CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 03/11
[2011] ZACC 32

In the matter between:

PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA — First Applicant

DEPUTY INFORMATION OFFICER — Second Applicant

MINISTER IN THE PRESIDENCY — Third Applicant

and

M & G MEDIA LIMITED — Respondent

Heard on : 17 May 2011

Decided on : 29 November 2011

JUDGMENT

NGCOBO CJ (Froneman J, Mogoeng J, Mthiyane AJ and Yacoob J concurring):

Introduction

[1] Shortly before the 2002 presidential election in Zimbabwe, former President Thabo Mbeki appointed two senior judges to visit that country. It is by now common cause that the two judges were sent to assess the constitutional and legal issues relating to

that election. Upon their return, the judges prepared a report and submitted it to the President. The report has never been released to the public. M & G Media Limited (M & G), the publisher of a weekly newspaper, the *Mail & Guardian*, requested access to the report pursuant to section 11 of the Promotion of Access to Information Act (PAIA, or the Act).[1] The Presidency refused the request.[2]

[2] The request was refused on two grounds: first, that disclosure of the report would reveal information supplied in confidence by or on behalf of another state or international organisation, contrary to section 41(1)(b)(i) of PAIA; and second, that the report had been prepared for the purpose of assisting the President to formulate executive policy on Zimbabwe, as contemplated in section 44(1)(a) of PAIA.

[3] In the ensuing litigation initiated by M & G pursuant to section 78 of PAIA, the North Gauteng High Court, Pretoria (High Court) and, on appeal, the Supreme Court of Appeal held that the refusal to grant access to the report was not justified by either section 41(1)(b)(i) or section 44(1)(a) of PAIA, as claimed by the Presidency. The High Court ordered the President, the Deputy Information Officer and the Minister in the Presidency (together, the state), who were the respondents in those proceedings, to make

[1] Act 2 of 2000. For the text of section 11, see [7] below.

[2] The request was initially refused by the Deputy Information Officer in the Presidency, Mr Trevor Fowler. The request was subsequently refused, on internal appeal, by the Minister in the Presidency, the late Dr Mantombazana Edmie Tshabalala-Msimang.

the report available, in its entirety, to M & G.[3] This order, including an order for costs, was upheld on appeal by the Supreme Court of Appeal.[4] With our leave previously granted,[5] the state is now appealing to this Court.

[4] On appeal to this Court, the state contended that both the Supreme Court of Appeal and the High Court erred in finding that it had not discharged its statutory burden, imposed by section 81(3) of PAIA, of establishing that its refusal to grant access to the report was justified by either of the exemptions it claimed under sections 41(1)(b)(i) and 44(1)(a).[6] The state also argued that, in responding to the application by M & G, its hands were tied. It argued that it could not give more information on its refusal to provide access to the report without referring to the contents of the report that it sought to protect from disclosure, which would be in contravention of the Act.[7] While the state admits that the report contains some information that is not confidential, it nevertheless resists the disclosure of even the non-confidential portions on the basis that they cannot reasonably be severed from those portions containing confidential information.

[3] *M & G Limited and Another v President of the Republic of South Africa and Others* [2010] ZAGPPHC 43; Case No 1242/09, 4 June 2010, unreported, at 13.

[4] *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA) (SCA Judgment) at para 55.

[5] This Court granted the application for leave to appeal by way of an order dated 1 February 2011.

[6] For the full text of section 81, see [13] below.

[7] In making this argument, the state drew attention to sections 25(3)(b) and 77(5)(b) of PAIA, which stipulate that the officers refusing the request (in terms of section 25) and upholding the refusal on appeal (in terms of section 77) must "exclude, from such reasons, any reference to the content of the record". The constitutionality of these provisions is not in issue here and I express no opinion on their constitutionality. See [56]-[60] below.

Issues for consideration

[5] This case raises two important issues: first, how the state discharges the burden, under section 81(3) of PAIA, of establishing that its refusal to grant access to a record is justified; and second, the circumstances under which a court may call for additional evidence in the form of the contested record under section 80.[8] These issues will be considered in this judgment in the light of the constitutional right of access to information held by the state and the statutory framework that regulates proceedings under PAIA.

The constitutional right of access to information held by the state

[6] The constitutional right of access to information is governed by section 32 of the Constitution, which provides, in relevant part:

> "(1) Everyone has the right of access to—
>
> (a) any information held by the state".

