



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.:8090/2020

In the matter between:

WARREN THOMPSON

Applicant

and

**THE INFORMATION OFFICER: DEPARTMENT
OF DEFENCE AND MILITARY VETERANS**

First Respondent

**THE MINISTER OF DEFENCE AND MILITARY
VETERANS**

Second Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 22 FEBRUARY 2024

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The applicant seeks the review and setting aside of the first respondent's decision to refuse his request for access to information which was made in terms of the Promotion of Access to Information Act 2 of 2000 ("*the PAIA*"), as well as the review and setting aside of the second respondent's ("*the Minister's*") decision to dismiss his appeal against

the first respondent's refusal ("*the internal appeal*"). He also seeks an order directing the Minister to provide the requested information within ten days.

[2] This is part B of the proceedings launched by the applicant. The outcome of Part A is recorded in a judgment of my brother, Dolamo J, dated 21 December 2020 ("*the Part A judgment*"), in terms of which the Minister was ordered to comply with sections 3 and 77(5)(a) of PAIA by giving adequate reasons for her decision to dismiss the internal appeal, and by providing a copy of this application to all other parties affected by the PAIA application as required in terms of section 3(4) of the Promotion of Access to Information Rules and Administrative Review Rules, 2019 ("*the PAIA Rules*").

B. THE FACTS

[3] The information that is at the centre of the PAIA request relates to the outcome of a Board of Inquiry ("*the BOI*") conducted by the Department of Defence ("*the Department*") in the aftermath of the Battle of Bangui which took place in the Central African Republic ("*the CAR*") between 22 and 24 March 2013. The Battle involved troops of the South African National Defence Force ("*SANDF*"), including a contingent of Special Forces, and a grouping of CAR rebel forces who fought collectively under the name 'Seleka'. It resulted in a loss of 15 South African soldiers' lives and injury of a further 25.

[4] The applicant is a journalist who works for the Business Day and Financial Mail. At the time that the application was launched he sought the information in question for purposes of a book that he was writing with two other journalists about the Battle. By the time the matter was heard, the book had already been written. However, he persists with the application because he states that the Department has never provided an official account of what transpired in the Battle, save for sweeping broad answers and vague descriptions, including to the families of the deceased, which means that no one has been

held accountable for the disaster which is described as South Africa's worst military defeat in the democratic era.

[5] The applicant's PAIA request described the information sought as follows: "*SANDF Board of Inquiry into events commonly referred to as the "Battle of Bangui" which took place in the Central African Republic between 22 - 24 March 2013 that resulted in the deaths of 15 members of the SANDF's 1 Parachute Battalion*". It is common cause that a BOI was indeed held by the Department, specifically looking into the reasons why soldiers died and some were injured, as well as into the loss of military hardware and munitions. The applicant's request was submitted to the Department on 23 June 2019, and, after some delays, was denied on 25 October 2019, as follows:

"2. The request is not granted in terms of section 34(1) of the [PAIA] Act by the Information Officer based on the grounds of mandatory protection of privacy of third party who is a natural person as quoted here under:

'Subject to subsection (2) the Information Officer of a public body must refuse a request to access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party including a deceased individual.'

3. This refusal does not apply to previous information on the same subject that has been granted prior to this application."

[6] On 8 November 2019 the applicant lodged the internal appeal in terms of section 75 of PAIA. He challenged the assertion that granting his request would amount to unreasonable disclosure of personal information, pointing out the following: the Department had already announced the names and ranks of the 15 deceased soldiers, and had announced that the deceased soldiers were killed in armed conflict in the CAR in the Battle of Bangui resulting from engagement with the Seleka rebels; it had widely been reported that the families of the deceased were already informed of the deaths of the deceased; and the applicant was not attempting to access the deceased's medical records. The applicant also sought clarity regarding paragraph 3 of the refusal letter, regarding whether the Department had previously disclosed information in the matter in terms of

previous PAIA applications. This clarity had not been provided by the time he submitted the internal appeal.

[7] After numerous inquiries, the outcome of the internal appeal was communicated to the applicant telephonically, and after further prodding for formal written reasons from the Minister as contemplated in section 77(5) of PAIA, the applicant received an email on 27 February 2020 from an official of the Department, as follows:

“This e-mail serves as the confirmation that [the Minister] has refused the internal appeal made by [the applicant]. The Minister’s decision is based on Section 34(1) of the [PAIA] Act which relates to the protection of a third party’s information, quoted below:

‘the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.’”

