

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. CCT170 /2014

In the matter between:

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

First Applicant

THE DEPUTY INFORMATION OFFICER

Second Applicant

THE MINISTER IN THE PRESIDENCY

Third Applicant

and

M&G MEDIA LIMITED

Respondent

APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the above Applicants apply to this Honourable Court for leave to appeal against the whole of the judgment and order of the Supreme Court of Appeal which was handed down on 19 September 2014 under case number 998/2013 in which that Court confirmed the order of Raulinga J in the High Court sitting in Pretoria in case number 1242/09.

TAKE NOTICE FURTHER that the said application will be based on the grounds and basis mentioned hereunder.

Introduction

1. The primary feature which runs like a thread through the entire judgment of the SCA, and underpins the order of the SCA, is that, like the High Court judgment, it characterised the filing of and use by the Applicants herein of the *ex parte* affidavits admitted under section 80(3)(a) of PAIA read with Rule 4(1)(a) of the Rules promulgated under PAIA, as an abuse of process.
2. The SCA went on to characterise the case of the Appellants as one that revolved “*around the proposition that the two affidavits which it sought to introduce, should have been admitted in evidence*” whereas in its view, the *de novo* hearing was simply to establish whether the contents of the report justified the refusal of access¹.
3. In coming to this conclusion the SCA arrived at the erroneous finding that the purpose of section 80(3) was not to “*afford an opportunity to any of the parties to adduce new evidence, extraneous to the record, which should have been introduced as part of its original case*”.
4. It is this narrow interpretation of section 80 of PAIA, read with the materiality of the evidence tendered and admitted under section 80(3) and Rule 4(1)(a), that forms the backbone of the appeal to this Court.

¹ Judgment of the SCA para 23 - 24

Grounds of Appeal

5. The Appeal Court erred in finding that the judge in the court *a quo* dismissed the rule 6(5) application and thereafter considered and refused to admit the affidavits of President Mbeki and President Zuma under section 80(3)(a) of the Promotion of Access to Information Act (PAIA)². There is no evidence of this in the judgment of Raulinga J. Instead, there is clear evidence that the learned Judge decided that he would determine the application before him “*on the factual allegations made by the respondents in their ex parte affidavits as well as the record itself*.”

6. The Appeal Court failed to take into account the fact that the attempt to apply in terms of Rule 6(5) was made on 13 June 2012⁴, whilst the question of the procedure to be followed under section 80(3) was debated and decided on 14 June 2012⁵, whereafter the Court elected to apply the *ex parte* procedure⁶. The *ex parte* representations were exchanged between the parties⁷ and the court *a quo* admitted them as evidence. Had the SCA fully appreciated the sequence of events, it would have come to a different conclusion with respect to the relevance and weight to be

² SCA Judgment para 20.

³ Record – p. 508 - Judgment of Raulinga J at para 24

⁴ Record – p. 508 – Judgment of Raulinga J at para 25

⁵ Record – p. 501 – Judgment of Raulinga J at para 6

⁶ Record – p. 502 – Judgment of Raulinga J at para 9, 16

⁷ Record – p. 505 – 506 para 16, 19

accorded to the *ex parte* affidavits. The Court erred in that it did not give any weight to the finding of the court *a quo* that Rule 4(1)(a) simply defines that the *ex parte* representations should be in a form that “enables a court to accept the evidentiary value of the disposition taken”, and that section 80(1) read with Rule 4(1)(a) “is a procedure that allows parties to make representations that can be admitted in evidence”.⁸ Had the Court taken these findings into account and given them due weight, it would not have found the criticism directed at the judgment and order of the court *a quo* to be unjustified, or accepted the conclusion reached by the court *a quo*, and endorsed by it, that the Appellants sought to sneak new evidence in through the back door⁹. Instead it would have concluded that the said evidence was relevant to both the aborted Rule 6(5) application and the section 80(3)(a) process.

7. The SCA overlooked various passages in the judgment of the court *a quo*, which made it clear that the learned judge admitted these two affidavits into evidence, stating in that judgment “*The application will be decided on the factual allegations made by the respondents in their ex parte affidavits as well as the record itself.*”¹⁰

8. In the result the Court misdirected itself in that it interpreted the scope and

⁸ Record – p. 507 Judgment of Raulinga J at para 21

⁹ SCA Judgment para 20

¹⁰ Judgment of the High Court paragraph 24

ambit of section 80 of PAIA read with Rule 4(1)(a) of the Rules promulgated in terms of PAIA in a manner that negated the purpose and essence of those provisions, in that:

- 8.1. the Court erred in finding that “as a matter of principle, the representations contemplated in s80 (3)(a) must be directed at the contents of the record that the court had ascertained through taking a judicial peek”. The Court ought to have found that in addition to the *ex parte* representations being directed at the contents of the record, these representations could also present evidence on the context within which to interpret the contents of the record and the evidence presented by the Deputy Information Officer and Appeal Authority and in support thereof.
- 8.2. The Court erred in giving no weight to the evidence contained in President Mbeki’s affidavit to the effect that he had arranged with President Mugabe that the two Justices be given full access to whatever information they sought. The Court ought to have found that the Justices would not have gone to Zimbabwe to observe the 2002 Presidential elections, or been furnished with the information they received, had they not been the special envoys of President Mbeki.