[7] Section 11 of PAIA gives effect to this constitutional right, and 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
>
> (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.

[8] Section 80 empowers courts considering applications brought under PAIA to conduct an in camera review of the record in question. See [38] below.

(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."

[8] In *Brümmer v Minister for Social Development and Others*,[9] this Court explained the importance of the constitutional right of access to information held by the state as follows:

> "The importance of this right . . . in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'.
>
> Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. . . . Access to information is crucial to accurate reporting and thus to imparting accurate information to the public."[10] (Citations omitted.)

[9] As is evident from its long title, PAIA was enacted "[t]o give effect to the constitutional right of access to any information held by the State". And the formulation of section 11 casts the exercise of this right in peremptory terms – the requester "must"

[9] [2009] ZACC 21; 2009 (6) SA 323 (CC); 2009 (11) BCLR 1075 (CC).

[10] Id at paras 62-3.

be given access to the report so long as the request complies with the procedures outlined in the Act and the record requested is not protected from disclosure by one of the exemptions set forth therein.[11] Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.

[10] The constitutional guarantee of the right of access to information held by the state gives effect to "accountability, responsiveness and openness" as founding values of our constitutional democracy.[12] It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas,[13] for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote[14] also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.

[11] But PAIA places limitations on the right of access to information. It does this by exempting certain information from disclosure. PAIA recognises, in its Preamble, that there are "reasonable and justifiable" limitations on the right of access to information,

[11] See [7] above.

[12] See section 1(d) of the Constitution.

[13] See section 16(1)(b) of the Constitution.

[14] See section 19(3)(a) of the Constitution.

even in an open and democratic society.[15] Those limitations emerge from the exemptions to disclosure contained in Chapter 4 of the Act. The purpose of Chapter 4 is to protect from disclosure certain information that, if disclosed, could cause material harm to, amongst other things: the defence, security and international relations of the Republic;[16] the economic interests and financial welfare of the Republic and commercial activities of public bodies;[17] and the formulation of policy and taking of decisions by public bodies in the exercise of powers or performance of duties conferred or imposed by law.[18]

[12] We are not concerned, here, with the constitutionality of PAIA or the limitation on the right of access to information contained in Chapter 4. What we are concerned with is the constitutional and statutory framework within which claims for exemption from disclosure must be considered and evaluated.

The statutory framework that regulates proceedings under PAIA

[13] Court proceedings under PAIA are governed by sections 78 to 82. Section 81 provides that proceedings under PAIA are civil proceedings and the rules of evidence applicable in civil proceedings apply. The burden of establishing that the refusal of access to information is justified under the provisions of PAIA rests on the state or any other party refusing access. Section 81 provides:

[15] See Preamble to PAIA.

[16] Section 41 of PAIA.

[17] Section 42 of PAIA.

[18] Section 44(1)(a) of PAIA.

> "(1) For the purposes of this Chapter proceedings on application in terms of section 78 are civil proceedings.
>
> (2) The rules of evidence applicable in civil proceedings apply to proceedings on application in terms of section 78.
>
> (3) The burden of establishing that—
>
> (a) the refusal of a request for access; or
>
> (b) any decision taken in terms of section 22, 26(1), 29(3), 54, 57(1) or 60, complies with the provisions of this Act rests on the party claiming that it so complies."

[14] In proceedings under PAIA, a court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It decides the claim of exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits.[19] The evidentiary burden borne by the state pursuant to section 81(3) must be discharged, as in any civil proceedings, on a balance of probabilities.

[15] The imposition of the evidentiary burden of showing that a record is exempt from disclosure on the holder of information is understandable. To place the burden of showing that a record is not exempt from disclosure on the requesting party would be manifestly unfair and contrary to the spirit of PAIA read in the light of section 32 of the Constitution. This is because the requester of information has no access to the contents of the record sought and is therefore unable to establish that it is not exempt from disclosure under the Act. By contrast, the holder of information has access to the

[19] See *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at paras 24-6.

contents of the record sought and is able to establish whether or not it is protected from disclosure under one or more of the exemptions contained in Chapter 4. Hence section 81(3) provides that the evidentiary burden rests with the holder of information and not with the requester.