[8] It was this email that the Part A judgment effectively held was inadequate, resulting in an order that the Minister should provide adequate reasons for her decision to dismiss the internal appeal, and to give notice to affected parties. Both orders were complied with. The Minister supplemented her reasons by letter dated 9 April 2021, and the supplemented reasons are the subject of this application, and they are dealt with later.

C. PRELIMINARY ISSUES

[9] There have unfortunately been some delays incurred in the matter and both the applicant and the respondents seek condonation for the late filing of their papers in Part B. Although the Part A judgment is dated 21 December 2020, and the Minister’s amplified reasons were delivered on 09 April 2021, there was a deafening silence in the matter until the delivery of the applicant’s supplementary affidavit on 31 March 2022.

[10] The applicant has explained that the delay in filing his supplementary affidavit was due to the respondents’ lateness in complying with the requirement to notify the third parties involved, and that in fact he took it upon himself to find and contact the affected

persons for service. He adds that he moved to the United Kingdom which delayed obtaining access to the High Commission in London in order to depose to the supplementary founding affidavit.

[11] The third parties were only notified in October 2022 which was just before the hearing before this Court on 9 November 2022. The respondents explain that the delay was due to a change of attorneys assigned to represent the respondents at the State Attorney. The result of this changeover is that the supplementary affidavit of the applicant which was delivered on 31 March 2022 was not detected by the State Attorney. Neither was the notice of set down which was served upon them on 20 July 2022. In fact, the applicant's heads of argument for the hearing of 9 November 2022 were filed before receipt of the respondents' answering affidavit in Part B of the application, on 19 October 2022.

[12] After considering the explanations furnished by both sides, and the fact that neither party is prejudiced since they have obtained opportunity to exchange affidavits, the condonation applications are granted.

[13] After the hearing of the matter on 9 November 2022, I invited the parties' legal representatives to address the Court on why an order should not be issued for the Minister to give notice of the present proceedings and to provide a copy of the application to the government of the CAR within a period of one month, and to thereafter report to this Court once that was done, including by giving the results thereof. This was in light of the fact that the definition of a "third party" in PAIA includes "*the government of a foreign state, an international organisation or an organ of that government or organisation*".¹ And despite the order in the Part A judgment for the respondents to notify the third parties of this matter, the CAR had still not been apprised of the applicant's request for disclosure of information. Moreover, as will be evident below the respondents' defence in

¹ Except when dealing with sections 34 and 63. See also section 3(4) of the Promotion of Access to Information Rules and Administrative Review Rules, 2019.

this matter relies in part on the fact that the CAR had not been so apprised of the applicant's application. There was no objection to the Court's proposed order, and an order in those terms was subsequently granted on 2 December 2022.

[14] Again, there was a deafening silence in the matter until 10 October 2023, when the applicant's legal representatives informed the Court that there had been compliance with the order of December 2022. For reasons still unexplained, such compliance was never filed or brought to my attention, and after further inquiry, I was provided with an affidavit from the applicant's legal representatives explaining in essence that the Minister had indeed complied with the order of 2 December 2022 by sending a *note verbale* to the embassy of the CAR - via the Department of International Relations and Cooperation ("*DIRCO*") - on 15 December 2022 attaching the papers in this matter. The affidavit also annexed correspondence between DIRCO and the Department confirming that the CAR had not responded to the *note verbale* and was probably not going to do so. I am therefore satisfied that the order of December 2022 was complied with.

D. THE APPLICABLE LAW

[15] The constitutional right of access to information is governed by section 32 of the Constitution, which provides, in relevant part, that "[e]veryone has the right of access to any information held by the state"². It has been held³ that section 11 of PAIA gives effect to this constitutional right, and it provides:

“(1) A requester must be given access to a record of a public body if –

- (a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

² Section 32(1)(a).

³ *President of the Republic of South Africa and Others v M & G Media Ltd* (CCT 03/11) [2011] ZACC 32; 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011) para 7. See also *Transnet Ltd and Another v SA Metal Machinery Company (Pty) Ltd* (147/2005) [2005] ZASCA 113; [2006] 1 All SA 352 (SCA); 2006 (4) BCLR 473 (SCA); 2006 (6) SA 285 (SCA) (29 November 2005) para 8.