- 8.3. The Court erred in characterising the evidence tendered in the *ex parte* representations as evidence that was extraneous to the record, and as evidence which should have been introduced as part of the Appellant's original case. The Court ought to have found that the two affidavits gave context to the policy formulation initiatives of government as explained by both Presidents Mbeki and Zuma.
- 8.4. The Court ought also to have found that the affidavit of President Mbeki explained the rationale for and purpose of sending the two Justices to Zimbabwe to, *inter alia*, report to him on the legal and constitutional challenges that had arisen just prior to the 2002 Presidential elections, and in addition to furnish him with relevant facts for purposes of crafting policy driven interventions in Zimbabwe for the purpose of assisting the people of Zimbabwe resolve their political differences and work towards peace, economic development and stability¹¹.
- 8.5. The Court misdirected itself in concluding that the affidavit of President Mbeki did not address the broad contents of the report, in particular, those paragraphs that deal with the reports that he had received on laws that were being enacted, such as the Citizenship Act, 1984, and the

¹¹ Record – p. 404 – 405 Affidavit of President Mbeki read with the SCA Judgment para 24 - 25

Zimbabwean Public Order Act, and that were seen by some as being in conflict with the Constitution of Zimbabwe. A reading of the report makes it clear that these were issues pertinent to the 2002 Zimbabwe elections.

9. The Court misdirected itself in reading a sinister motive into the reasons why the affidavit of President Mbeki was submitted. There is no factual basis for this conclusion. In the result, the Court erred in finding that the Appellants attempted to use the referral back to the High Court for a purpose which was the exact opposite of what the Constitutional Court had in mind, and that this conduct amounted to an abuse of process.¹²

10. The Court erred in not concluding that it was in the interests of justice that the direct evidence of the intention of the person who sent the Justices to Zimbabwe should be admitted as evidence and given due weight in support of the submissions made by the Deputy Information Officer and the Appeal Authority.

11. The Court erred in holding that because President Zuma did not say that he had personal knowledge, his *ex parte* representations could not support the exemptions claimed. The Court ought to have found that the affidavit of President Zuma gave a perspective on the context and relevance of the matters raised in the report to SADC's (and South

¹² Judgment – para 25

Africa's) objective of maintaining peace, stability, growth and development on the sub-continent.

12. Finally, the Court misdirected itself in scornfully characterising the views on the policy formulation objective of President Mbeki as mere "incantations of section 44(1)(a)". The Court ought to have found that the affidavits of President Mbeki and President Zuma, read as a whole, gave a clear picture of the policy objectives that the President as Head of State and Head of the national executive, sought to achieve, and in large part, did achieve with respect to bringing political stability to Zimbabwe.

13. The Court misconstrued the evidence relating to the option of redacting or severing portions of the record. That evidence indicated that the information obtained was co-mixed, and that a piecemeal and premature disclosure of that information without taking account of the political environment that obtained when the information was imparted, could impact negatively on the policy driven interventions of the SADC facilitator and the South African government.

Constitutional matter raised

14. The judgment of the Court deals with the interpretation and application of the provisions enacted to give access to information held by the State within the context of the limitation of that right. It also considers the relationship between the role of President, as the person to whom the

report was directed, and that of the Deputy Information Officer and Appeal Authority, who are the statutory functionaries responsible for responding to requests for access to information held by the President.

15. This matter also focuses on the novelty of the application of section 80 of PAIA. In particular, it requires this Court to give a definitive interpretation of the nature, scope and purpose of section 80(3)(a) read with Rule 4(1) (a).

16. In remitting the matter to the High Court in 2011, this Court stated the following:

“...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 report sought. In addition, section 80(3) deals with procedural matters relevant to the application of section 80, including receiving representations, conducting the hearing, and potentially prohibiting the publication of information in relation to the proceedings. 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 considered by the High Court in the

first instance."¹³

17. The High Court failed to give effect to the directions given in the above extract. It failed to give any credence to the affidavits of President Mbeki and President Zuma, both of which were submitted in accordance with Rule 4(1) of the PAIA Rules of Procedure, and admitted on that basis.

18. The consequence of the exclusion of this evidence was that material that was intended to assist the Court in understanding how the Deputy Information Officer and Appeal Authority arrived at the decisions taken, and what circumstances, in context, informed that decision, was excluded.

19. In the result the SCA failed to apply section 80 in the manner envisaged by both the Legislature, and within the context of the referral by the Constitutional Court, which referral gave the provision a more expansive reach.

