bizos* and *I. Mahomed)*, for the applicants.

J. J. Trengove, Q.C. (with him *T. H. van Reenen)*, for the respondents.

H *Cur. adv. vult*.

Postea (March 28th).

Judgment

TROLLIP, J.: The applicants are the owners of a certain property in Pietersburg. The area within which it is situate was on the 4th March,

TROLLIP J

1960, declared a group area for White ownership and occupation with the result that the property became affected property within the meaning of sec. 1 of the Group Areas Development Act, 69 of 1955, in as much as it was owned and occupied by persons belonging to the Indian Group. In due A course it was placed on the list of affected property compiled under that Act, and the committee of valuators appointed in terms of sec. 19 (2) determined its final basic value at R29,000. Thereupon the applicants lodged an appeal against that determination in terms of sec. 19 (4) *(a)*. The revision court, appointed in terms of the Act, sat at Pietersburg on the 15th October, 1962, to hear the applicants' and other B appeals. The first three respondents are the members of that court. At the hearing the applicants and the fourth respondent, the Group Areas Development Board (to whom I shall refer as 'the board') were represented by counsel.

At the very outset of the hearing a dispute arose between the applicants C and the board as to the proper function of the revision court in regard to the 'appeal'. That dispute was debated before and heard by the revision court and the parties sought its ruling thereon. The applicants contended that the 'appeal' was an appeal in the wide sense of the word, being a complete re-hearing of the issue that had arisen concerning the D final basic value of the affected property, and a re-determination by the revision court itself of that value. The board contended that the 'appeal' was a review (in the strict sense) of the valuators' determination in which the revision court's function was confined to determining merely whether or not the valuators had exercised their powers properly and honestly in determining the final basic value. That E was in essence the main dispute between the parties, but in the course of canvassing it before the revision court the parties also raised collateral issues such as the weight that had to be given by the revision court to the valuators' valuation.

On the 16th October, 1962, the revision court gave its ruling which is recorded in the copy of the proceedings annexed to the petition.

F That ruling was fundamental to the nature of the revision court's proceedings. It applied not only to the applicants' appeal, but would, of course, have applied too to all the other appeals that were then and are still pending before the revision court. It was consequently agreed between the parties that the question of the correctness of that ruling G should be submitted immediately to this Court for its decision. The revision court itself was naturally anxious that that should be done, and adjourned its proceedings for the purpose. Hence the present application in which the applicants claim certain declaratory orders.

Although the revision court has not yet given its final decision on the H merits in the applicants' appeal, I think that this Court can and, in the circumstances, should hear and decide this application now. Generally the Court will not entertain review proceedings of the present kind until the inferior tribunal has pronounced its final decision upon the merits. The main reason for that rule is probably that the final decision might correct the irregularity in the proceedings complained of, or might cure any prejudice that the aggrieved person has thereby sustained. But, as appears from the authorities cited by Mr. *Oshry* for the applicants, this Court is entitled to intervene at any stage to correct

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TROLLIP J

the pending proceedings before the inferior tribunal if, in the particular circumstances, that is necessary or convenient for the purpose of doing justice between the parties (*Eliovson v Magid*, 1908 T.S. 558 at pp. 561, 566; *Rascher v Minister of Justice*, 1930 T.P.D. 810 at p. 820; *Wessels v General Court Martial*, 1954 (1) SA 220 (E) A at pp. 221H - 222 C). That requirement is manifestly complied with in the present case.

The revision court's ruling was ambiguous. Indeed, the applicants asserted in the present proceedings before this Court that the revision B court had ruled against their contentions and they accordingly claimed appropriate declaratory orders; whereas the board maintained before me that the ruling was in the applicants' favour and against it, and as such it was erroneous. With the consent of the parties, the chairman of the

revision court, the first respondent, was prevailed upon to clarify the ruling by affidavit. He explained that the ruling meant:

C *(a)* that all parties concerned had the fullest right to adduce evidence in respect of the basic value which was the subject of the appeal;

(b) that the revision court could have regard to the fact that the valuators had determined the basic value at a particular figure, and that it was a valuation to which the revision court could D have regard if there was no other evidence placed before it contradicting it;

(c) that after hearing evidence the revision court had to make its own determination of the basic value on all the evidence adduced before it.

E It then appeared that the ruling as amplified had in regard to *(a)* and *(c)* been in favour of the applicants and against the board on their main contentions, and in favour of the board and against the applicants in regard to *(b)*.

The crux of the dispute is the correct construction of sec. 19 (5), as amended by sec. 15 of Act 81 of 1959. It reads:

'An appeal lodged in terms of sub-sec. (4) shall be heard by a revision F court consisting of a magistrate or retired magistrate and two assessors appointed by the Minister which shall determine the basic value of the affected property, and its determination shall be final.'

The word 'appeal' can have different connotations. In so far as is relevant to these proceedings it may mean:

G (i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information (*Golden Arrow Bus Services v Central Road Transportation Board*, 1948 (3) SA 918 (AD) at p. 924; *S.A. Broadcasting Corporation v Transvaal Townships Board and Others*, 1953 (4) SA 169 (T) at pp. 175 - H 6; *Goldfields Investment Ltd v Johannesburg City Council,* 1938 T.P.D. 551 at p. 554);

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong (e.g. *Commercial Staffs (Cape) v Minister of Labour and Another*, 1946 CPD 632 at pp. 638 - 641);

(iii) a review, that is, a limited re-hearing with or without additional

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TROLLIP J

evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly (e.g. *R v Keeves*, 1926 AD 410 at pp. 416 - 7; *Shenker v The Master*, 1936 AD 136 at pp. 146 - 7).

A Mr. *Oshry* contended that the 'appeal' under sec. 19 (5) meant the procedure in (i), whilst Mr. *Trengove*, for the Board, maintained that it was (iii) or alternatively (ii).

The sense in which 'appeal' was used in the section must be determined from its context in the Act.

B The Act provides that the board must compile a list of all affected properties in any duly proclaimed area, recording therein, *inter alia,* 'the basic value' of the land and buildings thereon in respect of each property (sec. 15 (1) as amended). The 'basic value' means the market value of the land immediately prior to the 'basic date' (i.e. the date of the proclamation) and the value of the buildings C thereon, as determined under the provisions of the Act.

The determination of the basic value is of considerable importance to the owner and the board. If the property is subsequently sold, expropriated, or removed from the list with the board's consent for a D consideration exceeding the basic value, the owner is

obliged to pay or to account to the board for an 'appreciation contribution', whereas if the consideration is less than the basic value the owner generally becomes entitled to a 'depreciation contribution' from the board, the contribution in each case being regulated on the difference between the E consideration and the basic value (secs. 20 (5), 21, 23, 24; *Down v Malan, N.O. en Andere*, 1960 (2) SA 734 (AD) at p. 740 G - H).

Consequently, elaborate provision is made in sec. 19 (as substituted by sec. 15 of Act 81 of 1959) and the regulations for determining the basic value. The Act provides that this value is first determined provisionally by a valuator or valuators appointed by the Minister. They F then notify the board, owner and mortgagee thereof, and call for written objections. If no objections are lodged, the provisional basic value becomes final. If objections are duly lodged, the valuators after considering them must then make a final determination. Any final determination made after considering objections is subject to appeal which has to be lodged with the Minister, otherwise it remains final. Then there is sec. 19 (5), quoted above, which relates to the hearing of the appeal.

G I think that those provisions of the Act indicate clearly that 'appeal' in that context is used in its wide sense as described in (i) above, that is, a complete re-hearing and re-determination by the revision court of the basic value. The reasons for that conclusion are as follows:

H 1. According to sec. 19 (4) the appeal is 'against such determination' by the valuators; and on that appeal sec. 19 (5) requires that the revision court 'shall determine the basic value of the affected property'. That language is clear and unambiguous. In other words, the appellant by his appeal submits that the valuators' determination is incorrect, and in consequence, the revision court has itself to determine the correct value, and not merely to ascertain whether the valuators exercised their powers

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of discretion honestly and properly. That effectively eliminates the appeal being a review in the sense set out in (iii) above. (See, for example, *Golden Arrow Bus Services'* case, *supra* at p. 924; *Dickinson* v. A Valuation Court, Vereeniging and Others, 1944 T.P.D. 83 at p. 92).

2. Although the valuators are obliged to receive and consider written objections, their duties and functions are in essence those of a valuation and not of a judicial or semi-judicial proceeding (cf. *Down's* B case at p. 743 A - F). In particular, sec. 19 does not oblige them to hear evidence, to hear any party orally, to give any reasons for their determination or to keep any record of their proceedings. Those functions alone militate completely against the 'appeal' being an appeal in the strict sense as described in (ii) above (see *Johannesburg Consolidated Investment Co. Ltd v Johannesburg Town Council*, 1903 T.S. C 111 at p. 119; *Shenker's* case, *supra* at p. 147; *S.A. Broadcasting Corporation's* case, *supra* at p. 175E - H; *Lambert v Director of Census*, 1956 (3) SA 452 (T) at p. 458 A - C).

3. As there is no record of the valuators' proceedings, the revision court must itself receive all relevant information or evidence tendered D in respect of the basic value. That such a procedure was envisaged is also borne out by the reference to the tribunal as a court, the appointment of a magistrate or ex-magistrate as chairman, and the duty imposed on the court to 'hear' the appeal, and having heard it to determine the basic value itself. That shows that the appeal is a E complete re-hearing in the sense described in (i) above. (See *S.A. Broadcasting Corporation's* case at pp. 174 - 5; *Pretoria-Noord Dorpsraad v Bolter*, 1950 (3) SA 453 (T) at pp. 456 - 7; *Pietermaritzburg Corporation v SA Breweries Ltd.*, 1911 AD 501 at p. 513; and generally the *Goldfields Investment* case, *supra)*.

F The regulations enacted under sec. 36 by the Minister support this conclusion. That section empowers the Minister to make regulations as to the powers, functions and duties of valuators, the procedure relating to the determination of the basic value, and the procedure governing hearings and determinations by the revision court (sub-secs. (1) *(c), (g)* and *(i))*. The regulations so enacted do not constitute the valuators G as a court of record, and do not indicate that their duties and functions are anything other than a mere valuation. It is true that reg. 6 *(e)* empowers them to take evidence on oath where they think that that is necessary, but in the absence of any duty to record that evidence, it H would appear that the object of that regulation is merely to induce the person being questioned to speak the truth where they suspect he might otherwise lie, and not to impress the valuators' proceedings with a semi-judicial character.

On the other hand the regulations do confirm decisively that the appeal to the revision court is an appeal in the widest sense described in para. (i) above. For example, reg. 20 provides that the parties may appear by counsel or attorneys; that

> 'unless otherwise agreed . . . the appellant shall first adduce evidence and thereafter the other parties to the appeal may adduce evidence',

and that addresses to the court shall also be in that order; that with the revision court's leave further evidence can be adduced at any time before the appeal is determined; and that generally

> 'the law of procedure in civil proceedings in a magistrate's court shall *mutatis mutandis* apply in respect of all proceedings of a revision court'.

A That elaborate procedure for a trial hearing of an essentially judicial character could not have been designed merely for an appeal or review *stricto sensu*.

Moreover, reg. 22 provides that the basic value, as determined by the revision court, would be recorded in the list of affected properties. That confirms that the revision court's duty is to determine the basic B value itself.

My view, therefore, is that the appeal under sec. 19 (5) is a complete re-hearing of the matter as described in (i) above. It follows that the ruling of the revision court set out in *(a)* and *(c)* above is correct. I shall deal with *(b)* presently.

C Mr. *Trengove* contended that because under the original sec. 19 the valuators' decision was final subject only to the Common Law review by the Court, the intention of the Legislature under the amended section was merely to endow the revision court with an expeditious and summary power of review that the Court had previously exercised. I think, D however, that it is far more probable that the Legislature, realising the drastic consequences of the finality of the valuators' valuation, decided, in view of the importance to the owner, mortgagee and board of the basic value, to afford them an opportunity of a re-hearing and re-determination of the basic value through a judicial hearing if they E felt aggrieved by the valuators' determination. The language of the amended section proclaims that such was the intention of the Legislature.

Mr. *Trengove* further relied on the word 'revision' in relation to 'court' to show that the purpose of the appeal was to revise the valuators' judgment and that the procedure was therefore a review. That F argument is untenable. The revision court's functions on the appeal is to 'revise' the valuators' determination, but only in the sense of having to determine itself the basic value, and not merely to ascertain whether the valuators have acted honestly and properly.

Mr. *Trengove* relied heavily on *Shenker's* case, *supra*, for the contention G that the 'appeal' was merely a review. Sec. 34 (2) of the Administration of Estates Act empowers the Master to appoint 'such person as he deems fit and proper to be executor dative'; and sec. 107 provides that, *inter alia*, every appointment by the Master was subject to 'appeal to or review by' the Court which could confirm, set aside or vary it. In *Shenker's* case the Appellate Division held that in relation H to an appointment under sec. 34 (2) 'appeal' means in effect merely a review of the Master's appointment because sec. 34 (2) committed that appointment so entirely to the

Master's discretion that it could never have been contemplated by the Legislature that the Court could and should under sec. 107 re-try the merits of the appointment and substitute its own appointment for that of the Master (pp. 146 - 7). That decision, therefore, turned on the particular wording of the Administration of Estates Act. In the present case, in my view, for the

TROLLIP J

reasons given above, sec. 19 and the regulations clearly enact that the revision court on appeal must rehear the matter on the merits and substitute its own determination for that of the valuators. *Shenker's* case is therefore obviously distinguishable.