- (b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
- (2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.
- (3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by
 -
 - (a) any reasons the requester gives for requesting access; or
 - (b) the information officer's belief as to what the requester's reasons are for requesting access."

[16] The Preamble of PAIA recognizes that there are reasonable and justifiable limitations on the right of access to information, and the Act places limitations on the right of access to information by exempting certain information from disclosure which are set out in Part 2 of Chapter 4 of the PAIA.

[17] Court proceedings under PAIA are governed by sections 78 to 82. Section 78(2) provides that a requester that has been unsuccessful in an internal appeal to the relevant authority of a public body may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.

[18] Proceedings in terms of section 78 are civil proceedings, and the rules of evidence applicable in civil proceedings apply to such proceedings.⁴ The burden of proof is on the party that has refused access to show that refusal was in accordance with the provisions of the Act.⁵ This evidentiary burden borne by the state pursuant to section 81(3) must be discharged on a balance of probabilities.⁶

[19] In order to discharge its burden under section 81(3) of PAIA, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The test is whether the state has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.⁷

⁴ Section 81(1) and (2).

⁵ Section 81(3).

⁶ *M&G (2012)* para 14.

⁷ *M&G 2012* para 23.

[20] It is not sufficient to recite the statutory language of the exemptions claimed.⁸ Nor are mere *ipse dixit* affidavits proffered by, for example, an information officer, merely stating that a record falls within the exemptions claimed without more.⁹ The question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed.

[21] Section 82 gives the court the power to make any order that is just and equitable, including orders (a) confirming, amending or setting aside the refusal decision; (b) requiring the information officer to take, or refrain from, specified action; (c) granting an interdict, interim or specific relief, a declaratory order or compensation; and (d) as to costs. A court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It is also not limited to such material as was before the information officer when access was refused. It is at liberty to decide the claim of exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits.¹⁰

[22] In addition, section 80 provides, in relevant part, as follows:

“(1) Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds.

....

(3) Any court contemplated in subsection (1) may—

- (a) receive representations *ex parte*;
- (b) conduct hearings in camera; and

⁸ *M&G 2012* para 23.

⁹ See *M&G 2012* para 24 and footnote 40.

¹⁰ *M&G 2012* para 14; *Transnet Ltd and Another v SA Metal Machinery Company (Pty) Ltd* para 24.

- (c) prohibit the publication of such information in relation to the proceedings as the court determines, including information in relation to the parties to the proceedings and the contents of orders made by the court in the proceedings.”

[23] It has been stated¹¹ that section 80(1) is an override provision that may be applied despite the other provisions of PAIA and any other law and is to be used sparingly. It empowers courts to independently review the record in order to assess the validity of the exemptions claimed, and provides legislative recognition that, through no fault of their own, the parties may be constrained in their abilities to present and refute evidence. It is a discretionary power that must be exercised judiciously, with due regard to the constitutional right of access to information and the difficulties the parties face in presenting and refuting evidence, and where there is the potential for injustice as a result of the unique constraints placed upon the parties in access to information disputes.¹² Ultimately, the standard for assessing whether a court should properly invoke section 80 in a given case is whether it would be in the interests of justice for it to do so.¹³ Judicial examination is not a substitute for requiring state to discharge its burden of showing that the statute’s exemptions applied.¹⁴

E. DISCUSSION

[24] Because the applicant has since published his book, which was the basis on which he approached the Court, the respondents argue that the application has become moot. I do not agree. There is nothing in the PAIA which prevents the applicant from obtaining the relief he seeks in these circumstances, or which requires him to demonstrate his purpose for seeking the information. There is furthermore no dispute between the parties that there continues to be significant public interest in the matter.

[25] There is otherwise no suggestion that the applicant failed to meet any procedural requirements of the PAIA. As a result, it is for the respondents to justify their refusal as

¹¹ *M&G 2012* para 39.

¹² *M&G 2012* paras 42 and 44.

¹³ *M&G 2012* para 45.

¹⁴ *M&G 2012* para 126.

contemplated in s 81(3) of PAIA, which provides that the burden of establishing that a refusal of a request for access complies with the provisions of the Act rests on the party claiming that it so complies.