Foreign jurisprudence on discharging the evidentiary burden

[16] Before formulating the standard to assess whether the state has properly discharged its burden under section 81(3), it is desirable to consider foreign jurisprudence dealing with comparable legislation, as we are encouraged to do by section 39(1)(c) of the Constitution.[20] Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights, as the present case does, we must exercise particular caution in referring to foreign jurisprudence.

[17] The United States has well-developed access to information jurisprudence. Its Freedom of Information Act (FOIA) contains nine exemptions to disclosure and, like PAIA, provides for *de novo* judicial review of a government agency's reliance on an

[20] Section 39(1)(c) provides that courts "may consider foreign law" when interpreting the Bill of Rights. In this case, it is appropriate for this Court to make reference to foreign law in considering the proper application of PAIA because of the direct effect our interpretation of PAIA has on the scope of the right of access to information articulated in section 32 of the Constitution.

exemption to refuse access to a government record.[21] As with judicial review of refusals under PAIA, refusals made under FOIA place the burden to demonstrate to the court that it has properly relied on the exemption claimed on the agency refusing the information request.[22] The agency claiming the exemption can discharge its burden only by presenting the court with evidence that the information withheld falls within the exemption claimed, and such evidence should not be controverted by either contrary evidence on the record or evidence of bad faith on the part of the agency.[23]

[18] The state may not rely on affidavits that are conclusory, merely repeat the language of the statute, or are founded upon sweeping and vague claims.[24] Affidavits must describe the justification for nondisclosure with reasonably specific detail for the requester of information to be able to mount an effective case against the agency's claim for exemption.[25] In the United States, public policy favours disclosure of information, and this requires that exemptions be construed narrowly.[26] In addition, courts consider the burden borne by the government refusing access to information with an awareness

[21] See U.S.C. § 552 (FOIA) at (a)(4)(B) (*de novo* review by court) and (b) (exemptions).

[22] See U.S.C. § 552 at (a)(4)(B) (burden is on the agency to sustain its action).

[23] See *Hunt v Central Intelligence Agency* 981 F 2d 1116, 1119 (9th Cir 1992); *Stein v Department of Justice and Federal Bureau of Investigation* 662 F 2d 1245, 1253 (7th Cir 1981).

[24] See *Times Journal Co v Department of Air Force* 793 F Supp 1, 3 (D DC 1991); *Santos v Drug Enforcement Agency, Office of Information and Privacy* 357 F Supp 2d 33, 37 (D DC 2004); *Doyle v Federal Bureau of Investigation* 722 F 2d 554, 555 (9th Cir 1983); and *Yeager v Drug Enforcement Administration* 678 F 2d 315, 320 (DC Cir 1982).

[25] See *National Treasury Employees Union v United States Customs Service* 602 F Supp 469, 472 (D DC 1984).

[26] See *State of North Dakota ex rel Olson v Andrus* 581 F 2d 177, 179 (8th Cir 1978).

that the requesting plaintiff is at a distinct disadvantage in attempting to controvert an agency's claims regarding the nature and contents of a record.[27]

[19] In *Hayden v National Security Agency*,[28] the District of Columbia Circuit Court of Appeals summarised the appropriate procedures to be used by trial courts in determining whether documents should be released. It said:

> "(1) The trial court must make a De novo review of the agency's classification decision, with the burden on the agency to justify nondisclosure. (2) In conducting this review, the court is to give 'substantial weight' to affidavits from the agency. (3) The court is to require the agency to create as full a public record as possible, concerning the nature of the documents and the justification for nondisclosure. (4) If step (3) does not create a sufficient basis for making a decision, the court may accept classified affidavits In camera, or it may inspect the documents In camera. This step is at the court's discretion . . . . (5) The court should require release of reasonably segregable parts of documents that do not fall within FOIA exemptions."[29] (Citations omitted.)

[20] The Canadian equivalent of PAIA is the Access to Information Act.[30] As with PAIA, the Access to Information Act provides for a number of exemptions to disclosure, as well as judicial review of a refusal of access to information.[31] The Act stipulates that the burden of establishing that a challenged refusal is authorised rests with the

[27] *Ollestad v Kelley* 573 F 2d 1109, 1110 (9th Cir 1978).

[28] 608 F 2d 1381 (DC Cir 1979).

[29] Id at 1384. For guidelines articulated by the District of Columbia Circuit Court of Appeal in respect of a court's exercise of discretion to conduct in camera inspection of documents, see [39] below.

[30] R.S.C., 1985, c. A-1 (Access to Information Act).

