IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 32512/13

In the matter of:

M&G MEDIA LIMITED	Applicant for admission as amicus curiae

In re the matter of:

THE RIGHT2KNOW CAMPAIGN	First Applicant
THE SOUTH AFRICAN HISTORY ARCHIVE TRUST	Second Applicant

and

THE MINISTER OF POLICE	First Respondent
THE NATIONAL DEPUTY INFORMATION OFFICER: SOUTH AFRICAN POLICE SERVICE	Second Respondent
THE MINISTER OF DEFENCE AND MILITARY VETERANS	Third Respondent

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FILING SHEET

Presented herewith for service and filing:

Written Submissions on behalf of M&G Media Limited

DATED at **JOHANNESBURG** on this 24th day of **MARCH 2014**

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WRITTEN SUBMISSIONS ON BEHALF OF M&G MEDIA LIMITED

INTRODUCTION

1. The South African History Archive Trust made a request under the Promotion of Access to Information Act 2 of 2000 ("**PAIA**") on behalf of Right2Know Campaign for, amongst other things, access to all records indicating what places or areas have been declared "*national key points*" or "*national key points complexes*" in terms of sections 2 and 2A of the National Key Points Act 102 of 1980 ("**the Act**"). The requested records shall be referred to as "**the list**". The first and second respondents ("**the respondents**") refused the request primarily on the grounds of sections 38(a) and 38(b)(i)(aa) of PAIA.[1]

2. Sections 38(a) and 38(b)(i)(aa) of PAIA provide as follows:

> ***Mandatory protection of safety of individuals and protection of property***
>
> *38 The information officer of a public body—*
>
> (a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual; or
>
> (b) may refuse a request for access to a record of the body if its disclosure would likely prejudice or impair—
>
> *(i) the security of—*
>
> *(aa) a building structure or system, including, but not limited to, a computer or communication system...*

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[1] Annexure CMK9 at page 117 of the Record. In the internal appeal the first respondent confirmed the refusal in terms of sections 38(a) and (b)(i)(aa) of PAIA; in addition the first respondent found that the refusal was also justified under section 45(b) of PAIA. M&G will confine its submissions to the refusal based on sections 38(a) and 38(b)(i)(aa) of PAIA.

3. The primary question is therefore, whether disclosing the list:

   (a) *could reasonably be expected* to endanger the life or physical safety of an individual; or

   (b) *would likely* prejudice or impair the security of a building structure or system.

4. These are questions of fact and, significantly (as we will demonstrate in more detail below), are questions that require the respondents' positive affirmation in order to sustain their refusal of the applicants' PAIA request.

5. These submissions are made on behalf of M&G Media Limited ("**M&G**"). M&G has applied for an order admitting it as an *amicus curiae* in the main application under Rule 16A. At this stage, none of the parties object to M&G's admission as an *amicus curiae*. At the hearing of this matter, M&G will seek an order confirming its admission as an *amicus curiae*.

6. The structure of M&G's submissions is as follows:

6.1 *preliminary submissions*

6.1.1 M&G's interest in these proceedings;

6.1.2 condonation for any non-compliance with Rule 16A;

6.2 *substantive submissions*

6.2.1 the importance of the principle of legality in our law;

6.2.2 how the Act infringes the principle of legality;

6.2.3 how the Act should be interpreted to comply with the Constitution;

6.2.4 how the infringement of the principle of legality in refusing to disclose the list is relevant, at three levels, to determining:

6.2.4.1 whether the respondents have presented adequate evidence to demonstrate sufficient harm to justify their refusal to disclose the list;

6.2.4.2 whether the information officer exercised his/her discretion under section 38(b)(i)(aa) of PAIA correctly; and

6.2.4.3 whether, even if any ground of refusal were applicable, the public interest override in section 46 of PAIA nevertheless requires disclosure of the list.

THE INTEREST OF M&G IN THE MAIN APPLICATION

7. M&G is one of the leading newspapers in South Africa, and in the course of its work there have been numerous incidents over the years in which reporters have been advised that a particular location cannot be photographed or reported on because it is a national key point. Therefore, the issues raised in, as well as the outcome of this matter, are of significant interest to M&G.

