THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO. 375/2003

In the matter between

MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA **Appellant**

and

UNRECOGNISED TRADITIONAL LEADERS OF THE LIMPOPO PROVINCE (SEKHUKHUNELAND) **Respondent**

CORAM: MPATI DP, SCOTT, NAVSA, HEHER JJA et JAFTA AJA

HEARD: 23 AUGUST 2004

DELIVERED: 29 SEPTEMBER 2004

Summary: Promotion of Access to Information Act 2 of 2000 – limitation in terms of s 44(1) – interpretation and application thereof.

JUDGMENT

JAFTA AJA

[1] This appeal concerns the interpretation and application of s 44 (1) of the Promotion of Access to Information Act 2 of 2000 ('the Act'). Parliament enacted this legislation in compliance with an obligation imposed on it by s 32 of the Constitution which provides:

'(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.'

[2] Section 44(1) of the Act reads:

'(1) Subject to subsections (3) and (4) 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 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; or

(b) if –

(i) the disclosure of the record could reasonably be expected to frustrate the deliberative process in a public body or between public bodies by inhibiting candid -

(aa) communication of an opinion, advice, report or recommendation; or

(bb) conduct of a consultation, discussion or deliberation; or

(ii) the disclosure of the record could, by premature disclosure of a policy or contemplated policy, reasonably be expected to frustrate the success of that policy.'

[3] The appellant is the Minister for Local and Provincial Government ('the Minister') whose department is, for the purposes of s 44(1), a public body. The respondent is a voluntary association of traditional leaders ('the association') in the Province of Limpopo. As its name indicates its existence has its origin in the refusal by the government to recognise the status of its members. In October 2002 the association applied to the Pretoria High Court for an order declaring that it had a right of access to a report compiled by a commission of enquiry known as the Ralushai Commission. This report was held by officials in the department. The association also sought an order setting aside a decision by the Minister's information officer denying it access to the report.

[4] The facts on which the association relied for the relief sought by it were common cause. During February 1996 the Premier of the then Northern (now Limpopo) Province established the Ralushai Commission to investigate disputes relating to irregularities and malpractices in the appointment of certain traditional leaders in that province. The Commission was also required to recommend steps to be taken by the Premier to resolve such disputes. In 1997 the Commission presented its interim report to the Premier. This report was made available to the public and the association obtained a copy thereof.

[5] The Commission's final report, which was subsequently presented to the Premier, was not made public. On 30 April 2001 the association, acting in terms

of s 18 of the Act, addressed a letter to the office of the Premier requesting access to the report. The reply elicited was that the report had been referred by the Premier 'for further handling' and the letter was, therefore, being redirected to the Minister to communicate directly with the association. On 31 August 2001 the association sent a letter to the Minister demanding compliance with its request and threatening legal action should there be no reply. The Minister failed to respond. A second letter dated 22 February 2002 also failed to elicit a prompt response.

[6] Eventually the Minister replied by way of a letter dated 9 July 2002. In it the information officer, Mr Craig Clerihew (Clerihew) stated:

'2. As information officer of this Department, I am, in terms of various provisions of [the Promotion of Access to Information Act 2 of 2000], empowered to refuse your request for access to the Ralushai Commission's report. You are specifically referred to, amongst others, section 44 (1) of the Act. In terms of this provision a request for access to information may be refused if the record contains an opinion, report or recommendation "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". The Ralushai Commission's report is to be used for the purposes quoted above, with the result that your request for access to that report is denied.

3. In terms of section 25 (3)(c) of the Act, you may lodge an internal appeal against the refusal of your request.'

[7] The association noted an appeal in terms of s 75 of the Act but the Minister upheld the decision of the information officer and dismissed the appeal. The dismissal of the appeal led to the application in the court below.

[8] The Minister, in opposing the application, contended that the request for access had been refused in terms of subsecs 44 (1)(a) and (b) of the Act. Notably, s 44 (1)(b) had not been referred to in the letter of 9 July 2002. In the answering affidavit filed on the Minister's behalf, Clerihew stated the following:

'6.1 I am advised that the respondent is empowered, in terms of section 44, to refuse the applicant's request for access to the Ralushai Commission's Report because:

6.1.1 The Ralushai report contains an opinion, advice, report or recommendation obtained for the purpose of assisting the Department of Provincial and Local Government ("the department") to formulate a policy on the issue of the traditional leadership disputes and claims or for the respondent to take a decision in the exercise of a duty conferred or imposed by the Constitution (Act no 108 of 1996) and other relevant legislation;

6.1.2 the disclosure of the report could reasonably be expected to frustrate the deliberative process within the department and in Cabinet by inhibiting the candid: (a) communication of an opinion, advice, report or recommendation or (b) conduct of a consultation, discussion or deliberation on the issues of traditional leadership disputes;

6.1.3 the disclosure of the report could, by its premature disclosure reasonably be expected to frustrate the success in the development of the said policy and a legislative process which I will later deal with herein.'

[9] The court below (Botha J) held that in appropriate circumstances an information officer would be entitled to refuse access to information either in terms of subsec 44 (1)(a) or 44 (1)(b). In respect of s 44 (1)(b) he found that the

Minister had not proved that the disclosure of the report would frustrate the deliberative process. He said:

'I can hardly see, on the facts presented to me, how the release of the report relating to 46 aggrieved leaders in Sekhukhuneland could bring the national indaba to naught. Nor can I see how it can inhibit candid communication of the report or the conduct of the debate. No facts were given to show how the national debate would be frustrated. It can also not amount to the premature disclosure of a policy, because it does not contain any formulation of the national policy which is still being formulated.