[31] See section 41 of the Access to Information Act.

government institution refusing access.[32] Unlike in both the United States and South Africa, where courts engage in a *de novo* review of the lawfulness of the refusal, Canadian courts limit their review to whether or not the refusal was reasonable.[33] As in the United States, to establish proper reliance upon a discretionary exemption from disclosure, the government must provide evidence that the record falls within the description that is contemplated by the statutory exemption invoked.[34] The government must provide actual direct evidence of the confidential nature of the information at issue,[35] which must disclose a reasonable explanation for exempting the record.[36]

[21] In Australia, requests for access to government records are governed by the Freedom of Information Act 1982.[37] Australian courts have held that the test for determining whether a refusal was justified is a reasonableness test, and the state's burden is not discharged merely by showing that the refusal was not irrational, absurd, or

[32] See section 48 of the Access to Information Act.

[33] Section 45 of the Access to Information Act provides that applications for court review of refusals shall be heard and determined in summary proceedings and section 50 deals with court orders where reasonable grounds for refusal are not found.

[34] *Canada (Information Commissioner) v Canada (Prime Minister)* [1993] 1 FC 427 (FCA) at 439.

[35] *Canada (Information Commissioner) v Atlantic Canada Opportunities Agency* [1999] 250 NR 314; 177 FTR 159 at para 3.

[36] *Wyeth-Ayerst Canada Inc v Canada (Attorney General)* [2003] FCA 257; 305 NR 317 at para 21.

[37] Act 3 of 1982. The Australian Freedom of Information Act provides for two levels of review once an information request has been refused by a government agency. The requesting party can lodge a request for review by the Information Commissioner (IC), and if the IC upholds the refusal then the requesting party can appeal the IC's decision to the Administrative Appeals Tribunal. See Parts VII (Review by Information Commissioner) and VIIA (Review by the Tribunal). At both levels, the refusing agency bears the burden of showing that its refusal was justified. See sections 55D (Procedure in IC Review—onus) and 61 (Onus).

ridiculous.[38] Rather, it must go further to show that, in light of the public interest, there were reasonable grounds for the refusal. Even where a government minister has certified refusal on the grounds of public interest, the court must still ask itself whether, in the light of countervailing factors in the public interest, there were reasonable grounds for the refusal.[39]

[22] It is apparent from this comparative analysis of the standards applied by courts in other jurisdictions with legislation comparable to PAIA that the state may discharge its evidentiary burden only when it has shown that the record withheld falls within the exemptions claimed. Exemptions are construed narrowly, and neither the mere *ipse dixit* of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the state. Even in jurisdictions like Canada, where courts do not engage in a *de novo* reconsideration of the merits of an exemption claimed, the refusal of access to information held by the state must be reasonable. This is consistent with the importance placed in the Constitution on the right of access to information, as well as with the scheme of PAIA, according to which disclosure is the rule and exemptions from disclosure are the exception.

[38] See *McKinnon v Secretary, Department of Treasury* 228 CLR 423 at 428 (per Gleeson CJ and Kirby J), 445 (per Hayne J) and 468 (per Callinan and Haydon JJ).

[39] Id.

Discharging the burden under section 81(3)

[23] In order to discharge its burden under PAIA, the state must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the state has discharged its burden under section 81(3) of PAIA is therefore to ask 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.

[24] The recitation of the statutory language of the exemptions claimed is not sufficient for the state to show that the record in question falls within the exemptions claimed. Nor are mere *ipse dixit* affidavits proffered by the state.[40] The affidavits for the state must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the state is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.[41]

[25] Ultimately, 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

[40] When questioned during oral argument, counsel for the state conceded that the mere statement by an information officer that a record falls within the exemptions claimed is insufficient, without more, to discharge the state's burden under section 81(3).

[41] See [8] above.

provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it does, then the state has discharged its burden under section 81(3). If it does not, and the state has not given any indication that it is unable to discharge its burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the state has only itself to blame.

[26] In this case, deponents to the affidavits on behalf of the state claimed personal knowledge of the following facts: that the two judges received information from representatives of the Zimbabwean government in confidence; and that the report was commissioned and prepared for the purpose of assisting the President in the formulation of policy and the taking of decisions pertaining to the situation in Zimbabwe. The assertions of personal knowledge of specific facts, with which we are concerned here, must be distinguished from the assertions of personal knowledge that generally preface all affidavits and that merely relate to the admissibility of affidavits as written evidence. In this case, the affidavits proffered by the state included both the standard assertions of personal knowledge in respect of the entirety of the information contained within each affidavit, as well as specific assertions of personal knowledge of certain facts separately enumerated within the affidavits.