[26] From the outset, the respondents have relied on section 34(1). However, because of my conclusions with regard to the other statutory exemptions relied upon by the respondents discussed below, it is most appropriate to first deal with the respondents' reliance on those grounds, starting with prejudice to bilateral or diplomatic relations, and to deal with the reliance on section 34 at a later stage.

[27] It was confirmed in the respondents' heads of argument that the reliance on prejudice to bilateral or diplomatic relations is based on section 41(1)(a)(iii), which provides, in part, as follows:

“The information officer of a public body may refuse a request for access to a record of the body if its disclosure could reasonably be expected to cause prejudice to...subject to subsection (3), the international relations of the Republic”.

[28] The exact unedited wording of the Minister's letter in which this ground is substantiated is as follows:

“There can be no doubt that in the nature of the incident that the BOI dealt with, that the information contained in it is of high sensitive nature because of the combat nature of the operation that was undertaken in the Bangui, that these soldiers were injured and others died in foreign land which has impacted not only bi-lateral relations that exist between South Africa and the CAR, but also international law. Certain information can therefore not be released without first engaging the foreign country in which the incident occurred, which is the CAR. Releasing such information has the potential to damage South Africa's reputation and its relations with the CAR. The other reason for refusing to provide the BOI is due to diplomatic relations between the two countries.”

[29] Insofar as the Minister's letter relies on the fact that the CAR had not been notified of the applicant's request, I have already mentioned that the matter was indeed brought to the attention of the CAR, per this Court's order of 2 December 2022, and there has been no response in response to such notification.

[30] As for the refusal of the disclosure request because it may damage the Republic's reputation, as the applicant points out, there is no provision in the PAIA permitting refusal on that basis. The details in this regard are scant as it remains unclear why or how the reputation of South Africa stands to be damaged as a result of disclosure of the information. When this was raised in the supplementary affidavit of the applicant, the respondents failed to give any further detail in the answering affidavit.

[31] Regarding the bilateral, diplomatic or international relations that are said to be at stake, the Minister's letter did not elaborate on the nature thereof - whether economic, security or scientific - or why the release of information would jeopardize the relations between the two countries, or with any other international country. The applicant states that since the Minister has not provided detail regarding what relations are at stake or why the release of the information in the BOI would jeopardize relations between the two countries, it is unclear how findings from a military investigation into a battle fought of some 10 years ago could jeopardize international relations between the two countries. He also states that the diplomatic engagements and relations between the two countries have not been of long duration, and that the South African Embassy opened for the first time in 2017, which was the same time that an MOU on cooperation in the field of minerals and geology was signed by the former Minister of Minerals and Energy, Mr. Mosebenzi Zwane. Thus, according to the applicant, any impact that the release of the BOI report would have on this bilateral relationship could only be minor. The applicant adds that the total value of exports and imports between the two countries in the year 2020 to 2021 was R64.7 million. Furthermore, the applicant states that, although the unilateral deployment of the military and the outcome of the battle may be considered embarrassing and damaging to South Africa's standing on the continent, this is not a reason to deny the request.

[32] I do not consider it appropriate for this Court to determine whether diplomatic relations are deep enough and strong enough to outweigh any prejudice that may be caused by the release of the requested information, and especially based on the measuring lines proposed by the applicant. In my view, such an exercise would quite clearly intrude into the terrain of the executive.

[33] That, however, does not detract from the fact that the said relations are couched in the vaguest of terms by the respondents. But at the very least, and based on a contextual reading of the Minister's letter, it must be accepted that the bilateral relations referred to include military and security considerations, which are specifically mentioned elsewhere in the letter with reference to diplomatic relations between the two countries. This is in a paragraph of the letter dealing with the outcome of investigations into the loss of military equipment and hardware¹⁵, the disclosure of which, according to the Minister, may compromise the security of South Africa and infringe on the said diplomatic relations. For this reason, my conclusion with regard to this ground is the same as the conclusion in respect of the grounds discussed immediately below, namely defence and security of the Republic.

[34] The next ground relied upon by the respondents for refusing access is prejudice which may be caused to the defence or security of the Republic, which is protected in subsections (i) and (ii) of section 41(1)(a), as follows:

“The information officer of a public body may refuse a request for access to a record of the body if its disclosure ...could reasonably be expected to cause prejudice to –

- (i) the defence of the Republic;
- (ii) the security of the Republic...”