8. The issues raised in the main application raise novel questions which are crucial for the principle of legality which forms an integral part of the rule of law. They are manifestly of profound public interest and are squarely of interest to all members of the media, including M&G. That is so because, in terms of section 10(2)(c) of the Act, it is a criminal offence for any person to publish information about the security measures applicable at a national key point or to report on any incident that occurred there. The existence of this offence has the potential to stifle

legitimate reportage on events that occur at or around locations that happen to be national key points.

9. While it is an offence for any person to publish information about the security measures applicable at a national key point, a person has no way of knowing whether a particular place that he or she is interacting with is a national key point because the list has never been published. According to the Act as it stands, a person could, for instance, be charged with breaching section 10(2)(c) of the Act for taking pictures of the security features of a national key point without even knowing that the particular place is a national key point. As we will submit below, this is squarely a violation of the principle of legality.

10. It is accordingly essential that the respondents' decision taken in terms of the Act be tested against the relevant legal and constitutional principles. Moreover, it is essential that the correct constitutional and legal principles in this regard be established. This is particularly the case because the principle of legality requires a person to know of the existence of the offence allegedly committed so that he or she may regulate his/her conduct in accordance with the law.

11. In the circumstances, we submit that M&G, as one of the leading newspapers in South Africa, which is dedicated to providing information to the public and reporting on matters which are of public interest, has sufficient interest in the main application to qualify it as an *amicus curiae* and it is on this basis that it will seek this Court's confirmation of its admission as an *amicus curiae* at the hearing of the main application.

CONDONATION

12. Rule 16A sets out various time-periods for the admission of an *amicus curiae*. Rule 16A(9) permits this Court to "*dispense with any of the requirements of this rule if it is in the interests of justice to do so*."

13. To the extent that there has been any non-compliance with Rule 16A, M&G requests this Court to dispense with the relevant requirements.

14. In this regard we note that there was no Rule 16A notice filed when the application was launched by the applicants and no such notice has been filed to date. M&G accordingly only found out about the application on 22 November 2013. As soon as M&G became aware of the application, it instructed its attorneys on 28 November 2013 to consider the prospects of its intervention as an *amicus curiae*.

15. The progress of the matter was delayed somewhat by the intervening December holidays as counsel was unavailable. M&G subsequently approached the parties seeking their consent for its admission as an *amicus curiae*.[2] As the respondents would not consent to such admission, M&G's application for admission was prepared as expeditiously as possible.[3] The respondents subsequently withdrew their opposition[4] and thus M&G's application for admission as an *amicus curiae* stands unopposed.

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[2] Paras 23 to 26 of the application for admission as an *amicus curiae* ("***amicus* application**") at p 316 to 317 of the Record.

[3] This refusal was set out in a letter from the State Attorney, dated 29 January 2014, para 28 of the *amicus* application at p 318 of the Record.

[4] See the Notice of Withdrawal of Opposition, dated 6 March 2014.

16. In light of the considerable importance of the present matter for the media in particular and the public as a whole, as well as the absence of any prejudice to the respondents, we submit that it is in the interests of justice that condonation be granted for any non-compliance with Rule 16A.

THE IMPORTANCE OF THE PRINCIPLE OF LEGALITY IN OUR LAW

17. According to Snyman,

> *In its broadest sense, the principle of legality can be described as a mechanism to ensure that the state, its organs and its officials do not consider themselves to be above the law in the exercise of their functions but remain subject to it. In the field of criminal law the principle fulfils the important task of preventing the arbitrary punishment of people by state officials, and of ensuring that the determination of criminal liability and the passing of sentence correspond with clear and existing rules of law.*[5]

18. The principle of legality is an incidence of the rule of law. It is a widely-recognised principle under the common law and one of the founding values of our Constitution.[6]

19. In *Commissioner for Customs & Excise v Container Logistics (Pty) Ltd; Commissioner for Customs & Excise v Rennies Group Ltd t/a Renfreight*,[7] the Court conceded that "*it is difficult to conceive of a case where the question of legality cannot ultimately be reduced to a question of constitutionality*".

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5 CR Snyman *Criminal Law* (2008) Fifth Edition, page 36.

6 Section 1(c) of the Constitution.

7 1999 (3) SA 771 (SCA) at para 20.

20. In *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers*,[8] the Court held that the common law doctrine of legality and the constitutional ground of judicial review are intertwined and do not constitute separate concepts.