[27] The question here is not one of the admissibility of evidence, but of the sufficiency of evidence. The deponents have asserted personal knowledge of the facts that the two

judges received information from representatives of the Zimbabwean government in confidence and that the report was commissioned for the purpose of assisting the President in the formulation of policy relating to the situation in Zimbabwe. The question is therefore whether these claims of personal knowledge are sufficient to place the record within the exemptions claimed.

Sufficiency of claims of personal knowledge

[28] The Supreme Court of Appeal held that a deponent's assertion that information is within his or her personal knowledge "is of little value without some indication, at least from the context, of how that knowledge was acquired".[42] I agree. An indication of how the alleged knowledge was acquired is necessary to determine the weight, if any, to be attached to the evidence set out in the affidavit. The key question is whether the deponent would, in the ordinary course of his or her duties or as a result of some other capacity described in the affidavit, have had the opportunity to acquire the information or knowledge alleged.

[29] In *Barclays National Bank Ltd v Love*,[43] the court, in the context of summary judgment, held that "[a]lthough it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his own knowledge he should . . . at least give some indication of his office or capacity which would show an opportunity to

[42] SCA Judgment above n 4 at para 38.

[43] 1975 (2) SA 514 (D).

have acquired personal knowledge of the facts to which he deposes."[44] (Citation omitted.) The principle articulated in *Love* is sound. It is about how knowledge, practically speaking, is acquired, and how a deponent lays the foundation for alleging personal knowledge of certain facts. It acknowledges that laying a foundation for personal knowledge of a fact cannot practically require a deponent to produce a paper trail of every knowledge-building action he or she has undertaken.

[30] While the principle that *Love* and its progeny articulate applies generally in civil proceedings, the principle must be applied with caution in access to information cases. What must be borne in mind is that access to information disputes are concerned with a constitutional right. In addition, the scheme of PAIA is such that information must be disclosed unless it is exempt from disclosure under one or more narrowly-construed exemptions. And what is more, the holder of information bears the onus of establishing that the refusal of access to the record is justified under PAIA. The say so of a deponent that he or she has personal knowledge of the facts that put the record within one or more exemptions is insufficient without an indication, at least from the context, of how that knowledge was acquired.

[44] Id at 516A-B. The approach taken by the Court in *Love* was affirmed by the Appellate Division in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 424A-D, and is still applied in assessing whether a deponent can reasonably depose to the facts with regard to which he claims to have personal knowledge. See, for example, *FirstRand Bank Limited v Johannes Jacobus Meyer and Another* [2011] ZAECPEHC 8; Case No 3483/10, 17 March 2011, unreported, at para 14.

[31] The opportunity to acquire knowledge may emerge from the duties of the deponent and the office he or she occupies, as well as the seniority of the deponent within the office and his or her prior experience with similar activities or procedures within the office. The nature of the deponent's office may therefore provide evidence that the deponent would, in the ordinary course of his or her duties, acquire personal knowledge of the information in question. In addition to the standard operating procedures of an office and the post occupied by a deponent providing a basis for alleging personal knowledge of certain facts, circumstances specific to the particular record at issue and the specific exemption claimed could support a deponent's claim to personal knowledge.

Evidence of exemption claimed

[32] As I have stated above,[45] the question whether the information put forward is sufficient to place the record within 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. If the information provided is sufficient for the court to conclude, on the probabilities, that the record falls within the exemption claimed, then the state has discharged its burden under section 81(3).

[33] In terms of the assessment of whether the state has discharged its burden under section 81(3), section 81(2) provides that the rules of evidence applicable in civil proceedings apply to proceedings under PAIA. What must be emphasised, however, is

[45] See [25] above.

that proceedings under PAIA differ from ordinary civil proceedings in certain key respects. First, these disputes involve a constitutional right of access to information. Second, access to information disputes are generally not purely private disputes – requesters of information often act in the public interest and the outcome of these disputes therefore impacts the general health of our democratic polity. Third, parties to these disputes may be constrained by factors beyond their control in presenting and challenging evidence. And finally, courts are empowered to call for additional evidence in the form of the contested record.