[35] In this regard, the Minister's letter states that the witness statements and evidence contained in the BOI dealt with military combat strategies employed which ought not to be in the public domain. This, says the letter, includes highly sensitive information

¹⁵ See paragraph 6 of the Minister's letter.

regarding the human capital involved, the military equipment used for diplomatic engagements between the South African Commanders and the Rebel Force Commanders, as well as the manner in which the soldiers died and were injured.

[36] The letter continues that the outcome of investigations into the loss of military equipment and hardware can also not be made available without compromising the security of South Africa and infringing on diplomatic relations between the two countries. It would reveal the nature of the military equipment lost in the combat, the nature and circumstances under which the equipment was lost, the nature of equipment which the military uses for certain types of combat, how many weapons of a particular calibre were dispatched to the CAR, how many were used, and how many were lost or destroyed.

[37] Section 41(2) of PAIA sets out the type of information which might fall under this ground, as follows:

“

- (2) A record contemplated in subsection (1), without limiting the generality of that subsection, includes a record containing information –
 - (a) relating to military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression or curtailment of subversive or hostile activities;
 - (b) relating to the quantity, characteristics, capabilities, vulnerabilities or deployment of –
 - (i) weapons or any other equipment used for the detection, prevention, suppression or curtailment of subversive or hostile activities; or
 - (ii) anything being designed, developed, produced or considered for use as weapons or such other equipment;
 - (c) relating to the characteristics, capabilities, vulnerabilities, performance, potential, deployment or functions of –
 - (i) any military force, unit or personnel; or

- (ii) any body or person responsible for the detection, prevention, suppression or curtailment of subversive or hostile activities;
- (d) held for the purpose of intelligence relating to –
 - (i) the defence of the Republic;
 - (ii) the detection, prevention, suppression or curtailment of subversive or hostile activities; or
 - (iii) another state or an international organisation used by or on behalf of the Republic in the process of deliberation and consultation in the conduct of international affairs;
- (e) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d);
- (f) on the identity of a confidential source and any other source of information referred to in paragraph (d);
- (g) on the positions adopted or to be adopted by the Republic, another state or an international organisation for the purpose of present or future international negotiations; or
- (h) that constitutes diplomatic correspondence exchanged with another state or an international organisation or official correspondence exchanged with diplomatic missions or consular posts of the Republic...”

[38] The applicant contends that none of the information contained in the BOI amounts to the type of information set out in the above provisions. According to the applicant, there was no direct attack or threat posed to the Republic or its neighbours, and accordingly its actions could not have constituted defence of, or issues related to, the security of the Republic. Instead, it was South Africa which thrust itself in the midst of a civil war which was underway some thousands of kilometres from its borders.

[39] Furthermore, the applicant states that the battle did not involve use of large-scale configurations of SANDF infantry and artillery; nor did it require the use of, or coordination with, the South African Air Force or the South African Navy in combat operations. Rather, this was a defence of the city of Bangui by a small contingent of troops using light arms and ammunition, the details of which have been recorded in at least one published historical account. In any event, says the applicant, the troops, army

vehicles and weaponry were paraded in Bangui for weeks ahead of the battle as the troops conducted patrols in full view of the public.

[40] On this score, the respondents' papers are silent. The closest to any explanation in this regard is a copy of the Minister's briefing to Parliament's Joint Standing Committee on Defence of 4 April 2013, which was attached to the applicant's replying affidavit in Part A of these proceedings. According to the Minister's briefing, the South African government signed a Defence Cooperation MOU, referred to as Operation Vimbezela, in response to the African Union (AU) Peace and Security Council's decision to provide support for social economic recovery and consolidation of peace and stability in the CAR which included assistance towards defence and security in that country. It was pursuant to Operation Vimbezela that South Africa sent military forces to the CAR, for purposes of training. It also assisted in the process of disarmament, demobilization and reintegration, again pursuant to an AU peace deal achieved in that country. When the security situation deteriorated in the CAR in January 2013 the South African government deployed a further 200 troops to protect the trainers and military assets that were already in that country. According to the Minister's briefing, the Battle of Bangui ensued when the rebel forces in the CAR breached a ceasefire agreement and marched into Bangui and in the process attacked a newly established South African military base.