21. It is a fundamental principle of our criminal law that a person may only be convicted in terms of a law that is publicly-known, and non-retroactive. In addition an accused person must have a blameworthy state of mind necessary to be held responsible for that particular offence. For instance, negligence for culpable homicide or intention for murder (or in extremely rare cases strict liability).

22. In *President of the Republic of South Africa & Another v Hugo*,[9] Mokgoro J stressed the need for the law to be accessible, precise, and of general application. She noted that these characteristics "*flow from the concept of the rule of law*" and that a "*person should be able to know of the law, and be able to conform his or her conduct to the law*".[10]

23. The principle of legality also requires that people be given clear and adequate notice of what the law expects of them. As Burchell notes:

> *Since a person cannot be regarded as blameworthy and thus liable to punishment if he or she did not know that he was contravening the criminal law, it is inherent in the system of criminal justice that the citizen must be properly informed of the prohibitions of law so that he or she is not punished for that done in ignorance.*[11]

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8 2000 (2) SA 674 (CC).

9 1997 (4) SA 1 (CC).

10 Ibid at para 102.

11 J Burchell *Principles of Criminal Law* (2005) 3rd Edition at page 102.

24. The importance of the principle of legality has been emphasised by courts in numerous jurisdictions around the world. By way of example, the House of Lords in the United Kingdom has held that:

> *The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it.*[12]

25. Similarly, in *Fothergill v Monarch Airlines Ltd* it emphasised that:

> *Elementary justice or, to use the concept often cited by the European Court [of the European Communities], the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly available.*[13]

26. In *Sunday Times v the United Kingdom (no. 1)*,[14] the European Court of Human Rights went even further and interpreted the principle of legality as an essential part of the phrase "*prescribed by law*" in Article 9(2) of the European Convention on Human Rights:

> *In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient*

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[12] *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 638 (HL).

[13] [1981] AC 251, 279 (HL). See also *Regina v. Rimmington (On Appeal from the Court of Appeal (Criminal Division)) Regina v. Goldstein (On Appeal from the Court of Appeal (Criminal Division))* [2005] UKHL 63.

[14] (1979) 2 EHRR 245 at para 49.

precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

27. Significantly, the Constitutional Court has endorsed a similar approach to that taken in foreign jurisdictions. In *President of the Republic of South Africa and Another v Hugo*, Mokgoro J emphasised:

> *[t]he need for accessibility, precision and general application [of the law] flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law.*[15]

28. And in *Masiya v Director of Public Prosecutions, Pretoria and Another*,[16] the Constitutional Court underscored that "*[o]ne of the central tenets underlying the common-law understanding of legality is that of foreseeability - that the rules of criminal law are clear and precise so that an individual may easily behave in a manner that avoids committing crimes.*"[17]

THE ACT INFRINGES THE PRINCIPLE OF LEGALITY

29. Section 10(2)(c) of the Act provides that any person who:

> *furnishes in any manner whatsoever any information relating to the security measures, applicable at or in respect of any National Key Point or in respect of any incident that occurred there, without being legally obliged or entitled to*

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[15] at para 102.

[16] *Masiya v Director Of Public Prosecutions, Pretoria And Another (Centre For Applied Legal Studies And Another, Amici Curiae)* 2007 (5) SA 30 (CC).

[17] Ibid at para 52.

do so, or without the disclosure or publication of the said information being empowered by or on the authority of the Minister, or except as may be strictly necessary for the performance of his functions in regard to his employment in connection with, or his ownership of, or as may be necessary to protect, the place concerned,

shall be guilty of an offence and on conviction liable to a fine not exceeding R10 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment.

30. According to the ordinary grammatical meaning of the words in section 10(2)(c) of the Act it is an offence for any person to publish information about the security measures applicable at a national key point. However, as noted above, a person has no way of knowing whether the particular place they are interacting with is a national key point, since the list has never been published.

31. Therefore, according to the Act as it stands, a person could plausibly be charged and/or imprisoned for taking pictures (for instance) of the security measures of a national key point or for reporting on an incident that occurred at a national key point, without ever knowing that the particular place was a national key point. We submit that this is squarely a violation of the principle of legality.

32. Further, the respondents' mere citation of categories of structures that constitute national key points[18] and not the actual areas or places which are national key points is insufficient in order to give effect to the principle of legality.