A One of the main reasons for the dispute was the uncertainty of the weight that the revision court should give to the valuators' valuation. The applicants prayed for a declaratory order that in determining the basic value the revision court was not entitled to have any regard to the determination made by the valuators unless evidence of such determination was duly adduced before them (prayer A (2)). The attitude B of the revision court is set out in para. *(b)* of its above-mentioned ruling.

The fact and the amount of the valuators' valuation, of course, need not be formally proved because the valuation would be in evidence before the C court by reason of the appeal. The weight to be attached to that valuation by the revision court in its determination of the basic value in terms of sec. 19 (5) is, in my view, for the revision court itself to decide. But it may be of some guidance to the revision court if it bears the following observations in mind.

As already stated, the valuators do not record their proceedings or the D reasons for their valuation. Consequently, the only information that would ordinarily be before the revision court would be the amount of the valuation. If either the appellant or any other party, or the revision court, itself, wished to rely upon that valuation, he or it would generally have to call the valuators, or one of them, to testify in support of that valuation. For that purpose, they or he could be E subpoenaed or ordered by the revision court to submit to examination in terms of reg. 20 (2) *(c)* and (3). They or he could then give the facts and reasons for their valuation and could be cross-examined thereon. The revision court would then be in a position to decide what weight to give to that valuation. Without the valuators or one of them testifying in F support of their valuation the revision court would ordinarily not be able to give any weight to that valuation. That would be the general approach. But occasionally it might happen that the appellant failed to appear to prosecute his appeal, or if he appeared, he might not adduce any evidence, or evidence worthy of any consideration, contradicting the G valuators' valuation. In those cases, because the valuation appealed against would not be in effect seriously challenged, the revision court could accept, on the principle *omnia praesumuntur rite esse acta*, that the valuators had regularly and correctly determined the basic value, and it could then itself determine the basic value at that amount.

H Support for that approach is to be found in *Dickinson v Vereeniging Valuation Court, supra*, especially at pp. 91 - 93, which was quoted by Mr. *Trengove*.

It follows that in my view the revision court's ruling in *(b)* was also correct. It remains to consider how I should give effect to my conclusions. Substantially the applicants would have been entitled to declaratory orders in terms of prayers A (1) and (3) but not (2). In view, however, of the fact that after the amplified ruling of the revision court was handed in, the proceedings were then directed solely

TROLLIP J

towards determining the correctness or otherwise of that ruling, I think that the best course would be to give an order declaring that that ruling is correct. As the applicants have substantially succeeded, I think that they are entitled to the costs, but I agree with Mr. *Trengove* that the costs in respect of one of the junior counsel briefed by the

A applicants should be disallowed as only senior and one junior counsel were warranted.

An order is therefore granted declaring that the ruling by the first, second and third respondents in their capacity as members of the revision court, as set out in the affidavit dated the 28th February, B 1963, by the first respondent, is correct. The fourth respondent is ordered to pay the costs of the applicants, excluding those relating to the briefing of one of the junior counsel.

Applicants' Attorneys: *Schwartz & Goldblatee*. Respondent's Attorney: *State Attorney*.

C

D

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

30/10/2015

Case No: 7376/14

In the matter between:

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
30/10/2015 DATE SIGNATURE

AFRIFORUM NPC Applicant

And

THE DEPUTY INFORMATION OFFICER OF THE PRESIDENCY	First Respondent
THE MINISTER IN THE PRESIDENCY	Second Respondent
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
THE DEPUTY-PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fifth Respondent
THE MINISTER OF DEFENCE	Sixth Respondent
THE MINISTER OF INTERNAL RELATIONS AND COOPERATION	Seventh Respondent
THE MINISTER OF FINANCE	Eighth Respondent

JUDGMENT

Sutherland J:

Introduction

1. This case is about a request made, on 15 February 2013, by the applicant to the first respondent, the deputy information officer of the Presidency, pursuant to section 11 of the Promotion of Access to Information Act 2 of 2000 (PAIA). The request was refused on 14 April 2013. An internal appeal was lodged on 12 June 2013 and dismissed on 6 August 2013. The applicant thereupon brought this application as contemplated by sections 78 and 82 of PAIA to compel disclosure of the information sought.

2. The request initially made was articulated thus:

> "THE PRESIDENTIAL HANDBOOK- in particular those parts dealing with travel benefits, travel arrangements, private holidays, expenses in respect of private holidays and the use of the presidential aircraft, owned by the South African Air Force in respect of private holidays."

3. Several controversies have arisen:

   3.1. What record was requested by the applicant?

   3.2. What is the jurisdictional nature of an application in terms of Section 78 and 82 of PAIA?

   3.3. Is section 12 of PAIA, as regards the exclusion of cabinet records from the application

of PAIA, unconstitutional?

4. Also, the respondents have tendered to publish the presidential handbook, subject to certain conditions.

5. I deal with each issue in turn.

The Controversy about what has been requested

6. In my view, the controversy about the subject matter of the request has, like the proverbial unruly horse, run amuck and has broken out of, not only the stables, but also leapt the fences around the paddock.

7. Axiomatically, the logical point of departure in every application to compel disclosure of a record would indeed be: what was asked for? PAIA itself leaves no doubt that what may be requested is a 'record'. A record is defined in section 1 as 'any recorded information'. Plainly, PAIA does not facilitate an open interrogation about 'information' more broadly.[1] For example, 'information' about a practice or a course of conduct is not the species of information capable of being requested in terms of PAIA if it is not 'recorded information'. PAIA is not an omnibus device to achieve public accountability from organs of state; it is one of several instruments to do so, in different ways, and PAIA ought not to be construed in a manner to make it perform a role for which it was not designed. [2]

8. To belabour the point, Section 11 of PAIA entitles a requester to a record; however, the

[1] See: Klaaren and Penfold, in Constitutional Law of South Africa, Chapter 62, paras 62.3 and 62.4. The authors quip that the name of the statute might better have been 'Access to *Records'* act.
[2] Other channels include, most obviously, the Promotion of Administrative Justice Act 1 of 2000. (PAJA) and where appropriate, the institution of litigation invoking, where appropriate, directly, the provisions of the Bill of Rights.

request has to conform to the correct procedure as set out in section 18; if not compliant, the request need not be granted. Section 18 stipulates two things of significance for present purposes: first, the request must be the prescribed form, and second, in the words of Section 18(2)(a) the requester must '....provide sufficient particulars to enable an official ....to identify the record..'[3] The emphasis placed on the procedural straitjacket to entitle a requester to the contemplated record is plain.[4]

9. These injunctions contemplate the requester being given exactly what was requested and, in my view, no more than what, reasonably construed, was requested. The *de facto* burden of making sure what, exactly, is being requested, falls on the requester. No apparent reason exists why, in any given instance, if the information disclosed prompts an interest in other or further records, that a series of requests might not take place, subject of course, to the constraints imposed by Section 45(a) against a species of requests described as 'manifestly frivolous or vexatious'.

10. The request articulated by the applicant, as cited above, does not lack clarity. A document is identified by name and by its contents. In my view, the label is *per se* unimportant; what is important is that the description that is given, affords a reasonable official 'sufficient particulars' to identify the document being requested; ie whatever 'record' that exists that

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[3] Section 18 (2) of PAIA provides: "The form for a request of access prescribed for the purposes of subsection (1) must at least require the requester concerned-

(a) to provide sufficient particulars to enable an official of the public body concerned to identify-

(i) the record or records requested; and

(ii) the requester;

[4] See: President, RSA v M & G Media Ltd 2012 (2) SA 50 (CC) at [9] " As is evident from its long title, PAIA was enacted '(t)o give effect to the constitutional right of access to any information held by the State'. And the formulation of s 11 casts the exercise of this right in peremptory terms — the requester 'must' be given access to the report so long as the request complies with the procedures outlined in the Act and the record requested is not protected from disclosure by one of the exemptions set forth therein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception."

contains the information about how the '...travel benefits, travel arrangements, private holidays, expenses in respect of private holidays and the use of the presidential aircraft, owned by the South African Air Force in respect of private holidays' of the President and Deputy-President are conferred on them.

11. The reply given by the first respondent to the request was twofold.

12. First, it was stated that the 'handbook' was a work-in-progress. The essence of the first respondent's stance was, and has remained, that no such document as a 'Presidential handbook' existed at the time the request was made; however, there existed a draft of a contemplated handbook, which, because there was not yet any commitment to its content by the relevant decision makers, who were still soliciting input from several actors, (including the other respondents cited in this application) disclosure of the draft was inappropriate. This stance, it was alleged is consistent with the grounds provided for in section 44(1)(a)(i) of PAIA to justify a refusal to disclose because the draft handbook constituted 'an opinion, advice or recommendation obtained or prepared....' (Additional inappropriate reasons as contemplated in terms of Section 41(1) were also given in the reply, which may be ignored as the respondents, in argument before this court, quite correctly, disavow them).

13. Second, the first respondent was moved to offer additional information to the applicant. It was stated that:

> '4. During 2007, Cabinet made a policy decision that regulates the President and Deputy President's use of public funds for, amongst other things, their travel, accommodation and entertainment. This decision remains a record of Cabinet and in its possession and under its control. The records of Cabinet are excluded from the operation of PAIA by virtue of section 12(a) thereof.
>
> 5. The procedural framework for the implementation of Cabinet's policy decision is to be formulated by the relevant government officials.

6. The Presidential Handbook that your client refers to in its request is a preliminary or draft of the procedural framework referred to in paragraph 5 above. It is still undergoing deliberation by the relevant government officials and their political principals where this is necessary. Once the deliberations are completed, it is envisaged that the procedural framework will be approved and adopted by the accounting officers and where necessary by their political principals. To the extent that the procedural framework impacts upon Cabinet's policy decision, which it inevitably will, the procedural framework will be presented to Cabinet for the Cabinet to approve it or refer it back to the accounting officers for further work. All of the deliberations, candid and full, ought not to be inhibited by a premature disclosure of the draft procedural framework, in the form of the Presidential Handbook.'

14. This information which was disclosed about the cabinet policy was not within the knowledge of the applicant until this reply was given. According to the applicant, its use of the label 'presidential handbook' was based on the use of that phrase by a presidency spokesman, in the press, responding to enquiries about a trip taken by the then Deputy-President to the Seycelles for a private holiday, ostensibly at state expense. The applicant thereupon formulated its notice of appeal so as to clarify what record it had requested. Noting that the *draft* handbook plainly could not have been the basis for expenditure already incurred, it stated, in effect, that the first respondent had misconstrued its request because what was asked for was the record of how the *current* decisions were being made about the several types of expenditure mentioned in the request. The applicant contended that it was inconceivable that some or other document did not already exist. In this regard, to further clarify the identity of the requested record, it alluded to two instances reported in the press where the then Deputy President had taken holidays, ostensibly at state expense.

15. Addressing the letter of refusal to disclose, more specifically, the applicant stated in its notice of appeal that it did not seek a policy document. At paragraphs 4.3 – 4.5 of the notice of appeal the applicant states:

"At the risk of stating the obvious, the [applicant] emphasises that the

[applicant] has not requested the policy decision of the cabinet, but the document which [the first respondent] calls a procedural framework and of which the cabinet is not the author....irrespective of the name [given to] the document, the [applicant] disputes it is a (i) preliminary or draft (ii) procedural (iii) framework.....[Applicant] requested a document which by necessity implication is in force. The President ....and Deputy President [have] been utilising this document for a period of six years. (ie from 2007) If it was only preliminary, the President and Deputy President would not have been able to rely on such document as a basis for claiming to be entitled to benefits".

(Emphasis supplied)

16. The reply that dismissed the appeal addressed the applicant's contentions in its notice of appeal, about how, at present, such matters were being dealt with. Paragraphs 5 – 9 stated that :

> '5. The procedures that are followed in arranging entertainment, travels and accommodation of the President and Deputy President exist as past practice and are not contained in a formal document in the possession of the Presidency and which is in force and effect. It is intended that the Presidential Handbook, currently in draft form, would ultimately incorporate the procedures developed through these past practices.
>
> 6. The practices referred to above developed over time in Departments that have carried the responsibility generally to arrange the travels and accommodation of the President and Deputy President. This responsibility is not a direct responsibility of the Presidency. Departments such as Defence and International Relations and Cooperation generally carry the responsibility and may be better placed to describe the practices that have developed over time.
>
> 7. The entitlements of the President and Deputy President to any benefits paid for from the public purse in respect of their entertainment, travel and accommodation are determined and regulated by the policy as described in paragraph 4 of the letter of Dr Batandwa Siswana. That policy constitutes a Cabinet record that is excluded from the operation of PAIA by virtue of section 12(a) of PAIA.
>
> 8. References to the Presidential Handbook, which are attributed to the Deputy President's spokesperson, were intended to be to the policy, as the document

> the impression that the Presidential Handbook is a final and binding document that describes the Deputy President's entitlements as regards foreign travel and accommodation, this was in error. The correct position has been explained in the letter by Dr Batandwa Siswana and in this letter.
>
> 9. Prior to the adoption of the policy as described in paragraph 4 of the letter of Dr Batandwa Siswana, the entitlements of the President and Deputy President to any benefits paid for from the public purse in respect of entertainment, travel and accommodation were determined and regulated by decisions of Cabinet. The decisions were not contained in a policy document. It was only in 2007 that Cabinet adopted a policy.'