20. The above are constitutional matters of great importance in the application of the relevant provisions of PAIA.

Supplementary Information

21. The judgment and order of the SCA, delivered on 19 September 2014, dealt with an appeal against the decision of His Lordship Raulinga J of the

¹³ Judgment of the CC para 68

Gauteng High Court, Pretoria. It concerned the process and procedure applied by the court *a quo* in deciding an application for access to information in the form of a report prepared by Justices Khampepe and Moseneke for President Mbeki who sent them to Zimbabwe to observe the 2002 Presidential elections in that country. The added perspective given to the facts and circumstances of the dispute before both the court *a quo* and the appeal court was that the contents of the requested report were available to the Court, as were the *ex parte* representations furnished in terms of section 80(3)(a) read with Rule 4(1)(a) of the Rules promulgated under PAIA.

22. The nub of the appeal to the SCA concerned the manner in which the court *a quo* dealt with the dispute in the light of this Court's judgment that a judicial examination of the report was apposite in the given circumstances. The context of the *de novo* hearing of the matter was thus that the provisions of section 80 were to inform the court's reception of the requested report, its consideration of all the evidence admitted under section 80, including the record of proceedings that had served in the earlier hearings.

23. In this context the hearing in the High Court was intended to deal with the merits of the refusal of access to the said report by the Deputy Information Officer and Appeal Authority. In particular, that hearing had to consider the sufficiency of the evidence required in justification of the exemptions

claimed in circumstances where:

- 23.1. the contents of the requested report, its purpose, and the context in which the exemptions were claimed are material to assessing the exemptions asserted;
- 23.2. the functionary with personal knowledge of the purpose for which the Justices were sent to Zimbabwe¹⁴, and who made the necessary arrangements with the Government of Zimbabwe, was no longer in office;
- 23.3. the purpose for sending the Justices to Zimbabwe was central to the justification for refusing access;
- 23.4. it is the purpose of the functionary who commissioned the report and not that of the author of the report that matters;
- 23.5. the direct evidence of President Mbeki was only made available under the process provided for by section 80(3) of PAIA;
- 23.6. the evidence of President Zuma was to assist the Court to obtain a perspective on the continuity of the objectives

¹⁴ Though the SCA made much of the status of the Justices, it is common cause that they would not have gone to Zimbabwe on that particular mission had President Mbeki not requested that they go.

pursued under the auspices of mediatory interventions of the Southern African Development Community (“SADC”) which appointed, in turn, President Mbeki, President Motlanthe, and President Zuma as facilitators of the dialogue in Zimbabwe, and which facilitation process led to the watershed signing of the Global Political Agreement on 15 September 2008;

23.7. at the time when access to the report was sought on or about 12 June 2008, the statutory duty to provide justification for the refusal of access rested with the Deputy Information Officer and Appeal Authority;

23.8. the Deputy Information Officer responded on 22 July 2008 and the Appeal Authority on 13 November 2008; and

23.9. the crux of the ensuing debate can be characterised as one that relates to the exercise of the President of his powers under section 84 and 85 of the Constitution to obtain information from other sovereign states, limit access to that information on the basis of confidentiality, and seek that information for the purpose of making policy and strategic interventions that have implications for South Africa and for the country to which the information relates, (in this instance Zimbabwe).

24. The misdirection committed by the court *a quo* in its assessment and evaluation of the evidence relating to the above matters informed the grounds of appeal that were ventilated in the SCA, which, having heard argument, dismissed the appeal. The SCA's judgment adopted the same narrow interpretation of a Courts' powers under section 80 of PAIA. These matters are novel, and they address important constitutional rights and obligations.

25. It is in the public interest and in the interests of justice that the Constitutional Court give a definitive interpretation of the scope and ambit of the powers accorded under section 80 of PAIA within the context of the powers of the President under sections 84 and 85 of the Constitution and the limitations/exemptions that may legitimately be applied to the right of access to information held by the State.

26. With regard to the evidence of President Zuma as a successor in title both to the office of President and to that of the SADC appointed facilitator, this case brings into sharp focus the responsibility of a President who seeks to preserve and promote the policy interventions of his predecessors.

27. The prospects of success are reasonable in the given circumstances, in that, the matters dealt with by the various deponents to affidavits and the contents of the requested report address policy laden matters that the President as Head of State and head of the national executive sought to grapple with.

28. In the result there are reasonable prospects that this Court will come to a different decision on material aspects of this appeal.

29. The costs of the application are to be costs in the appeal.

30. Further and/or alternative relief is sought.

TAKE FURTHER NOTICE that the accompanying affidavit of **REGINALD CASSIUS LUBISI** will be used in support of the relief claimed.

TAKE FURTHER NOTICE that this application is made in terms of Rule 19 of the Rules of the Constitutional Court read with section 16(2)(b) of the Constitutional Court Complementary Act 13 of 1995, as amended.

TAKE NOTICE FURTHER that the Applicants have appointed the Office of the State Attorney, 10th Floor, North State Building, 95 Market Street, Johannesburg as the address at which the Applicants will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that you may respond to this application in writing within 10 days of such having being lodged, indicating whether or not the application for leave to appeal is being opposed, and if so, the grounds for such opposition and further that you are required to appoint in such response an address at which you will accept notice and service of all documents in these proceedings. .

DATED AT PRETORIA ON THIS DAY OF OCTOBER 2014.

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