33. To demonstrate just how unhelpful it is for the respondents to refer to categories of national key points; with regard to banks as an example of the categories of

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[18] See respondents' answering affidavit, para 9 at p 175 of the Record.

structures that constitute national key points, it is unclear which banks are national key points. It is even more uncertain whether every branch of every bank is a national key point thus if a reporter were to report on a robbery that took place in a specific branch of Standard Bank (because there is no list of national key points), and she is later informed that the specific branch of Standard Bank that she reported on is a national key point, she would have committed an offence in terms of section 10(2)(c) of the Act.

34. Importantly, it would not be an answer for the respondents to claim that, in practice, the offences are not used and there is therefore no constitutional difficulty. On this score the Constitutional Court's unanimous finding in the *Teddy Bear Clinic* case is apt. The Court held:

> *In principle, and as this Court has made plain, the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions.*[19]

35. Analogously, in our submission, the mere fact that an offence is not enforced as a matter of practice cannot save otherwise unconstitutional provisions.

A CONSTITUTIONAL INTERPRETATION OF THE ACT

36. The applicants have not argued that the Act is unconstitutional. Nonetheless, it is a settled principle of our constitutional law that an interpretation of a statute which renders the Act constitutional must be preferred to one which renders that statute

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[19] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) at para 76. See also *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC) at para 23.

unconstitutional. This principle has been consistently endorsed by the Constitutional Court:

> *[J]udicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.*[20]

37. We submit therefore that the Act must be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights and which is in line with the principle of legality and consequently the rule of law.

38. There are, of course, limits to the extent to which a court is empowered to prefer a constitutional interpretation over an unconstitutional one. The crux of the matter is that the constitutional interpretation must be a reasonable interpretation of the text of the particular provision and must not be unduly strained.[21]

39. In recent cases the Constitutional Court has developed this method of interpretation even further. The approach now followed is that even where there are two interpretations of a provision which are "*constitutionally compliant, one would then have to prefer the interpretation that conforms better with the spirit, purport and objects of the Bill of Rights.*"[22]

40. As noted above, the Act is, on its face, plainly at odds with one of the axioms of our criminal law. We submit that the constitutionally-compliant interpretation of the Act is one that is consistent with the principle of legality, which promotes the spirit,

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[20] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Distributors (Pty) Ltd v Smit NO and Others* 2001 (1) SA 545 (CC) at para 23.

[21] Ibid at para 24.

[22] *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto NO and Another* 2012 (6) SA 249 (CC) at para 72.

purport and objects of the Bill of Rights, and in the result, an interpretation which envisages that the list will be publicly disclosed so that a person can know in advance if they are breaching the law in respect of a national key point.

41. We submit that an interpretation of the Act which envisages that the list will be disclosed best achieves the purposes of PAIA, as well as the purposes of the Act itself, as it would prevent inadvertent breaches of the Act.

42. This is significant as section 2(1) of PAIA provides an additional direction to the court: that when a provision of PAIA is interpreted, every court must prefer any reasonable interpretation thereof that is consistent with the objects of PAIA over any alternative interpretation that is inconsistent with those objects:

42.1 As a point of departure, therefore, and as is suggested by its very name, PAIA must be interpreted generously in favour of access to information held by the state.

42.2 PAIA was enacted in order to give effect to access to information and promote the values of openness, transparency, accountability and good governance – principles which are foundational to the Constitution.

42.3 In *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)*,[23] the Supreme Court of Appeal interpreted the provisions of PAIA in light of section 32 of the Constitution, and stated that:

> *... the genesis of the legislation was the Constitution and [PAIA] must be interpreted with due regard to its terms and spirit. The right of*

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[23] 2005 (2) SA 110 (SCA).

> *access to information held by the state is couched therein in wide terms. … It must also be borne in mind that [PAIA] was enacted in order to give effect to access to information and promote the values of openness, transparency and accountability which are foundational to the Constitution.*[24]

43. The above construction is a reasonable interpretation of the Act (it is not unduly strained), and is consistent with both the Constitution as well as the underlying rationale of PAIA. This is particularly so because the Act is silent on whether the list should be disclosed (we accept that it would be a different matter entirely if there was an express prohibition in the Act precluding the list from being disclosed).

THE GROUNDS OF REFUSAL

44. It is trite that the burden on the public body, in respect of whether a record falls within one of the exemptions under PAIA, is a stringent one and the courts will scrutinise the evidence put up by the public body carefully.