17. The information given by way of explanation in this reply is significant. First, it is unequivocal in denying the existence of a handbook that was in force at the relevant time. It tries to explain what certain public statements, alluding inaccurately to a 'handbook', presumably meant to say, and that erroneous remarks have sown confusion. Secondly, and crucially for this controversy, it explains that 'past practises' determined how such expenditure was dealt with, which practises '....are not contained in a formal document...' Moreover, it is explained that decisions about such matters were made separately by several departments of state. These several decisions were made pursuant to a policy decision made in cabinet in 2007. In effect, there is no record about such matters, other than the cabinet record of the policy decision addressing the subject matter.

18. The applicant then launched the section 78 Application. At this juncture, an adaptation of importance to the applicant's request was articulated in the application to court. The applicant, before this court, sought disclosure of the document containing the so called cabinet policy of 2007 which is, ostensibly, a far cry from the request as initially formulated, ie, for the handbook. The applicant is not, so it says, in the main, interested in the draft handbook which shall regulate future expenditure, but in the source document that authorised, if it does indeed do so, the past expenditure. This adaptation is said on behalf of the applicant to be consistent with the common sense need to allow substance to triumph

of the applicant to be consistent with the common sense need to allow substance to triumph over form. It invokes the authority of Standard Bank of SA v Carports for Africa CC [1998] 3 ALL SA (W) at 451, in which Cloete J condemned mechanical rigidities common in the law of Ancient Rome being perpetuated into modern times. I doubt that this line of authority is apposite to the true question to be tested, which is to determine, on the facts, what the applicant could reasonably be understood to have asked for.

19. It seems plain that the evolution of the formulation of the request has been dictated by information acquired after the initial request was made. Understandable as this evolution may be, and without assigning blameworthiness for the evolution, the notion that the applicant is entitled to demand disclosure of something it, previously, expressly disavowed it wanted, is not, in my view, sustainable.

20. A fair inference to draw from the statements by the respondents throughout this saga is that there is no 'current' handbook and that the executive decisions taken to expend money were dispersed among several officials in several departments of state, who take such decisions on instructions, it must be supposed, from either their respective ministers or directly from the presidency officials. The supposed legitimacy of such decisions, prima facie, is assumed by such officials on the basis of being told that the cabinet approves of such a decision being taken. This 'practice' which may, or may not, offend the Public Finance Management Act 1 of 1999 (PFMA) or, indeed, some other law, is just that: a 'practice' that is not encapsulated in a consolidated document, and, as such, there is no 'record' as defined in section 1 of PAIA, ie, 'recorded information' about how these decisions are taken in existence which can be disclosed.

21. Doubtless, there must be recorded somewhere, by the accounting officers responsible for

one or other department of state that a sum has been appropriated for the relevant purposes, and presumably budgetary records would reflect the estimates approved and accounting records reflect what was spent and when. However, none of these accounting records is what was asked for. The reasonable reader of the request would understand that the request was premised on a request for some form of document which consolidated the rationales why the provision of ostensible benefits to the office bearers in question were appropriate.

22. In my view, it is not open to the applicant to demand disclosure of the cabinet policy record, because that is not what was requested. Moreover, properly construed, the supposed record which the request assumed must exist, on the basis of the affidavits deposed to by the respondents, does not exist yet.

What is the jurisdictional nature of an application in terms of Section 78 and 82 of PAIA - the '*De Novo* proceedings' Argument

23. In argument on behalf of the applicant, it has been contended that an application in terms of section 78 of PAIA is a *de novo* proceeding. This contention was advanced to address the controversy about whether the applicant could be held to the reasonable scope of the request as initially formulated or whether the scope of the request could be clarified or broadened in order to encapsulate better and further information which emerges along the way about the identity of the 'record' wherein the information wanted was supposedly located. The submission draws directly on the passage in President, RSA & others v M&G Ltd (supra) at [14]:

> "In proceedings under PAIA, a court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It decides the claim of exemption from disclosure afresh, engaging in a de novo reconsideration of the merits. The evidentiary burden borne by the State pursuant to s 81(3) must be discharged, as in any civil proceedings, on a balance of probabilities."

(Emphasis supplied)

24. These remarks by Ngcobo CJ were based on the remarks concerning the nature of a Section 78 application in the decision, by Howie P, in Transnet Ltd & Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) at [24] – [26].

> "[24] As to the contested issues, it is convenient to begin with a point raised by the appellant which is really jurisdictional in nature. *It contended that in an application under s 78 the relevant material on which a court had to make its decision was limited to such material as was before the information officer when access was refused. That cannot be right.* A court application under the Act is not the kind of limited review provided for, for example under the Promotion of Administrative Justice Act 3 of 2000. It is much more extensive. It is a civil proceeding like any motion matter, in the course of which both sides (and the third party, if appropriate) are at liberty to present evidence to support their respective cases for access and refusal. As the present matter serves to illustrate, the parties' respective cases in such an application will no doubt in most instances travel beyond the limited material before the information officer. 13 That conclusion is reinforced by the Legislature's having catered for the presentation of evidence and the resolution of disputes of fact by reference to an onus of proof. Those provisions would have been unnecessary if the suggested limitation applied. Moreover, it is unlikely that a Court, acting under s 82, would be sufficiently informed so as to be in a position to make a just and equitable order were the limitation to apply.
>
> [25] To take the present case as an example once again, it is apparent from the appellant's opposing affidavit that after the respondent's request was received it was first considered by the appellant's personnel. After that Inter Waste was approached to establish its attitude to disclosure of the rates. It was not prepared to consent to their disclosure. Mr Oosthuizen discussed the matter at length with colleagues in the appellant's service and 'having taken the relevant advice' refused access. There is no indication that he was then in possession of the material evidence which Inter Waste provided for inclusion in the opposing affidavit. And of course he did not have a detailed exposition of the respondent's case. This is not surprising. In the nature of a public body's day-to-day administrative functions one would not envisage an information officer being able to assemble such evidence and conduct such evaluation as would be necessary properly to explore the effects of disclosure on a third party's commercial interests. And even if he or she did acquire full information from the third party it would only be fair to call for equally full input from the requester. As it is, a requester does not have to motivate a request. It is for the public body or third party to motivate refusal. By the same token one cannot imagine that a court hearing a s 78 application could properly explore the effects of disclosure without evaluating full evidence from both sides. It could not do so - and do justice - on the flimsy material that is likely to be the sum total of what is before an information officer.

> [26] There is a further consideration to be borne in mind in this regard and that is that the Act lays down no guidelines as to who should qualify as deputy information officers. A public body might act responsibly enough in assigning middle-management staff to this task but it would be placing an undue burden on somebody of that rank to expect him or her to be able to dispose, with the necessary knowledge and experience, of the factual and legal questions to which implementation of ss 36 and 37 can give rise. The inference is compelling that the Legislature intended those questions to be visited anew by the Court hearing a s 78 application. The appellant's argument on this point must fail."

25. The powers of a court in a section 78 application are set out in section 82 of PAIA; they are indeed wide.

> "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;
> (d) as to costs; or
> (e) condoning non-compliance with the 180-day period within which to bring an application, where the interests of justice so require."

26. In my view, the 'wider review' contemplated by Howie P, and the 'de novo reconsideration of the merits' noted by Ngcobo CJ do not mean that an applicant can revise the request to demand a substantively different record than that described initially. These *dicta* address PAIA, Chapter 4 defences to disclosure and the inevitable body of information that is likely to be generated in the appeal process, and the information likely to be advanced to deal with Section 46 public interest override considerations. However, if a requester asks for X and is told that it does not exist or that the contents are not what, apparently, the requester wants, the requester may not revise its request to ask for another record, pursuant to that request being refused. The proper next step may well be to formulate a fresh request for

another record now known to exist. 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.

27. Accordingly, in my view, the fact that a court has indeed broader powers than in a conventional review of an administrative decision, the court is not licensed thereby to entertain a rolling request.

28. As it cannot reasonably be held that the request was for a cabinet record conceiving a policy about state funded benefits for private use by the relevant office bearers, the attempt to procure access to such a record in these proceedings is inappropriate.

The Effect of Section 12

29. Given the findings made, it is not strictly necessary to address the controversy about the extent of the application of section 12. However, it may useful to deal with certain aspects as regards the prospects of a continuing controversy between the parties.

30. The applicant acknowledges the force of section 12(a) of PAIA which provides that '[PAIA] does not apply to a record of ....the cabinet or its committees' However, the applicant has argued that in a case such as this, where the policy, in order to be acted upon, must be known to an array of officials, who are not cabinet officials, the exclusion of access thereto under section 12, would be unconstitutional as no true secrecy or confidentiality could exist. The applicant is not alone in questioning the possible unconstitutionality of

Section 12.[5]

31. However, it must be borne in mind what section 12 means, and equally important, what it does not mean.[6] Section 12 does not make cabinet documents secret, nor does it make access to such records inaccessible *per se*. All that section 12 does is to exclude PAIA as an instrument to access documents of cabinet, and also records of courts and of public representatives. Accordingly, the exclusion is not premised on the nature of the information or who is ordinarily allowed to know the contents, but rather is premised on the statute being unavailable to procure such records. Questions of confidentiality and secrecy are beside the point.

32. Thus, as I understand the effect of section 12, were a cabinet record to provide for peanut butter sandwiches to be served at all meetings of cabinet, a presumably innocuous tit-bit of information, PAIA cannot be used to procure a copy of that note. That cannot mean that pursuant to some other law, cabinet records are inaccessible, and that knowledge that the ministers of state munch peanut butter sandwiches whilst at work may not be revealed. If that construction is correct, Section 32 of the Constitution might not be violated by the exclusions provided for in PAIA. The brake on the reach of PAIA in this respect has been

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[5] Klaaren and Penfold (Supra) express reservations too.

[6] Section 12 of PAIA provides:

This Act does not apply to a record-

(a) of the Cabinet and its committees;

(b) relating to the judicial functions of-

(i) a court referred to in section 166 of the Constitution;

(ii) a Special Tribunal established in terms of section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996); or

(iii) a judicial officer of such court or Special Tribunal;

(c) of an individual member of Parliament or of a provincial legislature in that capacity; or

(d) relating to a decision referred to in paragraph (gg) of the definition of 'administrative action' in section 1 of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), regarding the nomination, selection or appointment of a judicial officer or any other person by the Judicial Service Commission in terms of any law.

noted by the Constitutional Court without adverse comment.[7] Moreover, section 7 of PAIA excludes its application where litigation is conducted and discovery and subpoena procedures are available to the parties.[8] Seemingly, if another channel of access exists, the risk of unconstitutionality must be slight. Counsel for the respondents, in my view, most plausibly, conjectures that in litigation about the propriety of state expenditure, for example, if the state relied on a cabinet decision to justify the disbursements, it is not apparent why such document could escape being susceptible to discovery, and in an instance that it is not susceptible, the ground would have to be that the document enjoyed the protection of secret status by virtue of some other law. Neither the records of peanut butter sandwiches nor of any perks the President or Deputy President might enjoy seem obvious examples of records that beyond the reach of the public to know about.

33. Accordingly, whether Section 12 is susceptible to a constitutional challenge remains open and in this case, on the grounds advanced by the applicant, unnecessary to be decided.

The Respondents Tender

34. The first respondent has, since the outset of the controversy, promised to publish the handbook when it had been finalised. A week before this application was scheduled to be heard, the respondent filed a supplementary affidavit which served to describe the status quo. Apparently, the handbook is now, it is thought, to be on the brink of completion. The respondents tendered to consent to an order, with costs, granting the applicant access to the

[7] See PFE International & Others v Industrial Development Corporation of SA Ltd 2013 (1) SA 1 (CC) at [6].
[8] See, eg: Unitas Hospital v Van Wyk & Another 2006 (4) SA 436 (SCA), contrasted with van Niekerk v Pretoria City Council 1997 (3) SA 839 (T) and PFE International (Supra)

document within 14 days of its approval by the cabinet, and if that access is not given by 30 November 2015, the applicant may set the application down for 'determination'. It was clarified, from the bar by counsel for the respondents, that the tender means that the respondents are agreeable to be put on terms to publish the handbook by that date. Failure to comply would risk being held to be in contempt of a court order. The respondent contended that such tender rendered the further prosecution of the application unnecessary. The tender was not accepted, but as it was made unconditionally, it stands, and the respondents persist in it.

35. Accordingly, I shall incorporate the tender in an order, together with the tender of costs up to the date of the tender, 12 October 2015.

The Order

36. The application is dismissed, save as set out hereunder.

37. The first respondent shall publish the presidential handbook on or before 30 November 2015.

38. Such publication shall be effected by at least furnishing a copy to the applicant directly in hard copy or electronic format.

39. In the event that the first respondent fails to comply, the applicant is given leave to approach the court, on these papers, duly amplified if necessary, to seek further or alternative relief pursuant to such failure.

40. The costs of this application, including the costs of two counsel, up to and including 12 October 2015, shall be borne by the respondents jointly and severally, the one paying the others to be absolved.

Roland Sutherland

Roland Sutherland
Judge of the High Court,
Gauteng Division, Pretoria

Hearing: 15 - 16 October 2015
Judgment: 30 October 2015

For the Applicant:
Adv Q Pelser SC, with him, Adv A Lamey,
Instructed by Hunter Spies Inc,
Ref W Spies

For the Respondents:
Adv N H Maenetje SC, with him Adv H Rajah,
Instructed by The State Attorney, Pretoria.

