

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 32512/2013

In the application for leave to appeal between:

**THE MINISTER OF POLICE**

1<sup>st</sup> Applicant

**THE NATIONAL DEPUTY INFORMATION OFFICER  
OF THE SOUTH AFRICAN POLICE SERVICE**

2<sup>nd</sup> Applicant

and

**THE RIGHT2 KNOW CAMPAIGN**

1<sup>st</sup> Respondent

**THE SOUTH AFRICAN HISTORY ARCHIVE**

2<sup>nd</sup> Respondent

**M & G MEDIA LIMITED**

Amicus Curiae

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**NOTICE OF APPLICATION FOR LEAVE TO APPEAL**

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**KINDLY TAKE NOTICE THAT** the applicants make an application for leave to appeal against part of the judgement and orders granted by Honourable Justice Sutherland J on 3 December 2014, a copy of which is annexed **marked "A"**. The appeal is against orders made in paragraphs 56, 57 and the finding in paragraph 53 of the judgment.

1. The finding of fact and or ruling of law appealed against and the grounds upon which the appeal is founded are the following:

2. The learned judge has on page 29 of the judgement made the following orders:

*"(54) it is declared that the decision of the first and second respondents to refuse the applicants' request for the information in terms of the promotion of access to Information Act 2 of 2000 (PAIA) is unlawful and unconstitutional.*

*(55) the decision by the first and second respondents to refuse the request is set aside.*

*(56) the first and second respondents shall supply to the applicants, within 30 days of the granting of this order, the records indicating what places or areas have been declared a national key point or national key points complex under section 2 and 2A of the National Key Points Act 102 of 1980.*

*(57) the first and second respondents shall pay the costs of this application, including the cost of two counsel."*

3. In making the above mentioned orders, the Court has found that the applicants who were the respondents in the court a quo is rationale for refusing to provide the first and second respondents ("the Respondents") with the information requested in terms of PAIA fails to meet the threshold set by PAIA.
4. The finding of this Court in reviewing and setting aside the decision of the applicants in refusing to provide the requested information to the respondents is not contested.
5. The remedy imposed by the Court in paragraph 56 of the judgement is contested. The costs orders in paragraphs 57 and 53 are also appealed against.
6. The appeal is against the orders in paragraphs 56, 57 and as well as the finding on costs in paragraph 53.

7. In finding that the applicants have not applied their minds to the request for information by the respondents, which finding is not contested, the learned judge ought in providing an appropriate remedy as contemplated in section 8 of Promotion of Administrative Justice Act 3 of 2000 (PAJA) acted in terms of section 8(1) (c) (i) by remitting the matter for reconsideration by the applicants with or without directions.
8. The Court only invoke section 8(1) (c) (ii) of PAJA in exceptional cases where the Court substitutes the administrator's decision with one of its own.
9. Whilst it cannot be contested that some of the nation key points are not sensitive areas, it can similarly not be contested by the respondents that other national key points are sensitive sites which cannot be or should not be disclosed to the public for security reasons. This includes their locality because of their security features and security concerns impacting on the security of the state.
10. In order to strike the balance between openness and transparency in a constitutional democracy where access to information held by the state is paramount on the one hand and the security of the state, its property and the property of its citizens on the one on the other hand a concept of a judicial peek was endorsed by the Constitutional Court in the judgement that has been extensively relied upon by the learned judge of the matter of ***President, RSA vs M & Media Ltd 2012 (2) SA 50 (CC)***.

11. This is a matter in which the learned judge ought to have adopted the approach adopted by the Constitutional Court in *President, RSA vs M & G Media Ltd* by ordering either one of the following:
  1. remitting the matter back to the decision maker with directions which may include appointment of an independent person to have access to all the names of the national key points and decide which ought to be made available and those which ought to be excluded from disclosure. If any dispute arises regarding the decision of an independent person, a judicial officer may conduct the exercise as provided for in PAIA.
  2. Not remitting the matter back to the decision maker, but referring it to a judicial officer who will conduct the exercise of judicial peek.
12. The learned judge did not correctly apply the legal principles in the *President, RSA vs M & G Media Pty Ltd* and the remedy provided by the learned judge to the respondents is inapposite to the facts and circumstances of this case.
13. The learned judge erred in accepting the submissions of the Amicus Curiae on the principle of legality which found no application on the facts and circumstances of this case.

14. The learned judge erred in awarding costs in favour of the Amicus Curiae as contemplated in paragraph 53 of the judgement when an Amicus Curiae is participating in the proceedings as the friend of the Court and not as the litigant. The amicus curiae ought not to have been awarded costs.
15. Leave is sought to the SCA.
16. WHEREFORE, may leave to appeal be granted with costs to be costs in the appeal.

*Sandel*

**THE STATE ATTORNEY**  
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TO: **THE REGISTRAR OF THE HIGH COURT  
 JOHANNESBURG**

AND TO: **CLIFFE DEKKER HOFMEYER INC**  
 Respondents' Attorneys  
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*[Signature]* 18/12/14  
 CLIFFE DEKKER HOFMEYER INC.  
 1 PROTEA PLACE SANDOWN, SANDTON  
 ACCEPTED WITHOUT PREJUDICE AND  
 WITHOUT WAIVING CLIENTS RIGHTS 15.06

AND TO:

**WEBBER WENTZEL**  
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WEBBER WENTZEL	
TIME:	12:30
DATE:	18 DEC 2014
SIGNATURE:	
WITHOUT PREJUDICE / SONDER BENADELING VAN REGTE	