45. Our primary submission is that, where the respondents' refusal of a PAIA request has the effect of infringing fundamental constitutional principles, such as the principle of legality, this Court should scrutinise the evidence provided for the refusal by the public body even more closely.

46. In our submission, therefore, the principle of legality is relevant at three stages in respect of determining whether:

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[24] Ibid at para 16.

46.1 the evidence provided by the respondents adequately demonstrated harm (and therefore whether the grounds of refusal were validly imposed);

46.2 the information officer exercised his/her discretion under section 38(b)(i)(aa) correctly;

46.3 even if any ground of refusal were applicable, the public interest override under section 46 of PAIA nonetheless requires the disclosure of the list.

47. We address each of these levels in turn.

THE REASONS PROFFERED FOR THE REFUSAL

48. The respondents have in substance relied on two substantive grounds under PAIA as a basis for refusing the request:

48.1 Firstly, section 38(a) of PAIA which provides that a public body must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual.

48.2 Secondly, section 38(b)(i)(aa) of PAIA which provides that a public body may refuse a request for access to a record if its disclosure would be likely to prejudice or impair the security of "*a building, structure or system, including, but not limited to, a computer or communication system*".

49. We submit that it follows from the constitutional interpretation of the Act that the Act envisages that the list must be disclosed. Once that is so, disclosing the list cannot amount to a disclosure that would be likely to prejudice or impair the security of those national key points (and accordingly the respondents can place no reliance on section 38(b)(i)(aa) of PAIA).

50. By parity of reasoning, disclosing the list could not reasonably be expected to endanger the life or physical safety of an individual.

51. Alternatively, we submit that when evaluating the evidence put forward by the public body to show the likelihood of harm, this Court must take into consideration that the refusal to disclose the list infringes the principle of legality and that a constitutional interpretation of the Act is one that envisions that the list should be disclosed.

THE REASONS PROFFERED FOR THE REFUSAL ARE SELF-DEFEATING

52. The Information Officer justified the refusal by stating:

> *To provide access to the requested records will impact negatively on and jeopardize the operational strategy and tactics used to ensure the security at the relevant property or safety of an individual (e.g. if a person plans, intents [sic] or tries to harm the relevant individual or to prejudice or impair the security of the building, access to this information may prejudice the effectiveness of those methods, techniques or procedures used to ensure the safety of such individuals and/or the building - a person who intends to harm the relevant individual may with ease harm the individual if he or she has access to such information, or he or she may with ease determine the strategies and tactics used for such protection and then use the information to do such harm.*[25]

53. This response proceeds from a fallacious and fictitious premise, namely, that the mere disclosure that a particular structure is a national key point (and not its address) will undermine the security of that structure.

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[25] Annexure CMK9 at page 117 of the Record.

54. We submit that the security risks are more illusory than real. This is evidenced by the fact that the government has previously disclosed the fact that particular structures are national key points without citing any statutory basis for doing so. It cannot be suggested that the government would have deliberately put the President's life or physical safety in danger, for instance, by disclosing that the President's Nkandla residence is a national key point. The government would not have done so if the security risk from such disclosure were indeed real.

55. In this regard we also underscore, as the applicants point out, that the disclosure in Parliament in 2013 of the names and locations of a numerous national key points by the Ministers responsible for their administration demonstrates the unreasonableness of the respondents' blanket refusal of the request.

56. The respondents have not made any attempt to differentiate between different categories of national key points (for example, between those which may safely be disclosed and those which may not). Moreover, the state has previously under oath made a clean distinction between information *about* a national key point (which is security-sensitive) and the fact that a particular structure or complex *is* a national key point (which is not).

57. In this regard we refer to the recent case in the North Gauteng High Court of *M&G Centre for Investigative Journalism NPC and Another v Minister of Public Works and Others* under case number 67574/12, in which the Minister of Public Works presented the following evidence:

> *The Nkandla residence, like the residences of former Presidents and former Deputy Presidents, has been declared a National Key Point in terms of the National Key Points Act, No. 102 of 1980 ("the NKP Act"). The declaration certificate in respect of the Nkandla residence is dated 8 April 2010. All information relating to security measures applicable at, or in respect of, the*

> *Nkandla residence is protected from disclosure. In this regard, the respondents rely on section 10 of the NKP Act, sections 3 and 4 of the Protection of Information Act, No. 84 of 1982 ("the PI Act"), and sections 38 and 41 of the Promotion of Access to Information Act. No. 2 of 2000 ("PAIA").*[26]