South African Pork Producers Organisation v National Council of Societies for the Prevention of Cruelty to Animals 2016 JDR 0285 (GP)

Citation	2016 JDR 0285 (GP)
Court	Gauteng Division, Pretoria
Case no	A171/2015
Judge	HJ Fabricius J, WRC Prinsloo J and N Ranchod J
Heard	February 10, 2016
Judgment	February 18, 2016
Appellant/ Plaintiff	South African Pork Producers Organisation
Respondent/ Defendant	National Council of Societies for the Prevention of Cruelty to Animals

Summary

Administrative law — Access to information — Access to information held by public body — Request — Refusal — Grounds — Consequent upon complaint by member of public, senior inspector of respondent (NSPCA) inspecting piggery of appellant — Following thereon appellant seeking various records in terms of Promotion of Access to Information Act 2 of 2000 (the Act), one of which refused on grounds as set out in ss 37(1)*(b)* and 44(2)*(a)* of the Act, namely, that complaint was given in confidence and that the disclosure thereof could be expected to prejudice future supply of similar information, and that accordingly in public interest that similar information should continue to be supplied — Respondent was also of view that complaint could not be redacted so as to hide identity of complainant — On facts, grounds of refusal raised to prevent access shown by respondent to be justified — Appeal dismissed.

Judgment

Fabricius J,

1.

This is an appeal against the whole of the judgment delivered by Phatudi J on 5 November 2014, leave having been granted by the Court a quo.

2.

The Appellant sought access to certain documents in terms of s. 78 and 82 of the ***Promotion to Access to Information Act, 2 of 2000 (herein after "the Act"),*** which application was denied by the Respondents.

3.

The relevant facts are straight forward: a complaint had been lodged by a member of the public with the Respondent, and pursuant thereto an inspection was conducted by a senior inspector of the Respondent at the Applicant's piggery, a commercial pig-farm in the Limpopo Province, and a member of the Applicant.

Following such investigation, the Applicant requested six records held by the Respondent, but prior to the proceedings five of those records were provided, and one was refused, which formed the subject matter of the application before the Court a quo. It appears that the Respondent contemplated whether or not to institute criminal proceedings and as a matter of logic, at such proceedings, the identity of the complainant and the nature of the complaint would have been in the public eye. Respondent thereafter decided not to institute such proceedings, and then relied on the grounds referred to in s. 37 (1) (b) and 44 (2) (a) of the ***Act***. It is clear from the Respondents Answering Affidavit and the judgment of the Court a quo, that the Respondent in essence relied on the argument that the complaint was given in confidence, and that the disclosure thereof could probably be expected to prejudice the future supply of similar information, and that it was accordingly in the public interest that similar information should continue to be supplied. Respondent was also of the view that the complaint could not be redacted so as to hide the identity of the complainant.

4.

The Act was promulgated as a result of the provisions of ***s. 32 of the Constitution of the Republic of South Africa***, which affords everyone the right of access to any information held by the State. However, it is also clear that s. 36 makes provision for a limitation clause, and accordingly the ***Act*** does contain limitation clauses, a number of which are contained in chapter 4 of the ***Act***. The procedural requirements of the ***Act*** were met by the Appellant, and therefore the onus shifted onto the Respondent to show, on a balance of probabilities, that its grounds of refusal raised to prevent access to the relevant record were justified.

See: ***Section 81 of the Act*** and the ***President of the Republic of South Africa and Others v M & G Media Ltd 2011 (2) SA 1 (SCA)***.

5.

Section 37 (1) (b) reads as follows: "Subject to sub-section (2), the information officer of a public body may refuse the request for access to a record of the body if a record consists of information that was supplied in confidence by a third party, the

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disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source: and if it is in the public interest that similar information or information from the same source, should it be supplied". The provisions of sub-section 2 do not apply in the present instance. ***Section 44 (2) (a)*** reads: "Subject to sub-section (4), the information officer of the public body may refuse a request or access to a record of the body if the disclosure of the record could reasonably be expected to jeopardise the effectiveness of the testing, examining or auditing procedure or method used by a public body". The provisions of sub-section 4 also do not apply in the present instance.

The standard required in order to accept the grounds of refusal raised by a Respondent is to be determined objectively. In relation to both grounds of refusal relied upon by the Respondent herein, it would thus be required of the Respondent to show objectively and on a balance of probabilities that if the record were to be disclosed, there would be a "reasonable expectation" that the harm sought to be avoided may occur.

See in this context: ***Transnet Ltd and Another v SA Metal Machinery Company (Pty) Ltd [2006] 1 All SA 352 (SCA) at par. 31, 40 – 43***.

6.

The redacted form of the complaint had not initially been requested. The reason for refusal by the Respondent is primarily based on the provisions of s. 37 (1) (b) and it was also dealt with on this basis by the learned Judge in the Court a quo.

The purpose of this sub-section is stated to be to protect the flow of confidential information to public bodies.

See: ***Currie and Klaaren, the Promotion of Access to Information Act Commentary (2002) at p.155***.

There are three parts to the enquiry: whether the record consists of information supplied in confidence by a third party, if disclosure could reasonably be expected to prejudice a supply of similar information or information from the same source, and if it is in the public interest that similar information should continue to be supplied. Evidence of a reasonable expectation of confidentiality is what is required to classify

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the information as having been supplied in confidence. In its Answering Affidavit the Respondent stated that it does, and all Societies for the Prevention of Cruelty to Animals are obliged to treat all complaints received as confidential, as is evidenced by its own Code of Ethics. The relevant portion of this Code provides that "under no circumstances should a complainant's name or other details be divulged except for the purposes of a prosecution".

As regards the prejudice to the supply of future information, it was submitted by the Respondent that it follows as a matter of course that if persons who have complaints about animal cruelty learn that their identity or information pertaining to the complaint, made to the Respondent or any SPCA, could be disclosed upon request by any person, there would be a reasonable expectation that the future supply of information would be prejudiced or jeopardised.

This was clearly the Respondent's primary reason, it was dealt with on that basis by the Court a quo, and in my view it is the crux of the appeal before us. In the same vein it was submitted by the Respondent that it is in the public interest that similar information should continue to be provided in order that cruelty to animals could be

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detected, punished and hopefully prevented and the objects and functions of the Respondent, and SPCA's in general, fulfilled. Given the Respondent's lack of resources, it relies heavily on the public to report instances of alleged animal cruelty and it would prove extremely difficult to do so were people to decline to lay a complaint due to concerns of intimidation, victimisation or other repercussions. Again, this is clearly set out in the Respondent's Answering Affidavit, and can actually not be disputed in my view. In the context of the provisions of s. 44 (2) (a) it was submitted that it is reasonably foreseeable that the Respondent's ability to perform its statutory mandate would be jeopardised by disclosing the complaint against the piggery, essentially for the same reasons that apply in connection with the provisions of s. 37 (1) (b).

7.

It is clear from the judgment read as a whole in the light of the affidavits before the Court, that the learned Judge found that the Respondent's refusal to provide the information sought, was mainly to protect the identity and the information of the

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person who submitted a complaint. The identity of the relevant complainant alone was never found to be the sole reason to prevent disclosure, but only the main

reason. Not only was the complainant's identity referred to, but also the information that the person provided. It is clear from the judgment read as a whole that the Court had regard to and accepted the reasoning of the Respondent's Chief Executive Officer who, in the Answering Affidavit said the following:

7.1

The record consists of information supplied in confidence by a third party;

7.2

Disclosure of complaints made to the Respondent or local SPCA's could reasonably be expected to prejudice the future supply of similar information from persons wishing to remain anonymous and that it is in the public interest that similar information continue to be supplied so as to further the Respondent's statutory objective;

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7.3

By disclosing information about the complaint, one of the main sources of the Respondent's information, being tip-offs, is likely to be jeopardised and the Respondent's obligations threatened;

7.4

The Respondent's rules and Code of Ethics published in terms thereof prevent disclosure of the complainant's name or any other details except for purposes of a prosecution;

7.5

Actions which a person in respect of whom a complaint has been made to the Respondent or local SPCA may well receive public attention, at least within the small community in which the relevant piggery operated (Vaalwater), and dissuade other concerned businesses from laying complaints, thus damaging the SPCA's reputation and limiting its effectiveness;

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7.6

There would accordingly be a decrease in the number of complaints made to the Respondent and other SPCA's if the complainant's information were to be disclosed.

8.

It is also clear from the Answering Affidavit that the confidentiality of the complainant was a paramount concern of the Respondent, and it is clear that it expressly stated that any information relating to the complainant would jeopardise the Respondent's work. It is also clear from the Replying Affidavit that these concerns and issues were not disputed by the Appellant, and could not be so disputed.

9.

I have already stated that the onus to justify the refusal rested on the Respondent and in this context the Constitutional Court in the ***M & G Media*** case *supra,* said the following at par. 25: "Ultimately, the question whether the information put forward is

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sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify the refusal has been provided, but whether the information provided is sufficient for a Court to conclude, on the probabilities, that the record falls within the exemption claimed". It was also submitted by the Respondent

that the threshold has been met, that it was decided on this basis by the Court a quo, and that there was no merit in the appeal. I agree with that submission. It appears clearly from the Respondent's Answering Affidavit and the judgment of the Court a quo that this is the case.

10.

One question remains, and that is whether or not the relevant record should have been made available to the Applicant in the light of the provisions of s. 28 of the ***Act***. This section obliges public bodies to first determine whether a ground of refusal applies to the record requested and if so, to determine whether the protected information can reasonably be severed from the remainder of the record. If it can be,

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the remainder must be disclosed. Respondent indicated in its Answering Affidavit that it is the identity and details of the complainant and the information of the complainant that it sought to protect. In the present instance the totality of the complaint could not be redacted.

11.

In the light of the above, which goes to the root of the matter, it is not necessary to deal with other grounds of appeal raised by the Appellant herein, which are at best peripheral and at worst red herrings.

12.

Accordingly, the following order is made:

The appeal is dismissed with costs.

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JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

I Agree

JUDGE W. R. C. PRINSLOO

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

I Agree

JUDGE N. RANCHOD

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

2016 JDR 0285 p15

Case number:	A171/15
Counsel for the Appellant:	Adv J. C. Prinsloo
Instructed by:	Gildenhuys Malatji Inc
Counsel for the Respondent:	Adv S. Freese Instructed by: Marston Taljaard
Date of Hearing:	10 February 2016
Date of Judgment:	18 February 2016 at 10:00

CCII SYSTEMS (PTY) LTD v FAKIE AND OTHERS NNO (OPEN DEMOCRACY ADVICE CENTRE, AS *AMICUS CURIAE*) 2003 (2) SA 325 (T)

Citation 2003 (2) SA 325 (T)

Case No 4636/2002

Court Transvaal Provincial Division

Judge Hartzenberg J

Heard September 3, 2002

Judgment November 15, 2002

Counsel O L Rogers SC (with him E Fagan) for the applicant.
S J Maritz SC for the first, second and third respondents.
M D Kuper (with him P G Malindi) for the fourth respondent.

Annotations Link to Case Annotations

B

Flynote : Sleutelwoorde

Administrative law - Access to information - Request for access to documents in terms of s 18 of Promotion of Access to Information Act 2 of 2000 - Objection to production of - Draft c reports of commission of enquiry - Section 44 of Act not dealing with historical situations - Given that commission's joint report already finalised and accepted by Parliament, draft reports of historical importance only and accordingly no longer protected from disclosure by provisions of s 44.

Administrative law - Access to information - Request for access to documents in terms of s 18 of Promotion of Access to Information Act 2 of D 2000 - Objection to production of - Objections in terms of s 37 and s 42(1)*(b)* of Act - Respondent failing to identify which of documents in its possession were protected - Because of *onus* created by s 81, respondent required to identify which documents it wishes to withhold, and also to offer a description of basis upon which it claims protection - Respondent's approach making it E impossible to evaluate whether its entitlement to privilege justified.

Administrative law - Access to information - Request for access to documents in terms of s 18 of Promotion of Access to Information Act 2 of 2000 - Objection to production of - Objection in terms of s 45*(b)* of Act - Documents in F possession of commission of enquiry - Despite objection, if regard were had to media coverage which matter has enjoyed and prominence of members of commission, maximum access is necessary to dispel suspicion of cover-up, even if that meant respondent must employ extra staff - Accordingly, respondent ordered to provide relevant documents to applicant. G

Headnote : Kopnota

The applicant applied in a Provincial Division for an order for access to information acquired by the Joint Commission of Enquiry into the Strategic Defence Package (SDP) during the course of its investigation into the propriety of the SDP. The application was brought in terms of the Promotion of Access to Information Act 2 of H 2000. The applicant was a supplier of specialised software and computer systems for defence applications. It had been excluded as a supplier of subsystems to be installed on corvettes ordered by the Department of Defence for use by the South African Navy. It contended that the exclusion was unlawful.

The applicant had applied to the first respondent (the respondent), in terms of s 18 of the Act, for certain documents, namely all draft versions of the report and, in respect of a particular period, all audit files concerning the SDPs, all correspondence concerning the SDPs between the respondent and the Department of Defence and all correspondence concerning the SDPs between the first and the second respondents' offices. The respondent had refused the applicant's request on the grounds that: (1) in terms of

s 45*(b)* of the Act, the number of documents requested was too vast and the work involved in processing the request would substantially and unreasonably have diverted the respondent's resources from its core business; (2) in terms of s 37 of the Act, the documents contained information which had been supplied to it by third parties, after their confidence had been guaranteed, and, aside from being unable to breach its guarantee of confidentiality, breach of that guarantee might have jeopardised its ability to carry out its function in the public interest; (3) in terms of s 41(1)*(a)* of the Act, the documents contained information relating to, *inter alia*, the defence and security needs of the Republic and, aside from having been supplied in confidence, disclosure of that information might have prejudiced the defence and security of the Republic. The respondent alleged that only certain of the documents in its possession were entitled to protection. However, it failed to identify those documents. Its defence was therefore that the requested documents were so voluminous that it could not reasonably have been expected to analyse them all in order to identify which of them were protected from disclosure.