My conclusion is therefore that the respondent can only rely on section 44 (1)(a) for [his] refusal to grant access to the report of the Commission.'

[10] Botha J considered and rejected the association's contention that the report in question was not obtained for formulating national policy relating to traditional leadership because such purpose had not been covered by the Commission's terms of reference. The learned Judge said:

'That argument, in my view places a restrictive interpretation on the words of section 44 (1) (a). The subsection merely requires that an advice, report or recommendation has been 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. It does not require that the public body concerned must have commissioned the advice, report or recommendation. It is sufficient if it has obtained the advice, report or recommendation for the stated purpose. In this case it is clear that the respondent has obtained it for the purpose of

formulating national policy with a view to national legislation, all of which in the exercise of a power conferred by law.' [Botha J's emphasis].

[11] Pursuant to his finding that the report fell within the scope of s 44 (1)(a), Botha J held in favour of the association that Clerihew had failed to consider that the refusal of access in terms of s 44 (1)(a) was not mandatory. He proceeded to a conspectus of the factors weighing for and against the granting of access to the document against the background of s 32 of the Constitution and the objects of the Act. Finding that the release of sections of the report which referred to the members of the association would probably not have a negative impact on 'the wider national debate', the learned judge then granted the following order:

'1. The decision of the information officer of the respondent dated [9] July 2002 and the subsequent endorsement of that decision by the respondent on 18 September 2002, denying the applicant access to the report of the Ralushai Commission of Enquiry are set aside.

2. It is declared that the applicant is entitled to access to the sections of the report dealing with each of its 46 members listed in annexure MM1 and each portions of the introductory and general sections of the report that are necessary for a proper understanding of the sections dealing with the individual members of the applicant.

3. The respondent is ordered to make the sections of the report referred to in paragraph 2 above available for inspection by the applicant within 30 days of the date of this order and to provide the applicant with one copy of such sections, if so required.'

[12] The present appeal was noted against the above order, leave to appeal having been granted by this court. In essence the issue raised on appeal was

whether the court below correctly interpreted and applied s 44 (1) to the facts. Counsel for the Minister contended that the court below erred in coming to the conclusion that Clerihew had failed to prove that the decision to refuse access to the report was justified in terms of s 44 (1). Although he initially argued that s 44 (1)(a) should be interpreted liberally (ie in favour of the Minister) as the court below did, he later conceded that the subsection should be construed restrictively.

[13] Counsel for the association pointed out that the Ralushai Commission had been established to investigate disputes relating to traditional leadership and not for the purpose of preparing a report which was to be used for achieving the objects of subsec 44 (1)(a). He submitted that when the Minister contemplated making policy in August 2000, the compilation of the report had already been finalised and it had been presented to the Premier and that consequently the Minister could not justify withholding the report on any basis.

[14] The Minister's answer to these contentions, which found favour with the court below, was that he obtained the report from the Premier for the purpose of formulating a national policy as envisaged in the subsection. It was contended on the Minister's behalf that the withholding of the report was justified in terms of s 44 (1)(a).

[15] The proper interpretation of subsec 44 (1)(a) depends largely on the meaning to be ascribed to the phrase 'obtain for the purpose of formulating a policy'. According to the Shorter Oxford English Dictionary 'obtain' means 'to

procure or gain, as a result of purpose and effort' or 'to acquire or get'. The word 'obtain' is capable of both a narrow and a wide meaning. There are no indications in the Act itself, either textual or purposive, which point in one direction or the other.

[16] However, the genesis of the legislation was the Constitution and the Act must be interpreted with due regard to its terms and spirit. The right of access to information held by the state is couched therein in wide terms. Subsection 44 (1)(a) must be construed in the context of s 32 (1)(a), read with sections 36 and 39 (2) of the Constitution (cf *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 72). It is clear that subsec 44 (1)(a) limits the right of access to information and s 36 of the Constitution requires that the scope of such a provision be restricted only to an extent which is reasonable and justifiable. Section 39 (2) obliges every court to promote 'the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. It must also be borne in mind that the Act 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.

[17] In the light of what is set out in the preceding paragraph it is clear that the restrictive meaning of 'obtain' is to be preferred. In the context under discussion it must mean procuring information for any of the purposes referred to in the subsection. In view of that interpretation it is clear from the facts of this case that the Minister did not 'obtain' the report in terms of s 44 (1)(a). Consequently

the withholding thereof in terms of that subsection was not justified. The court below erred in construing the subsection differently. It follows that the purported exercise of the power in terms of the subsection by Clerihew was invalid.

[18] Regarding the justification of the refusal based on subsec 44 (1)(b), the findings of the court below cannot be faulted. It found that the Minister had failed to show that the disclosure of the report 'could reasonably be expected to frustrate the deliberative process' and the success of a national policy on traditional leadership. It is notable from the quoted provisions of s 44 (1) that in the answering affidavit Clerihew merely repeats the wording of the section. Clearly, para (b) enjoins an information officer to consider all the facts and to determine whether it could reasonably be expected that a disclosure of a report would frustrate any of the purposes referred to in subsec (1)(b)(i) or (ii).

[19] In the view I take of the matter, it is unnecessary to consider the other points raised by the association. The appeal should be dismissed. The parties were in agreement that costs should follow the result and that such costs should include the costs of two counsel.

[20] The appeal is dismissed with costs, including costs occasioned by the employment of two counsel.

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C N JAFTA

ACTING JUDGE OF APPEAL

MPATI DP)
SCOTT JA)
NAVSA JA) CONCUR
HEHER JA)