

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

CASE NO: 32512/13

In the matter between:

M&G MEDIA LIMITED

Applicant for admission as amicus curia

In the matter of:

THE RIGHT TO KNOW CAMPAIGN

1st Applicant

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST

2nd Applicant

and

THE MINISTER OF POLICE

1ST Respondent

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

2ND Respondent

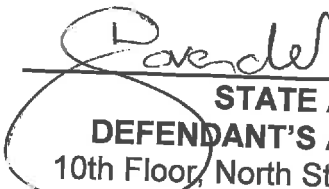
**THE MINISTER OF DEFENCE AND MILITARY
VETERANS**

3RD Respondent

FILING SHEET

Document presented for filing: Respondents' Heads of Argument.

DATED at JOHANNESBURG on this the 15th day of APRIL 2014.


**STATE ATTORNEY
DEFENDANT'S ATTORNEY**
10th Floor, North State Building
Market Street 95, cnr Kruis Street
Private Bag X9, JOHANNESBURG, 2000
Docex: 688, JHB
Ref to: Mr N. Govender
Ref No. 4354/13/P8/nzk
Tel: (011) 330 7680
Fax: (011) 337 6200

**TO: THE REGISTRAR OF THE
ABOVE HONOURABLE COURT
JOHANNESBURG**

**AND TO: WEBBER WENTZEL
APPLICANT'S (M&G MEDIA LTD) ATTORNEYS
10 Fricker Road, Illovo Boulevard
JOHANNESBURG
Tel: (011) 530 5607
Fax: (011) 530 6607
REF: Okyerebea Ampofo-Anti 2466111**

**Served by email at:
anti@webberwentzel.com**

**AND TO: CLIFF DEKKER HOFMEYR INC
APPLICANT'S ATTORNEYS
1 Protea Place
SANDOWN
Tel: (011) 562 1162
Fax: (011) 562 1514
REF: C Jesseman/01949175/01950909**

**Served by email at:
Tricia.Erasmus@diacdh.com**

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

CASE NO: 32512/13

In the matter between:

RIGHT TO KNOW 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 SERVICES** Second Respondent

RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1. The applicants have instituted application proceedings for a declaration of the respondents' decision to refuse their request for information and for an order directing the respondents to furnish them with a copy of the requested information. The respondents oppose the application.

2. The respondents oppose the application on the basis that the refusal is valid. In addition to opposing the application, the respondents have conceded that this Honourable Court should exercise its power in terms of section 80 of the Promotion of Access to Information Act, No. 2 of 2000 ("PAIA").
3. It is submitted that this Honourable Court should dismiss the application. In the alternative, this Honourable Court should exercise its powers in terms of section 80 of PAIA.

SUBMISSIONS

4. The applicants seek records indicating places and/ or areas declared as national key/ complex points in terms of the National Key Points Act, No 102 of 1980. They further requested information regarding bank statements of the special account established in terms of s3B of the Act.¹

¹ Record: CMK8, p112.

5. The respondents refused to furnish the requested record. The respondents' refusal is based on the exemption laid down by the PAIA. They aver that if the information requested were to be disclosed it would cause prejudice the defence and security of the Republic. They gave the nature of the key points but refused to furnish the names and addresses thereof.²
6. The respondents further aver that the bank account referred to in s3A of the Act was never opened.³
7. In addition to the foregoing the respondents conceded that this Court should exercise its discretion in terms of s80 of the Act.⁴
8. There does not seem to be any more dispute between the parties regarding the s3B bank account. It cannot be disputed that it was never opened.

² Record: Answering Affidavit, p174 – 175.

³ Record: AA, p175.

⁴ Record: AA, p175.

9. What remains is whether the respondents have discharged the onus that they bear.
10. The approach to resolving a dispute of this nature is set out by the Constitutional Court.⁵ It held that the question is not whether the best evidence to justify the refusal had been provided, but whether the information provided is sufficient for a court to conclude on probabilities that the record sought falls within the exemption claimed.
11. In this case, the respondents aver that the information requested regarding national key-points is such that if that information regarding the key-points were to be disclosed, it will cause prejudice to the defence and security of the Republic. The respondents went on to say that the key-points are banks, munitions industries, petro-chemical industries, water supply, electricity, communications, transport, government situations, debtor processing, and research or chemical information systems. It further

⁵ In *President of the Republic of South Africa and Others / M&G Media Ltd 2012 (2) SA 550 (CC)*

averred that it is unable to furnish any further information other than the description it gave. It avers that the mere mention of the name of a place will attract unnecessary attention to that place.⁶

12. In the circumstances, the respondents in this case are constrained by the provisions of sections 25(3)(b)⁷ and 77(5)(b)⁸ of PAIA in giving further details of the matter.
13. The information sought is, by its very nature, information which should not be readily given. An area is declared a national key-point if it appears to the Minister that it is so important that its loss, damage, disruption or immobilisation would prejudice the Republic or that it is necessary or expedient for the safety of the Republic or in the best interest that the place is so declared.⁹

⁶ Record: AA, p174 – 175.

⁷ S25(3) (b) provides that if the request for access is refused, the requester must be given notice thereof together with reasons for such refusal. The notice must however exclude any reference to the content of the record.

⁸ S77(5)(b) contains similar prohibition in respect of an appeal.

⁹ S2 of the Act provides as follows:

14. In this case, the respondents can give no further information other than the information they have given. The further information they may give is to state which bank or which munition place, or petro-chemical place they are referring to. That would be the very information that they do not wish to disclose and would in contravention of the provisions of sections 25(3)(b) and 77(5)(b).
15. It is submitted that the information provided by the respondents is sufficient for this Honourable Court to conclude that the record sought by the applicants falls within the exemption claimed by the respondents.
16. It is further submitted that there is no danger that the public at large will be prejudiced by the refusal of the information requested. The offences created by section 10 of the Act do not create a case of strict liability. A

"If it appears to the Minister at any time that any place or area is so important that its loss, damage, disruption or immobilization may prejudice the Republic, or whenever he considers it necessary or expedient for the safety of the Republic or in the public interest, he may declare that place or area a National Key Point."

person will only be convicted of the offences created therein if the offence is done intentionally. If a person did not know that the information to be furnished at the place is a national key-point, he cannot be convicted of such conduct.

17. It is submitted that this Honourable Court should dismiss the application on this ground.
18. It is further submitted that, in the alternative, this Honourable Court should use its discretionary power conferred upon it by section 80 of PAIA (*"the judicial peek or ukukrwaqula kwenkundla"*).
19. The Constitutional Court has held that such a power should be resorted to where there is potential for injustice as a result of the unique constraints placed upon parties in access of information disputes.¹⁰

¹⁰ At para [44]

20. In this case there are unique constraints placed upon the parties. The respondents cannot give more information than they have given. On the other hand the applicants are unable to assess the refusal properly.
21. It is submitted that in the circumstances of this case this Honourable Court should, in the alternative, invoke the provisions of section 80 of PAIA.

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M NTOMBELA

Counsel for the respondents

Chambers, Sandton

April 2014