The applicant contended that it had been excluded as a supplier because of political pressure or some impropriety and that the truth or otherwise of its contention would be revealed by a comparison of the draft and final reports. The respondent sought the dismissal of the application on the ground that, when it informed the applicant of its refusal of its request, the applicant ought to have brought a new request, in terms of s 18 of the Act, for access to the reduced record; that its request for the reduced record was irregular as it had not been preceded by a request in terms of s 18. The respondent also contended that: (1) all of the documents comprised a single record and that, if there were draft reports amongst the documents and it was entitled to refuse access to them (as, it contended, it was), then, in terms of s 44(2)*(c)* of the Act, it was entitled to refuse access to all of them; (2) because the applicant had instituted action against the fourth respondent, in terms of the provisions of s 7 of the Act, it was precluded from requesting the access it sought.

Held, further, that it stood to reason, from the definition of 'record' in s 1 and from the provisions of s 29(2) of the Act, that a single page could constitute a 'record' and that each item (of the whole) in itself constituted a 'record' as envisaged in the Act, be it an original or not. (Paragraph [14] at 332B - C/D, paraphrased.)

Held, further, that, because of the *onus* created by s 81, the respondent was required to identify which of the documents it wished to withhold and also to offer a description of the basis upon which it claimed protection. The respondent's approach made it impossible to evaluate whether its entitlement to privilege in respect of documents was justified and whether the applicant should not be given access to portions thereof. (Paragraphs [16] and [17] at 332F and H - H/I.

Held, further, that in the result the only objection which had, in fact, been raised was the volume objection. If regard were had to the media coverage which the matter had enjoyed and the prominence of the members of the joint commission, maximum access was necessary to dispel any suspicion of a cover-up. If that meant that the respondent had to employ extra staff, then it had to be done. The applicant had alluded to conflicts of interest and political pressure. If at all feasible, such suspicions had to be put to rest. (Paragraph [17] at 332H/I - 333A/B.)

Held, further, that s 44 did not deal with historical situations. Bearing in mind that the joint report of the commission had been finalised and accepted by Parliament, the draft reports were of historic importance only and could not

obstruct the commission in its work. They were, therefore, no longer protected by the provisions of A s 44. (Paragraph [18] at 333D - E.)
Held, further, that the applicant made its request long before institution of action. The prohibition against access to documents after the commencement of proceedings was included in the Act to ensure that litigants made use of their remedies as to discovery in terms of the Rules of the relevant court and to avoid the possibility of one litigant gaining an unfair advantage over his adversary. Before a litigant instituted proceedings, and even if he wanted to institute B proceedings, he was not prohibited from invoking the provisions of s 7 of the Act to gain access. (Paragraph [21] at 334C/D - F.)
Held, accordingly, that the respondent was obliged to provide the relevant documents to the applicant. However, because it might have caused prejudice to the Defence Force and to the Government if they were ordered to produce the entire reduced record, they were C ordered to produce those records to which no objection was raised and, within a stated period of time and in respect of the balance of the records of the reduced record, to identify them and to state the reasons why access may or must be refused and in respect of which portion of the record it was to be refused. (Paragraph [22] at 334G - I.) D

Cases Considered

Annotations

Statutes Considered

Statutes

The Promotion of Access to Information Act 2 of 2000, ss 1 *sv* 'record', 7, 18, 29(2), 37, 41(1)*(a)*, 42(2)*(c)*, 44, 45*(b)*: see *Juta's Statutes of South Africa 2001* vol 5 at 1-222, 1-223, 1-226, 1-229, 1-231, 1-232, 1-233. E

Case Information

Application for an order directing the first respondent to provide certain documents and reports to the applicant. The facts appear from the reasons for judgment.

O L Rogers SC (with him *E Fagan*) for the applicant.

S J Maritz SC for the first, second and third respondents. F

M D Kuper (with him *P G Malindi*) for the fourth respondent.

N Bawa for the *amicus curiae*.

Cur adv vult.

Postea (November 15). G

Judgment

Hartzenberg J:

[1] During the years 1998 to 2001 the acquisition of the Strategic Defence Package (SDP) at an estimated cost of R30,3 billion[1] was highly topical. Because of doubts, criticisms and allegations of impropriety the first H respondent, the Auditor-General, performed a high-level review but, despite that, public disquiet persisted. During November 2000 the first, second and third respondents were appointed as a joint commission to investigate the propriety of the entire SDP. They conducted the investigation and eventually submitted a report on 14 February 2001. It was accepted and approved by Parliament. I

[2] This application is one for access to information obtained by the commission during the investigation. It is brought in terms of Act 2 of J

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2000, the Promotion of Access to Information Act (the Act). The applicant is a supplier of specialised software and computer A systems for defence applications. It was

excluded as a supplier of subsystems to be installed on corvettes ordered by the Department of Defence for use by the South African Navy. It believes that the exclusion was unlawful. The second respondent is the Public Protector. The third respondent is the National Director of Public Prosecutions. The fourth respondent is the Minister of B Defence. Although no relief was claimed against the second, third and fourth respondents, they all chose to oppose the application. The second and third respondents support the principle of freedom to information but oppose the application on the basis that it will not be in the interest of the Republic of South Africa, good governance, C proper relationships with major investors and the security of the country that access be granted to the applicant. The fourth respondent relies on absolute and qualified privilege in terms of the Act.

[3] The applicant applied to the first respondent on 28 November 2001 for the following documents: D

[3.1] all draft versions of the report;

[3.2] all audit files concerning the SDPs from 1 January 1998 to 20 November 2001;

[3.3] all correspondence concerning the SDPs between the first respondent and the Department of Defence from 1 January 1998 E to 20 November 2001; and

[3.4] all correspondence concerning the SDPs between the first respondent and the second respondent's office from 1 January 1998 to 20 November 2001.

The application was done on the prescribed form and in terms of s 18 of the Act. F

[4] The first respondent's reply thereto, dated 18 January 2002, gave three grounds on which the request was refused. They were:

[4.1] 'The number of documents is too vast. We do not have the resources or capacity to go through the contents of each G and every document and evaluate the information contained therein. The work involved in carefully going through the vast quantity of documentation and processing your request would substantially and unreasonably divert our resources from our core business. The request is therefore refused in terms of s 45*(b)* of the Act.' H

[4.2] 'The documents contain information that was supplied in strict confidence by various third parties. The bulk of the information and documentation was supplied after their confidentiality was guaranteed. We are unable to breach our undertaking. Further, the nature of our work and the need to obtain information from various sources to enable us to carry out our function in the public interest may be jeopardised by our disclosure of information supplied in confidence. The request is therefore refused in terms of s 37 of the I Act.'

[4.3] 'The documents contain detailed information relating, *inter alia*, to the defence and security needs of the Republic and, apart from having been supplied in confidence, their disclosure may also prejudice the position of the Republic in that regard. The request is therefore refused in terms of s 41(1)*(a)* of the Act.' J

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The first respondent invited the applicant, if it disagreed with its decision, to bring a Court application. A

[5] On 18 February 2002 the applicant brought the present application. Its prayers were for an order directing the first respondent to provide the applicant with the documents specified in [3.1] to [3.4] above and for costs against the respondents who oppose the application. B

[6] In its answering affidavit the first respondent disclosed that in the main the documents emanated from the Department of Defence and Armscor. Armscor is the procurement arm of the Department of Defence. The members of the investigating team were only allowed to inspect documents under conditions of strict security and C confidentiality and were not allowed to remove any original documents. Documentation consisting of about 700 000 pages was perused and about 135 000 pages were copied. Approximately 60 people from the three agencies conducting the investigation were

involved. Of them 27 were from the first respondent's team. For purposes of his response to the request he only took into account the 135 000 pages (according to D the joint report the exact figure is 134 768 pages) which were copied. Although the documents in his possession are not an audit file he was prepared for the sake of convenience to regard them as such. Apart from the 135 000 pages the audit file comprises working papers, cabinet minutes, minutes of ministerial committee meetings, documents E emanating from the Department of Finance which were mainly feasibility studies and economic models, counter investment agreements from the Department of Trade and Industry and *draft reports*. The total number of pages comes to 225 000. The contracts which comprise the SDP, including the counter investment contracts are current and being reciprocally performed. According to him much of the information F contained in the contracts are confidential and worthy of protection, and disclosure thereof will be detrimental to the well-being of the Republic.

[7] What the first respondent does not deal with is how the different documents in its possession have been filed and indexed. It is inconceivable that the investigating team did not have a filing G system. One would imagine that it would now be much easier to find and evaluate documents than what the position was when the information was gathered. The first respondent also does not deal, otherwise than in general terms, with the resources available and what the inroad on H its ordinary activities will be if the request is to be considered in terms of the Act. It is alleged that the task will 'irrespective of how many people are involved, require the expenditure of man hours well in excess of a year'. It is not very helpful to form an idea as to how long it will take to complete the task. I understand 'man hours' in excess of a year to imply that one man will work longer than a year to I complete the task. Twelve men may be able to complete it in just over a month and 20 in three weeks. The first respondent 'regrets' that he is unable to furnish the court with greater particularity.

[8] In its replying affidavit the applicant limited its request to what has J

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become known as 'the reduced record' which relates to the acquisition of the Corvettes and in particular to A

[8.1] the de-selection of the applicant as the supplier of the combat suite's information management system and the selection instead of the detexis diacerto combat suite databus;

[8.2] the selection of the supplier of the system management system, the navigation distribution system and the integrated platform B management system simulator;

[8.3] the role of African Defence Systems (Pty) Ltd (ADS) in the supply of the combat suite for the corvettes and its conflict of interest by virtue of its involvement in the supply of the Corvettes at various different levels; and C

[8.4] the conflict of interest of Shamin Shaikh (the Chief of Acquisitions in the Department of Defence).

[9] The applicant no longer requires the documents specified in [3.3] and [3.4] above, ie the correspondence concerning the SDPs between the first respondent and the Department of Defence and D between the first respondent and the second respondent. The first respondent, in the answering affidavit, denied that such correspondence existed. The applicant was in possession of some of those letters and attached it to its replying affidavit. In a further affidavit the first respondent accused the applicant of having led E it into a trap! It attached all the relevant letters. The applicant accepts the first respondent's declaration under oath that all the documents have been supplied.

[10] The Open Democracy Advice Centre (ODAC) brought an application in terms of Rule 16A of the Uniform Rules of Court to be allowed to address the Court as *amicus curiae*. It was opposed by the respondents. ODAC wanted to have that application F

heard well in advance of the hearing of the matter. I indicated that they can bring the application just before the hearing and eventually arranged with counsel that such application, if necessary, can be brought after argument by the parties. After the argument I invited Ms *Bawa*, who represented ODAC, to address the Court on matters G which were relevant and not yet raised. Not surprisingly she sided totally with the applicant and castigated the respondents for not advancing open democracy.

[11] Mr *Maritz* for the first respondent in an ingenious argument asks for the dismissal of the application on the H following basis: He says that when the first respondent informed the applicant that it was entitled in terms of s 45*(b)*[2] of the Act to refuse the request (the volume objection), the applicant should have brought a new request in terms of s 18[3] for access

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to the reduced record. He relies on a letter, dated 1 August 2002 by the A first respondent to the applicant. In that letter it is stated that the original request was broad, that the applicant conceded in the replying affidavit that it was not aware of the bulk of the record, that in the opinion of the first respondent it should have been aware thereof and that the applicant watered down its request to the reduced record. It is then said that the request for the reduced record B constitutes a new request and an irregular request in that it was not preceded by a s 18 request. The applicant is formally invited to withdraw the application, tender costs and to draft a new application. Mr *Maritz* adopts the reasoning in the letter and says that it appears from the joint report that 700 000 pages were perused and that 134 768 pages were copied. He says that the applicant therefore C knew of the bulk of the record and had to expect to be met with a volume objection.

[12] I do not agree. Section 81(3) of the Act provides that there is an *onus* on the party claiming that the refusal of a request for access complies with the provisions of the Act. Furthermore in terms of s 9 some of the objects of the Act are to give effect to D the constitutional right of access to any information held by the State,[4] and to establish voluntary and mandatory mechanisms which enable persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible.[5] Moreover, s 2(1) of the Act provides that when interpreting a provision of the Act the E Court must prefer a reasonable interpretation consistent with the objects of the Act over an alternative interpretation inconsistent therewith. The letter of 18 January 2002 is vague. It does not say how many documents are in the possession of the first respondent and what his resources are. It did not discharge any *onus*. F The procedure which Mr *Maritz* wants the Court to sanction is slow, expensive and cumbersome. Moreover the first respondent knows very well what documents the applicant requires, does not deny that it is in possession thereof but proffers a reason why it is not necessary for it to go and look for them. A new s 18 request will not give any new information to the first respondent to alleviate the obligation G imposed upon it by statute.

[13] Before dealing with chap 4 of the Act and the protection that it gives to the respondents it is necessary to address another aspect, ie the question of what exactly is meant by a record. The respondents contend that all the documents comprise one record. Mr *Maritz* goes so far as to argue that, if there are draft H reports amongst the papers, access not only to them but to all the documents, the record, may be refused in terms of s 44(2)*(c)* of the Act.[6]

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[14] 'Record' is defined in s 1 of the Act as 'any recorded information . . . regardless of form or medium . . . in the A possession or under the control of that public . . . body'. Section 29(2) gives an idea of what recorded information the Legislature had in mind. If I understand the section correctly it relates to information in written and printed form, video recordings and photographs, tape recordings, computer data or possible

other forms of recordings, yet to B be invented. It stands to reason that a single page can constitute a 'record'. If there is one page about one subject in the possession of the public body it is a 'record'. If, however, there are 700 000 pages on one subject, one page of which is the requester's marriage certificate of his marriage in China, and he wants access thereto, he can fill out a request in terms of s 18 for the marriage certificate. The 'record' required is the one page and not the 700 000 pages. In C my judgment, each item in itself constitutes a record as envisaged in the Act, be it an original or not.