[41] Contrary to the Minister's briefing to Parliament, the applicant points to information that the African Union had no knowledge of the deployment of the SANDF troops in the CAR. And according to the applicant, the attack started when a South African Special Forces reconnaissance patrol was ambushed by rebels while travelling north to Damara, which is the nearest major town to Bangui. In other words, the attack was not at an SANDF base.

[42] These issues, in respect of which there are contradictory accounts, are at the heart of the applicant's stated reason for why he made the request for access to information.

Apart from the Parliamentary briefing by the Minister, it is common cause that the Department has never provided an official account of what transpired during the Battle and why it was such a resounding defeat. And as I have stated, the Parliamentary briefing is attached to the replying affidavit in part A of these proceedings, and the respondents did not have opportunity to confirm or deny its contents at that stage; and have also not sought to place any version of the events before this Court.

[43] It is not the purpose of these proceedings to resolve the dispute relating to how the Battle ensued. Rather, the question is whether the respondents have discharged the evidentiary burden to establish the grounds relied upon as enunciated in the Minister's letter. In terms of section 81, read with 78, of the Act, that evidentiary burden is to be discharged based on the rules of evidence applicable in civil proceedings, on a balance of probabilities. What is required is for the respondents to put forward sufficient evidence for the Court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.¹⁶

[44] As I have already indicated, the respondents have not put forward anything by way of information or evidence to justify reliance on the statutory exemptions relied upon. I am willing to accept that, since the subject-matter concerned a battle, it would necessarily involve the use of military equipment and military strategies. However, the Court remains in the dark regarding the nature of the military equipment or strategies used. It is specifically unknown why they are the kind whose disclosure would place the defence or security of Republic under threat. And no details are provided as to what kind of military equipment or strategies would constitute such a threat, or whether all the military equipment and strategies used in this case and which form the subject of the BOI falls under such a category. Also relevant is the time that has elapsed since the battle, over ten years ago. There is no indication as to whether the equipment and strategies employed then could compromise future plans to defend or secure the territorial integrity of South Africa or the use to the disadvantage of the SANDF in other deployments.

¹⁶ *M&G 2012* para 23.

[45] The dearth of information provided by the respondents is regrettable as the Court has not been placed in a position to assess the validity of the claims of the respondents, and specifically their reliance on the section 41(1)(a) exemptions. However, I am mindful of the constraints the respondents may have faced in presenting the kind of evidence and information involved in this exemption ground, an issue which is belatedly mentioned in their heads of argument.¹⁷ After all, if disclosing the type of military equipment and strategies used in the Battle and contained in the BOI could pose a threat to the defence or security of the Republic, that cannot be undone at a later stage. It is in this regard that I am not satisfied that it is possible to make an appropriate order without having regard to the BOI. The applicant foreshadowed the appropriateness of this route in his papers and heads of argument and suggested it as alternative relief.

[46] I am accordingly of the view that this is an appropriate case for the Court to exercise its discretion in terms of section 80 to examine the BOI – to take a judicial peek into it. This is the kind of case where the Court would be better able to assess the validity of the grounds relied upon by the respondents if further information or evidence is given regarding the questions I have already outlined above, and any others which may arise once regard is had to the BOI in terms of section 80(3).

[47] Not only will such an order be in the interests of justice¹⁸ taking into account the concerns of the parties involved in this case, but it will assist the Court in determining, in terms of section 46, whether ultimately the public interest in the disclosure of the BOI outweighs the harm contemplated in section 41.

F. ORDER

[48] In the circumstances, the following order is made:

¹⁷ *M&G 2012* para 42.

¹⁸ *M&G 2012* para 45.

- a. The respondents are ordered, in terms of section 80 of the Promotion of Access to Information Act 2 of 2000, to deliver to the chambers of Mangcu-Lockwood J by end of 8 March 2024, the SANDF Board of Inquiry into the events commonly referred to as the Battle of Bangui which took place in the Central African Republic between 22 and 24 March 2013.
- b. Costs are reserved for later determination.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant : **Adv J De Waal SC**
Adv P Myburgh

Instructed by : **R. Davis**
Eversheds Sutherland

For the respondents : **Adv W Mokhare SC**

Instructed by : **The Office of the State Attorney Cape Town**