58. Similarly, in that case, when the Department of Public Works refused the request for information about Nkandla, it stated as follows (with our emphasis added):

> *Please be advised that Nkandla Presidential Residence, like all other Presidential residences in South Africa, is a National Key Point. As such, information related to, the National Key Point is protected in terms of the National Key Points Act 102 of 1980.*[27]

ENFORCING THE OFFENCES

59. We emphasise that as the Act does not envisage any kind of confidential court process, any trial conducted in terms of the Act would follow the general principle of a public hearing. It follows that in order to enforce the offence, it would be necessary publically to disclose that the structure is a national key point, which would defeat the argument advanced by the respondents that the list must be kept secret.

60. Thus, the offences are either unworkable because they cannot be enforced (since a person cannot be prosecuted without being informed of the offence they are suspected to have committed) or the fact that a particular structure is a national key point would need to be disclosed publically.

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[26] Record under case number 67574/12 at page 122 (answering affidavit).

[27] Ibid at page 37 of the Record (annexure VB3 to the founding affidavit).

THE DISCRETIONARY NATURE OF THE POWERS OF THE INFORMATION OFFICER OF A PUBLIC BODY WHEN IT REFUSES TO RELEASE INFORMATION UNDER PAIA

61. We now turn to the second level. We submit that the constitutional interpretation of the Act is also relevant when an information officer is deciding to exercise his/her discretion in terms of section 38(b)(i)(aa) of PAIA.

62. PAIA distinguishes between grounds of refusal that are mandatory and grounds of refusal that are discretionary. For instance section 37(a) of PAIA provides that an information officer 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*". This ground of refusal is mandatory. That is not, however, the wording of section 38(b)(i)(aa) on which the respondents rely.

63. Section 38(b)(i)(aa) provides that the information officer *may refuse a request* if disclosure would be likely to impair the security of a building or structure.

64. The deliberate use of the word 'may' indicates that the relevant decision maker has a discretion whether to grant access to the requested information. The (information officer of a) public body has a duty to apply his mind and exercise his discretion fairly. Accordingly, we submit that the question of constitutional interpretation of the Act is still relevant when the public body is exercising its discretion whether to disclose the particular documents. That is, even if the information officer is satisfied that there is a risk to the safety of a building (in this case a national key point) the officer may still decide to disclose the information in any case.

65. We submit that in exercising his or her discretion the information officer must weigh up any security risk with the flagrant breach of the principle of legality that would be occasioned by failing to disclose the list. Accordingly, we submit that the discretion should have been exercised in favour of the principle of legality and disclosing the list (on the basis that not to do so would result in an infringement of the principle of legality).

PUBLIC INTEREST OVERRIDE

66. The final level at which the consideration of the principle of legality is relevant is at the level of the public interest override under section 46 of PAIA. The applicants demonstrate that the contents of the records sought are plainly in the public interest and list various reasons why that is so.[28] M&G aligns itself with those reasons.

67. In addition, M&G submits that the fact that the offences created by the Act, in circumstances in which the list is not disclosed, infringe the principle of legality is also a weighty consideration which must be added to the list of factors justifying the disclosure of the list in the public interest. We submit that when comparing the numerous factors in support of disclosure against the perfunctory and contradictory reasons proffered by the respondents the decision to refuse to disclose the list falls to be set aside.

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[28] At paras 72 to 80 of the applicants' heads of argument.

CONCLUSION

68. In summary, the respondents' argument essentially hinges on a single premise: that the mere disclosure of a structure as a national key point will inhibit the safety and security of that structure. The respondents bear the onus to prove this premise and they have not done so. In the ordinary course this is sufficient to grant the applicants' request for the disclosure of the list. Moreover, in the present matter the refusal to disclose the list infringes the principle of legality because it exposes the media and the public in general to potential criminal charges without the public being able to know what conduct constitutes the crime (because there is no list of national key points). Therefore the Court should treat the respondents' absence of clear evidence on the papers for refusing the request even more unsympathetically. Consequently, we submit that the respondents' refusal to disclose the list of national key points infringes the principle of legality and therefore the rule of law, and falls to be set aside by this Court.

Buhle Lekokotla
Chambers, Sandton
24 March 2014

TABLE OF CASES