[15] It is clear that the respondents do not allege that all the documents in the first respondent's possession are entitled to D protection in terms of the provisions of chap 4 of the Act. It has invoked the provisions on which they rely in a generalised way. The contention is that some of the documents enjoy the protection against disclosure which is provided for in one or more of the sections in chap 4 of the Act. Not one of those documents was identified. The defence is therefore that the requested documents are so voluminous that the first E respondent cannot reasonably be expected to analyse them all in order to identify those which may be protected from disclosure.

[16] In my view, and because of the *onus* created in s 81, it will be necessary for the information officer to identify F documents which he wants to withhold. A description of his entitlement to protection is to be given, one would imagine, as in the case of a discovery affidavit in which privilege is claimed in respect of some documents. The question of severability may come into play.Z Paragraphs may be blocked out or annexures or portions may be detached. The provisions of s 82 of the G Act read with s 80 cover the case where there is a dispute about the question whether a document or only a portion thereof is to be disclosed and the decision of the Court is required to rule whether a document is protected in whole or in part.

[17] The approach of the respondents, even in respect of the reduced record, makes it impossible to evaluate whether the H respondents justifiably claim privilege in respect of documents and whether portions thereof are not to be given access to. In the result I agree with Mr *Rogers* that the only objection which has in fact been raised is the volume objection. If regard is had to the media coverage which this matter enjoyed and the prominence of the members of I the joint commission, this is certainly a case where maximum access is necessary to dispel any J

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suspicion of a cover-up. It is not good enough to hide behind generalities. If it means that the first A respondent has to employ extra staff, it must be done. The applicant alludes to conflicts of interest and political pressure. If at all feasible such suspicions must be put to rest.

[18] The applicant argues that, if he was de-selected as supplier due to political pressure or some impropriety, a comparison between draft reports and the final one may indicate that that is what B happened. Conversely, if there was no impropriety, the very same comparison will prove that. That raises the question what the object of s 44 is. It was submitted that it is not to hamper a public body in its administration and formulation of policy and to guard against the supply of confidential information prematurely. Senior and junior officials must be able to talk freely about the development of policy C matters and their interaction at a stage before finalisation should not at that stage be accessible. Opportunistic entrepreneurs should not be allowed to obtain information along this route which gives them an unfair advantage over their rivals. In my view, it does not deal with historical situations. The joint report has been finalised and accepted by Parliament. At this stage the draft reports are of only historical D importance and cannot obstruct the joint commission in its work. In my view, they are no longer protected by the provisions of s 44.

[19] When it comes to confidential matters it is so that s 37 provides that an information officer must refuse access if disclosure E will lead to a breach of a duty of confidence and may refuse access if disclosure may lead to cutting off a source of information. One can understand the rationale behind the provision. It is in a strange

way to be compared with the position of the police informer. On the other hand, it must be remembered that the definition of a third party in F s 1 of the Act specifically excludes 'public bodies'. It is to prevent technical objections based on what department is really in possession of a document. Ms *Bawa* referred me to the matter of *McGehee v CIA* (case No 82-1096) argued on 15 September 1982 in the United States DC Circuit Court of Appeals in the District of Columbia. The judgment of Circuit Judge Harry T Edwards was G delivered on 4 January 1983.[8] Under the heading "'Agency Records" Covered by the Act' he said the following:

> 'If records obtained from other agencies could not be reached by a FOIA (the American equivalent of the Act) request, an agency seeking to shield documents from the public could transfer the documents for safekeeping to another government department. It could thereafter decline to afford requesters access to the materials on the ground that H it lacked "custody" or "control" over the records and had no duty to retrieve them. The agency holding the documents could likewise resist disclosure on the theory that, from its perspective, the documents were not "agency records". The net effect could be wholly to frustrate the purposes of the Act.' I

[20] Of course, it is likely that there are many instances of information which was given in strict confidence, not by other departments but by J

third parties. One can understand that there is a duty to protect such third parties and that the respondents would A be remiss if they did not do so. In my view, however, it is for the respondents to identify the record which is to be protected and to state concisely why it maintains that access to it can be withheld. Arguments may arise as to severability and may end up before a Judge. Exactly the same considerations apply to documents which may be withheld in terms of s 41 on the basis that their disclosure may cause B prejudice to the defence, security and international relations of the country or would reveal information specified in s 41(1)*(b)*.

[21] It has been argued that the applicant knows exactly what he wants and is already in possession thereof and that that is evident C from the particulars of claim in an action which he has instituted against the fourth respondent. The argument is that he does not really need the records. There is a further argument that, as he has instituted action against the fourth respondent during August 2002, he is precluded in terms of the provisions of s 7 of the Act from getting access. Section 7 provides that the Act does not apply to D a record requested after commencement of criminal or civil proceedings. In this matter the request was long before institution of action. The prohibition against access after commencement of proceedings was obviously included in the Act to see to it that litigants make use of their remedies as to discovery in terms of the Rules of the relevant E court and to avoid the possibility that one litigant gets an unfair advantage over his adversary. Before a litigant has instituted proceedings and even if he wants to institute proceedings he is, in my view, not prohibited from invoking the provisions of the Act to get access. One of the objects of the Act must be that citizens can get information regarding wrongs perpetrated against them to enable them to F hold the wrongdoers accountable in a court of law. See s 9*(c)*, and especially s 9*(e)*.[9] To interpret the Act that everybody who contemplates legal action is prohibited from requesting access will be to render the Act nugatory for the very purpose for which it was promulgated. G

[22] Although I am satisfied that the first respondent is obliged to provide the relevant documents to the applicant I have come to the conclusion that it may cause prejudice to the Defence Force and the Government to order it to produce the whole reduced record. Mr *Rogers* suggested that in such a case a *via media* is to be followed, ie to order the first respondent to make H available those records to which no objection is raised, within a stated period of time, and in respect of the balance of the records of the reduced record, to identify them and state the reasons why access may or must be refused and in respect of which portion of the record it is to be refused. I agree with that submission. Forty Court days or eight weeks seem to me to be enough for it to do so. I

HARTZENBERG J

I make the following order: A

1. The first respondent is ordered to provide the applicant by no later than 40 Court days from the date of this order with the following records:

1.1 all draft versions of the report submitted to Parliament by the joint investigating team regarding the so-called Strategic Defence Packages for the procurement of armaments for the South African B National Defence Force;

1.2 in respect of all audit files concerning the Strategic Defence Packages for the procurement of armaments for the SA National Defence Force from 1 January 1998 to 20 November 2001 dealing with: C

1.2.1 the de-selection of the applicant as a supplier of the combat suite's information management system and the selection instead of the detexis diacerto combat suite databus; D

1.2.2 the selection of the supplier of the systems management system, navigation distribution system and the integrated platform management system simulator;

1.2.3 the role of African Defence Systems (Pty) Ltd, a company controlled by Thomson-CSF of France (which later changed its name to E Thales International), in the supply of the combat suite for the Corvettes and its conflict of interest by virtue of its involvement in the supply of the Corvettes at various different levels, namely as:

1.2.3.1 a member of the consortium constituting the prime contractor for the supply of Corvettes; F

1.2.3.2 the supplier of the combat suite and at the same time being the combat suite integrator;

1.2.3.3 the supplier of various systems and subsystems for the combat suite, including the SMS and the combat management system; and G

1.2.3.4 an associate company (ie a company in the Thomson-CSF group) of the supplier of the Detexis system;

1.2.4 the conflict of interest of Shamin Shaikh as:

1.2.4.1 the Department of Defence's Chief of Acquisitions and chairperson or member of various committees and boards involved in the H assessment of the SDP; and

1.2.4.2 brother of Schabir Shaikh, who at all material times had an indirect interest in ADS;

1.3 all the documents and records in respect of which I it has no objection in terms of chap 4 or s 12 of Act 2 of 2000; and

1.4 a list of all the documents and records in respect of which it objects in terms of the provisions of the aforesaid Act 2 of 2000, setting out clearly and concisely *(a)* a description of the document or record, *(b)* the basis for the objection, *(c)* an J

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indication if the objection relates to the whole document or only to portions thereof and if so, *(d)* to which A portions.

2. The respondents are ordered jointly and severally to pay the applicants costs of the application inclusive of the costs of two counsel. B

Applicant's Attorneys: *Goodman & Jacobs Inc.,* First, Second and Fourth Respondents' Attorneys: *Maponya Inc.* Third Respondent's Attorney: *State Attorney.* C

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1 It has since escalated tremendously.
2 Section 45 reads:
'The information officer of apublic body may refuse a request for access to a record of the body if -
(a) . . .
(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body.'
3 Section 18 provides that the request for access is to be in the prescribed form and that the form must specify a number of requirements one of which is that 'the requester (is) to provide sufficient particulars to enable an official . . . to identify . . . the record . . . and the requester' (s 18(2)*(a)*).
4 Section 9*(a)*(i).
5 Section 9*(d)*.
6 It provides that an information officer may refuse a request for access if the record contains a preliminary, working or other draft of an official of a public body.
7 Section 28 provides that if a request for access to a record is made which may or must be refused in terms of chap 4 every part that can reasonably be severed from any part that contains such information must be disclosed.
8 Unfortunately I was handed a copy of the judgment without the precise reference.
9 Section 9*(e)* provides that one of the objects of the Act is 'generally, to promote transparency, accountability and effective governance of all . . . public bodies . . .'.

D

SOUTH AFRICAN RESERVE BANK ACT 90 OF 1989

(Afrikaans text signed by the State President)

[Assented To: 1 June 1989]
[Commencement Date: 1 August 1989]
[Proc. 128 / GG 12009 / 19890710]

as amended by:

Transfer of Powers and Duties of the State President Act 51 of 1991
Safe Deposit of Securities Act 85 of 1992
South African Reserve Bank Amendment Act 10 of 1993
General Law Third Amendment Act 129 of 1993
Government Notice R911 / GG 15729 / 19940506
South African Reserve Bank Amendment Act 2 of 1996
Government Notice R500 / GG 17897 / 19970329
South African Reserve Bank Amendment Act 39 of 1997
South African Reserve Bank Amendment Act 57 of 2000
Exchange Control Amnesty and Amendment of Taxation Laws Act 12 of 2003
Government Notice R855 / GG 26588 / 20040730
South African Reserve Bank Amendment Act 4 of 2010
[with effect from 13 September 2010]
General Notice 910 / GG 34858 / 20111223
[with effect from 1 April 2012]
Financial Services Laws General Amendment Act 45 of 2013
[with effect from 28 February 2014 - GN 120 / GG 37351 / 20140218]]

ACT

To consolidate the laws relating to the South African Reserve Bank and the monetary system of the Republic; and to provide for matters connected therewith.

ARRANGEMENT OF SECTIONS

33. Preservation of secrecy

(1) No director, officer or employee of the Bank, and no officer in the Department of Finance, shall disclose to any person, except to the Minister or the Director-General: Finance or for the purpose of the performance of his or her duties or the exercise of his or her functions or when required to do so before a court of law or under any law -

(a) any information relating to the affairs of -

(i) the Bank;

(ii) a shareholder of the Bank; or

(iii) a client of the Bank,

acquired in the performance of his or her duties or the exercise of his or her functions; or

(b) any other information acquired by him or her in the course of his or her participation in the activities of the Bank,

except, in the case of information referred to in paragraph (a) (iii), with the written consent of the Minister and the Governor, after consultation with the client concerned.

[Sub-s. (1) substituted by s. 3 of Act 39/97]

(1A) The provisions of subsection (1) shall not be construed as preventing any director, officer or employee of the Bank who is responsible for exercising any power or performing any function or duty under the Exchange Control Regulations, 1961, issued in terms of section 9 of the Currency and Exchanges Act, 1933 (Act No. 9 of 1933), from disclosing to the Commissioner for the South African Revenue Service any information as may be required for purposes of exercising any power or performing any function or duty in terms of any Act administered by the Commissioner.

[Sub-s. (1A) inserted by s. 46 of Act 12/2003]

(2) No person shall disclose to any other person any information contained in any written communication which is in any manner marked as confidential or secret and which has been addressed by the Bank to any person or which has been addressed by any person to the Bank, except -

(a) for the purposes of the performance of his duties or the exercise of his powers in terms of any law or when required to do so before a court of law; or

(b) with the written consent of both the sender and the recipient of that communication.

CANADA

CONSOLIDATION

Bank of Canada Act

R.S.C., 1985, c. B-2

Current to October 26, 2016

Last amended on December 16, 2014

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CODIFICATION

Loi sur la Banque du Canada

L.R.C. (1985), ch. B-2

À jour au 26 octobre 2016

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence
31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts
(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to October 26, 2016. The last amendments came into force on December 16, 2014. Any amendments that were not in force as of October 26, 2016 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve
31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois
(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 26 octobre 2016. Les dernières modifications sont entrées en vigueur le 16 décembre 2014. Toutes modifications qui n'étaient pas en vigueur au 26 octobre 2016 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Bank Staff

Officers and employees

15 (1) Such officers and employees may be employed as in the opinion of the Executive Committee may be necessary.

Pension fund

(2) The Board may by by-law establish a pension fund for the officers and employees of the Bank and their dependants and may contribute to it out of the funds of the Bank. The pension fund shall be invested in such manner as may be provided by the by-laws of the Bank.

By-laws respecting Governor and Deputy Governor

(3) A by-law made under subsection (2) that provides for or relates to the payment of a pension in respect of the retirement of the Governor or Deputy Governor otherwise than by reason of age or disability does not take effect unless it is approved by the Governor in Council.

R.S., 1985, c. B-2, s. 15; 1997, c. 15, s. 96(E).

Secrecy

Oath of directors and staff

16 Before a person starts to act as a director, an officer or an employee of the Bank, he or she shall take an oath, or make a solemn affirmation, of fidelity and secrecy, in the form set out in the schedule, before a commissioner for taking affidavits.

R.S., 1985, c. B-2, s. 16; 1997, c. 15, s. 97; 2001, c. 9, s. 193.

Capital and Shares

Capital

17 (1) The capital of the Bank shall be five million dollars but may be increased from time to time pursuant to a resolution passed by the Board of Directors and approved by the Governor in Council and by Parliament.

Shares

(2) The capital shall be divided into one hundred thousand shares of the par value of fifty dollars each, which shall be issued to the Minister to be held by the Minister on behalf of Her Majesty in right of Canada.

Registration

(3) The shares issued to the Minister shall be registered by the Bank in the name of the Minister in the books of the Bank at Ottawa.

R.S., c. B-2, s. 17.

Personnel de la banque

Nomination

15 (1) Peut être nommé le personnel que le comité de direction estime nécessaire.

Caisse de retraite

(2) Le conseil peut, par règlement administratif, instituer une caisse de retraite pour les cadres et employés de la Banque et leurs personnes à charge et en prévoir les modalités de placement; il peut cotiser à la caisse sur les fonds de la Banque.

Pensions de retraite du gouverneur et du sous-gouverneur

(3) La validité de tout règlement administratif prévoyant le paiement d'une pension de retraite au gouverneur ou au sous-gouverneur pour d'autres raisons que l'âge ou l'invalidité est subordonnée à l'approbation du gouverneur en conseil.

L.R. (1985), ch. B-2, art. 15; 1997, ch. 15, art. 96(A).

Secret

Serment ou déclaration solennelle

16 Avant d'entrer en fonctions, les administrateurs, cadres et employés de la Banque sont tenus de prêter le serment de fidélité et de secret professionnel, ou de faire la déclaration solennelle, figurant à l'annexe, devant un commissaire aux serments.

L.R. (1985), ch. B-2, art. 16; 1997, ch. 15, art. 97; 2001, ch. 9, art. 193.

Capital-actions

Capital

17 (1) Le capital de la Banque est de cinq millions de dollars; il peut être augmenté sur agrément, par le gouverneur en conseil et le Parlement, d'une résolution du conseil.

Actions

(2) Le capital est divisé en cent mille actions d'une valeur nominale de cinquante dollars chacune, émises et attribuées au ministre, pour le compte de Sa Majesté du chef du Canada.

Enregistrement

(3) Dans ses livres à Ottawa, la Banque enregistre, au nom du ministre, les actions émises.

S.R., ch. B-2, art. 17.

SCHEDULE

(Section 16)

Oath or Solemn Affirmation of Office

I, ..., do solemnly swear (or affirm) that I will faithfully and to the best of my judgment and ability perform the duties that relate to any office or position in the Bank held by me.

I also solemnly swear (or affirm) that I will not

communicate or allow to be communicated, to any person not entitled to it, any confidential information that relates to the business or affairs of the Bank that I may learn in the course of performing those duties;

use any such information for any purpose other than to perform those duties; or

allow any person to inspect or have access to any books and records that belong to or that are in the possession of the Bank and that relate to the business or affairs of the Bank, unless the person is legally entitled to inspect them or to have access to them.

R.S., 1985, c. B-2, Sch. I; 1997, c. 15, s. 107; 2001, c. 9, s. 202.

ANNEXE

(article 16)

Serment professionnel ou déclaration solennelle

Moi, ..., je jure (ou déclare solennellement) que je remplirai bien et fidèlement les fonctions attachées à l'emploi (ou au poste) que j'occupe à la Banque du Canada.

Je jure (ou déclare solennellement) en outre que je ne communiquerai, ni ne laisserai communiquer, aucun renseignement confidentiel sur les affaires ou les activités de la Banque que j'aurai obtenu en raison de l'exercice de ces fonctions à quiconque n'y a pas droit, que je n'utiliserai un tel renseignement que pour l'exercice de ces fonctions et que je ne permettrai à quiconque n'y a pas droit l'accès aux documents appartenant à la Banque ou en sa possession, et se rapportant à ses affaires ou à ses activités.

L.R. (1985), ch. B-2, ann. I; 1997, ch. 15, art. 107; 2001, ch. 9, art. 202.

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Commonwealth Consolidated Acts

RESERVE BANK ACT 1959 - SECT 79A

Secrecy

(1) In this section:

"court " includes a tribunal, authority or person having the power to require the production of documents or the answering of questions.

"financial institution " means a body (other than the Reserve Bank) that has at any time carried on, is carrying on, or proposes to carry on, a business that consists of, or includes, the provision of financial products or financial services (including a body that has previously carried on such a business but has ceased to exist).

"financial sector supervisory agency " means a person or body having the function, in Australia or in a foreign country, of supervising or regulating financial institutions.

"foreign central bank " means the central bank or monetary authority of a foreign country.

"officer " means:

(a) the Governor, the Deputy Governor, the Secretary to the Department or any other member of the Reserve Bank Board; or

(aa) a member of the Payments System Board; or

(b) a staff member of the Reserve Bank Service; or

(d) the Statistician or a member of the staff of the Australian Bureau of Statistics; or

(e) any other person who, because of his or her employment or engagement, or in the course of that employment or engagement:

(i) has acquired protected information; or

(ii) has had access to protected documents.

"produce " includes permit access to.

"protected document " means a document given or produced (whether before or after the commencement of this section) under, or for the purposes of, this Act, the *Banking Act 1959* , the *Payment Systems (Regulation) Act 1998* , the *Payment Systems and Netting Act 1998* or the repealed *Banks (Shareholdings) Act 1972* and containing information relating to the affairs of:

(a) a financial institution; or

(b) a body corporate (including a body corporate that has ceased to exist) that has at any time been, or is, related (within the meaning of the *Corporations Act 2001*) to a financial institution that is a body corporate; or

(c) a person who has been, is, or proposes to be, a customer of a financial institution;

It also includes a document given or produced under, or for the purposes of, the performance or exercise of the functions or powers of the Reserve Bank under Part 7.3 or 7.5A of the *Corporations Act 2001* . It does not however include any document to the extent that it contains information that has already been lawfully made available to the public from other sources.

"protected information " means information disclosed or obtained (whether before or after the commencement of this section) under, or for the purposes of, this Act, the *Banking Act 1959* , the *Payment Systems (Regulation) Act 1998* , the *Payment Systems and Netting Act 1998* or the repealed *Banks (Shareholdings) Act 1972* and relating to the affairs of:

(a) a financial institution; or

(b) a body corporate (including a body corporate that has ceased to exist) that has at any time been, or is, related (within the meaning of the *Corporations Act 2001*) to a financial institution that is a body corporate; or

(c) a person who has been, is, or proposes to be, a customer of a financial institution;

It also includes information disclosed or obtained in the course of, or for the purposes of, the performance or exercise of the functions or powers of the Reserve Bank under Part 7.3 or 7.5A of the *Corporations Act 2001* . It does not however include any information that has already been lawfully made available to the public from other sources.

"Statistician " means the Australian Statistician referred to in subsection 5(2) of the *Australian Bureau of Statistics Act 1975* .

(2) Subject to this section, a person who is or has been an officer must not, except for the purposes of this Act, the *Banking Act 1959* , Part 7.3 or 7.5A of the *Corporations Act 2001* , section 62ZZD of the *Insurance Act 1973* , the *Payment Systems (Regulation) Act 1998* , the *Payment Systems and Netting Act 1998* or the repealed *Banks (Shareholdings) Act 1972* , directly or indirectly:

(a) disclose to any person, or to a court, any protected information acquired by the first-mentioned person in the course of his or her duties as an officer; or

(b) produce to any person, or to a court, a protected document.

Penalty: Imprisonment for 2 years.

Note 1: Subsection 4B(2) of the *Crimes Act 1914* allows a court to impose an appropriate fine instead of, or in addition to, a form of imprisonment.

Note 2: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(3) Subsection (2) does not prohibit a person from disclosing protected information, or producing a protected document, if the person to whose affairs the information or document relates:

(a) is the employer of the first-mentioned person; or

(b) agrees in writing to the disclosure of the information or the production of the document, as the case may be.

(4) Subsection (2) does not prohibit a person from disclosing protected information or producing a protected document to:

(a) a financial sector supervisory agency; or

(b) a foreign central bank; or

(c) any other person or body (including a foreign person or body) prescribed by the regulations;

if the first person is satisfied that disclosure of the information, or the production of the document, will assist that agency or bank, or that other person or body, to perform its functions or exercise its powers.

(5) Subsection (2) does not prohibit a person from disclosing protected information or producing a protected document to a person or body (including a foreign person or body) if the disclosure or production to that person or body is approved in writing by the Governor.

(5A) An approval under subsection (5) is not a legislative instrument.

(5B) The Governor may, in writing, delegate to the Deputy Governor, or an Assistant Governor of the Reserve Bank, the power to give approvals under subsection (5).

(6) Subsection (2) does not prohibit a person from disclosing protected information, or producing a protected document, to:

(a) the Governor, the Deputy Governor or any other member of the Reserve Bank Board; or

(aa) a member of the Payments System Board; or

(b) a staff member of the Reserve Bank Service;

for the purposes of the performance of the functions, or the exercise of the powers, of the Bank under a law of the Commonwealth, of a State or of a Territory.

(6A) Subsection (2) does not prohibit a person from disclosing protected information, or producing a protected document, to the Australian Securities and Investments Commission if the person is satisfied that the disclosure of the information, or the production of the document, to that body will assist it to perform its functions or exercise its powers under Part 7.3 or 7.5A of the *Corporations Act 2001*.

(6B) Subsection (2) does not prohibit a person from:

(a) disclosing protected information that is information disclosed or obtained in the course of, or for the purposes of, the performance or exercise of the functions or powers of the Reserve Bank under Part 7.3 or 7.5A of the *Corporations Act 2001*; or

(b) producing a protected document that is a document given or produced under, or for the purposes of, the performance or exercise of the functions or powers of the Reserve Bank under Part 7.3 or 7.5A of the *Corporations Act 2001* ;

if the disclosure or production is:

(c) to the Minister; or

(d) to the Secretary of the Department for the purpose of advising the Minister, or to an officer of the Department authorised by the Secretary for the purpose of advising the Minister.

(7) Subsection (2) does not prohibit a person from disclosing information, or producing a document, if the information, or the information contained in the document, as the case may be, is in the form of a summary or collection of information that is prepared so that information relating to any particular person cannot be found out from it.

(7A) If a person discloses information or produces a document under this section to another person, the first person may, by notice in writing given to the other person at the time of the disclosure or production, impose conditions to be complied with in relation to the information disclosed or the document produced.

(7B) A notice under subsection (7A) is not a legislative instrument.

(7C) A person commits an offence if the person fails to comply with a condition imposed under subsection (7A).

Penalty: Imprisonment for 2 years.

(8) A person who is or has been an officer cannot be required to disclose to a court any protected information, or to produce in a court a protected document, except when it is necessary to do so for the purposes of this Act, the *Banking Act 1959* , Part 7.3 or 7.5A of the *Corporations Act 2001* , the *Payment Systems (Regulation) Act 1998* , the *Payment Systems and Netting Act 1998* or the repealed *Banks (Shareholdings) Act 1972* .

(9) A document that:

(a) is a protected document; or

(b) contains protected information;

is an exempt document for the purposes of section 38 of the *Freedom of Information Act 1982* .

(9A) For the avoidance of doubt, information or a document that, as permitted by subsection 127(2A) of the *Australian Securities and Investments Commission Act 2001* , is disclosed to the Bank does not become, because of that disclosure, protected information or a protected document.

RESERVE BANK ACT 1959 - SECT 79B

Secrecy: documents or information to which section 79A does not apply

(1) Subject to this section, a staff member of the Reserve Bank Service, or an agent or other person carrying on any business of the Reserve Bank, must not:

(a) permit a person to have access to, or give to a person copies of or extracts from, a document belonging to, or in the possession of, the Reserve Bank; or

(b) give to a person information relating to the business of the Reserve Bank;

except by the direction or authority of the Reserve Bank or under compulsion or obligation of law.

Penalty: 1 penalty unit.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) Paragraph (1)(b) does not apply to the giving to a person of information with respect to matters of a customer of the Reserve Bank if the person is the customer or the information is given at the direction or request of the customer.

(3) Subsection (1) does not apply to:

(a) a document that is a protected document for the purposes of section 79A; or

(b) information that is protected information for the purposes of that section.

BANK OF ENGLAND

The Bank of England Act 1998, the Charters of the Bank and related documents

July 2015

SCHEDULE 4

TRANSFER OF FUNCTIONS: SUPPLEMENTARY PROVISIONS

Schedule 4 has not been reproduced in this booklet.

SCHEDULE 5

TRANSFER OF FUNCTIONS: CONSEQUENTIAL AMENDMENTS

Schedule 5 has not been reproduced in this booklet. Paragraphs 1 to 35, 39, 44, 45, 47, 52 to 59, 61, 65, 66 and 68 were repealed by article 162 of SI 2001 No.3649. Para 42 was repealed by the Charities Act 2011. Para 62 was repealed by the Companies (Audit, Investigations and Community Enterprise) Act 2004, section 64 and Schedule 8. Para 63 was repealed by Art 2 and Sch 2 of The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 (SI 2009 No 1941). Para 71 was repealed by the Pensions Act 2004, section 320 and Schedule 13.

Schedule 6 (Banking Supervision Fees) was repealed by article 162 of SI 2001 No.3649.

SCHEDULE 7

RESTRICTION ON DISCLOSURE OF INFORMATION

Restricted information

1. (1) Subject to sub-paragraph (2), information is restricted information for the purposes of this paragraph if –

(a) it is obtained by the Bank by virtue of the power conferred by section 17(l) or paragraph 9 of Schedule 2 (whether or not it was obtained pursuant to a notice under that provision), and

(b) it relates to the business or other affairs of any person.

(2) Information is not restricted information for the purposes of this paragraph if –

(a) it has been made available to the public from other sources, or

(b) it is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.

(3) Except as permitted by the following provisions of this Schedule, restricted information shall not be disclosed by –

(a) the Bank or any officer or [employee] of the Bank, or

(b) any person obtaining the information directly or indirectly from the Bank,

without the consent of the person from whom the Bank obtained the information and, if different, the person to whom the information relates.

Square-bracketed wording in paragraph 1(3) introduced by section 5 of the Financial Services Act 2012, which came into force on 1 April 2013.

(4) Any person who discloses information in contravention of this paragraph shall be guilty of an offence and liable –

(a) on conviction on indictment, to imprisonment for a term not exceeding 2 years, or to a fine, or to both;

(b) on summary conviction, to imprisonment for a term not exceeding 3 months, or to a fine not exceeding the statutory maximum, or to both.

Disclosure for the purposes of the Bank's functions

2. (1) Paragraph 1 does not preclude the disclosure of information in any case in which disclosure is for the purpose of enabling or assisting the Bank to discharge –

(a) its functions as a monetary authority,

(b) its functions as a supervisor of systems for the transfer of funds between credit institutions and their customers, or

(c) its functions under Schedule 2.

[(2) "Credit institution" means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account.]

Previous wording in paragraph 2(2) replaced by article 164(2) of SI 2001 No.3649.

Disclosure by the Bank to other authorities

3. (1) Paragraph 1 does not preclude the disclosure by the Bank of information to any authority specified in the first column of the following Table if the Bank considers that the disclosure would enable or assist that authority to discharge any of the functions specified in relation to it in the second column of that Table.

TABLE

Authority	*Functions*
[The Treasury.	Functions under the Financial Services and Markets Act 2000.
The Secretary of State.	Functions under the Financial Services and Markets Act 2000.
An inspector appointed under Part 14 of the Companies Act 1985 [...].	Functions under that Part.
A person authorised to exercise powers or appointed under section 447 of the Companies Act 1985 [...] or section 84 of the Companies Act 1989.	Functions under that section [*or Article*].
A person appointed under – (a) section 167 of the Financial Services and Markets Act 2000, (b) subsection (3) or (5) of section 168 of that Act, or (c) section 284 of that Act, to conduct an investigation.	Functions in relation to that investigation.
The [Financial Conduct Authority or the Prudential Regulation Authority].	Functions under the legislation relating to friendly societies, the Building Societies Act 1986, Part 7 of the Companies Act 1989 or the Financial Services and Markets Act 2000.
[The Chancellor of the Exchequer (or any person to whom any functions of the Chancellor of the Exchequer under the Statistics of Trade Act 1947 are delegated)]	Functions under the Statistics of Trade Act 1947.
[The Pensions Regulator.	Functions conferred by or by virtue of – (a) the Pension Schemes Act 1993, (b) the Pensions Act 1995, (c) the Welfare Reform and Pensions Act 1999, (d) the Pensions Act 2004, or (e) any enactment in force in Northern Ireland corresponding to an enactment mentioned in paragraphs (a) to (d) above.]]

Previous Table in paragraph 3(1) replaced by article 164(3) of SI 2001 No.3649.

Square-bracketed wording in the third and fourth entries above (relating to inspectors appointed under Part 14 of the Companies Act 1985 and persons authorised to exercise powers under section 447 of that Act) repealed by Art 2 and Sch 1, para 172 of The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 (SI 2009 No 1941).

The reference to the Financial Conduct Authority and the Prudential Regulation Authority was introduced by section 114(1) of the Financial Services Act 2012, which came into force on 1 April 2013.

The reference to The Chancellor of the Exchequer (or any person to whom any functions of the Chancellor of the Exchequer under the Statistics of Trade Act 1947 are delegated) was introduced by section 46 and Schedule 2, para 7 of the Statistics and Registration Service Act 2007 by virtue of The Statistics and Registration Service Act 2007 (Commencement No. 2 and Transitional Provision) Order 2008 (SI 2008 No.839).

The reference to the Pensions Regulator was introduced by section 319(1) and Schedule 12, para 70 of the Pensions Act 2004.

(2) The Treasury may by order amend the Table in sub-paragraph (1) by –

(a) adding any public or other authority and specifying functions in relation to it,

(b) removing any authority for the time being specified in the Table, or

(c) altering the functions for the time being specified in the Table in relation to any authority.

(3) The Treasury may by order restrict the circumstances in which, or impose conditions subject to which, disclosure is permitted in the case of any authority for the time being specified in the Table.

(4) Before making an order under this paragraph, the Treasury shall consult the Bank.

Onward disclosure

4. (1) Paragraph 1 does not preclude the disclosure by any authority specified in the first column of the Table in paragraph 3(l) of information obtained by it by virtue of that provision if it makes the disclosure –

(a) with the consent of the Bank, and

(b) for the purpose of enabling or assisting it to discharge any functions specified in relation to it in the second column of that Table.

(2) Before deciding whether to give its consent to disclosure under this paragraph, the Bank shall take account of such representations as the authority proposing to make the disclosure may make about the desirability of or necessity for the disclosure.

Other permitted disclosures

5. Paragraph 1 does not preclude the disclosure of information –

(a) with a view to the institution of, or otherwise for the purposes of, any proceedings in connection with a payment due under Schedule 2 (payment in lieu of cash ratio deposit),

(b) with a view to the institution of, or otherwise for the purposes of, any criminal proceedings, whether under this Act or otherwise, or

(c) in pursuance of any [EU] obligation.

In relation to paragraph 5 see also section 17 and Schedule 4 of the Anti-terrorism, Crime and Security Act 2001. Square-bracketed reference to EU in para 5(c) introduced by Article 6(1)(e) of SI 2011 No.1043.

SCHEDULE 8

TRANSITIONAL PROVISIONS AND SAVINGS

Paragraphs 1 to 5 and paragraph 7 of Schedule 8 were repealed by article 162 of SI 2001 No.3649. Paragraph 6 of Schedule 8 has not been reproduced in this booklet.

SCHEDULE 9

REPEALS AND REVOCATIONS

Part 1 (Repeals) (part of which was repealed by article 162 of SI 2001 No.3649) has not been reproduced in this booklet.

Part II (Revocations) was repealed by article 162 of SI 2001 No.3649.

New section 15(4A) introduced by section 4(3) of the Financial Services Act 2012, which came into force on 1 April 2013.

(5) Publication under this section shall be in such manner as the Bank thinks fit.

16 Functions of [Oversight Committee]

(1) The [Oversight Committee] of the Bank shall keep the procedures followed by the Monetary Policy Committee under review.

(2) In particular, [the function of the Oversight Committee] under subsection (1) shall include determining whether [the Monetary Policy Committee] has collected the regional, sectoral and other information necessary for the purposes of formulating monetary policy.

[(3) ...]

Square-bracketed wording in sections 16(1) and (2) introduced by, and wording in section 16(3) omitted by, section 3(4) of the Financial Services Act 2012, which came into force on 1 April 2013.

Information and reports

17 Power to obtain information

(1) The Bank may by notice in writing require an undertaking to which this section applies to provide the Bank with such information as may be specified in the notice, being information about the relevant financial affairs of the undertaking which the Bank considers it necessary or expedient to have for the purposes of its functions under this Part.

(2) A notice under subsection (1) may require information to be provided –

(a) in such form or manner as may be specified in the notice;

(b) at such time or times as may be so specified;

(c) in relation to such period or periods as may be so specified.

[(3) An undertaking is one to which this section applies if –

(a) it has a place of business in the United Kingdom; and

(b) it falls within subsection (3A), (3B), (3C) or (3D).

(3A) An undertaking falls within this subsection if it is a deposit-taker.

(3B) An undertaking falls within this subsection if it is not a deposit-taker but it –

(a) falls within the subsector "other monetary financial institution", as defined by paragraph 2.48 of Annex A to Council Regulation (EC) No.2223/96,

(a) he shall disclose his interest to the court at the time of the dealing or business being negotiated or transacted, and

(b) he shall have no vote in relation to the dealing or business, unless the court has resolved that the interest does not give rise to a conflict of interest.

(5) A member of the court shall have no vote in relation to any question arising which touches or concerns him but shall withdraw and be absent during the debate of any matter in which he is concerned.

(6) Subject to sub-paragraphs [(3)] to (5), the court shall determine its own procedure [(including quorum)].

Previous wording in paragraph 13(6) replaced by (and new square bracketed wording introduced by) sections 242(3)(b) and 242(3)(c) respectively of the Banking Act 2009, which came into force on 1 June 2009.

Remuneration

14. (1) A person appointed as Governor or Deputy Governor of the Bank shall be entitled to be paid by the Bank such remuneration as [the Oversight Committee] may determine.

Square-bracketed wording introduced by section 5 of the Financial Services Act 2012, which came into force on 19 February 2013, for the purposes of making appointments, and on 1 April 2013 for all other purposes.

(2) The Bank may pay, or create and maintain a fund for the payment of, pensions or capital grants to members, or former members, of the court who have rendered exclusive services to the Bank.

15. A [non-executive director] of the Bank shall be entitled to be paid by the Bank such remuneration as the Bank may determine with the approval of the Chancellor of the Exchequer.

Square-bracketed wording introduced by section 5 of the Financial Services Act 2012, which came into force on 19 February 2013, for the purposes of making appointments, and on 1 April 2013 for all other purposes.

In accordance with para 15 of Schedule 2 to the Financial Services Act 2012, none of the amendments in Schedule 1 to the 1998 Act, which have been introduced by paras 2 to 7 of Schedule 2 to the 2012 Act pursuant to section 5 of the 2012 Act, affect the term of any appointment made before the commencement of that provision.

SCHEDULE 2

CASH RATIO DEPOSITS

Eligible institutions

1. [(1) Each deposit-taker is an eligible institution for the purposes of this Schedule.

(a) fall within the period to which the call notice relates, and

(b) be a period throughout which the conditions mentioned in sub-paragraph (1) have been met.

(3) The amount which the Bank may by a notice under sub-paragraph (1) require an institution to pay is an amount equal to interest for the period covered by the notice, at 4% over the benchmark rate, on the average shortfall during that period.

(4) The Bank may use such method to calculate the average shortfall as it thinks fit.

(5) In sub-paragraph (1)(b), the reference to the appropriate account, in relation to an eligible institution, is to such account of the institution with the Bank as is designated by the Bank for the purposes of this Schedule.

(6) For the purposes of sub-paragraph (3), the shortfall, at any time, is the amount which the institution needs to deposit to prevent the condition mentioned in sub-paragraph (1)(b) applying.

[Benchmark rate of interest

7. (1) The benchmark rate of interest for the purposes of paragraph 6(3) is the Bank rate.

(2) In this paragraph, "Bank rate" means –

(a) the official Bank rate determined by the Monetary Policy Committee of the Bank, or

(b) where an order under section 19 of this Act is in force, any equivalent rate determined by the Treasury under that section.]

New paragraph 7 introduced by Article 2 of the Bank of England (Call Notice) (Benchmark Rate of Interest) Order 2013/721, which came into force on 3 June 2013.

8. The Treasury may by order amend or replace paragraph 7.

Power to obtain information

9. (1) The Bank may by notice in writing require an eligible institution to provide the Bank with such information as may be specified in the notice, being information which the Bank considers it necessary or expedient to have for the purposes of its functions under this Schedule.

(2) A notice under sub-paragraph (1) may require information to be provided –

(a) in such form or manner as may be specified in the notice;

(b) at such time or times as may be so specified;

(c) in relation to such period or periods as may be so specified.

Orders

10. Before making an order under this Schedule, the Treasury shall consult –

(a) the Bank,

(b) such persons as appear to them to be representative of persons likely to be materially affected by the order, and

(c) such other persons as they think fit.

11. In exercising the power to make orders under paragraph 2(2) or 5, the Treasury shall have regard to the financial needs of the Bank.

Interpretation

12. In this Schedule –

"reference period", in relation to a call notice, means the period of 6 months ending immediately before the month in which the notice is given; and "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

Modifications for new entrants

13. (1) In its application to the first call notice to be given to an institution or society after it becomes an eligible institution, this Schedule shall have effect with the following modifications.

(2) In paragraph 3(3)(a), after "period of" there is inserted "not more than".

(3) In paragraph 7(2), for "the end of the reference period for the relevant call notice" there is substituted "such time before the beginning of the period to which the relevant call notice relates as the Bank thinks fit".

(4) In paragraph 12, in the definition of "reference period", for the words from "the period" to the end there is substituted "such period prior to the notice as the Bank thinks fit".