[34] The facts upon which the exemption is justified will invariably be within the knowledge of the holder of information. In these circumstances, the requester may have to resort to a bare denial of the facts alleged by the holder of information justifying refusal of access. A bare denial will normally not be sufficient to raise a genuine dispute of fact, and the *Plascon-Evans* rule would require that the application be decided on the factual allegations made by the party refusing access to the record.[46]

[35] On the other hand, a holder of information who needs to rely on the contents of the record itself, in order to justify the exemption claimed, will be prevented from doing so by the provisions of sections 25(3)(b) and 77(5)(b) of PAIA, which preclude "any reference to the content of the record" in order to support a claim of exemption.

[46] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634G-635D.

[36] Courts should therefore approach these disputes mindful of both the disadvantage at which requesters are placed in challenging evidence put forward by the holder of the record, and the restraints placed on the party holding the information in terms of how it may refer to the contents of the record in justifying refusal of access. In the light of these challenges in producing and refuting evidence, courts have been empowered by section 80 to call for additional evidence in the form of the contested record so that they may test the validity of the exemptions claimed.

[37] The issue that arises is the circumstances under which it is proper for a court to exercise its discretion under section 80 to call for additional evidence in the form of the record. It is to that issue that I now turn.

When may section 80 be invoked?

[38] Section 80 provides, in relevant part:

> "(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
>
> (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."

[39] Section 80(1) was drafted as an override provision that may be applied despite the other provisions of PAIA and any other law. As such, section 80 should be used sparingly. In the United States, courts have emphasised that in camera review should only be undertaken "as a last resort" or only "where absolutely necessary."[47] There, courts resort to "judicial peek" when the affidavits provided by the state are insufficient to enable them to responsibly engage in a *de novo* review of whether an exemption from disclosure has been validly claimed. In those instances, courts will undertake an in camera review of the record in question in order to assist them in determining whether the record falls within the exemption claimed. As the Court noted in *Hayden*: "*in camera* review is a 'last resort' to be used only when the affidavits are insufficient for a responsible *de novo* decision."[48] (Citation omitted.)

[47] See *Arieff v United States Department of Navy* 712 F 2d 1462, 1470-1 (DC Cir 1983) (holding that *ex parte* and in camera review should only be used where absolutely necessary, and such absolute necessity exists where: "(1) the validity of the government's assertion of exemption cannot be evaluated without information beyond that contained in the public affidavits and in the records themselves, and (2) public disclosure of that information would compromise the secrecy asserted").

[48] Above n 28 at 1387. See also *Ray v Turner* 587 F 2d 1187, 1195 (DC Cir 1978) (holding that courts should use their discretion to engage in in camera review where inspection of the record is necessary to make a responsible *de novo* determination on the claims of exemption) and 1212 (finding that in camera review is appropriate where there is a dispute of fact as to the nature or contents of the documents sought); *Navasky v Central Intelligence Agency* 499 F Supp 269, 272 (SDNY 1980) (holding that in camera review "is essential to responsible de novo determination" where the evidence put forth by the state "is insufficient to allow the court to determine whether its nature is such as to justify nondisclosure under the claimed exemption"); and *Lawyers Committee for Human Rights v Immigration and Naturalization Service* 721 F Supp 552, 566 (SDNY 1989) (holding that "*in camera* review is necessary when the validity of the government assertion of exemptions cannot realistically be evaluated without information other than that contained in the affidavits"), citing *Arieff* above n 47. In *Currie v Internal Revenue Service* 704 F 2d 523, 531 (11th Cir 1983), the Eleventh Circuit Court of Appeals noted that the burden placed on courts by in camera review is less onerous where, as in the present matter, "the disputed documents are relatively brief, few in number, and where there are few claimed exemptions."

[40] Section 46 of the Canadian Access to Information Act, which is strikingly similar to our section 80, gives a court considering an application under the Act the discretion to "examine any record to which [the] Act applies that is under the control of a government institution" and further provides that "no such record may be withheld from the Court on any grounds."[49] The Canadian Federal Court of Appeal has held that:

> "Parliament enacted section 46 so that the Court would have the information and material necessary to the fulfilment of its mandate to ensure that the discretion given to the administrative head has been exercised within proper limits and on proper principles."[50]

[41] What appears to inform the exercise of discretion to resort to judicial peek in both the United States and Canada is the duty of a court to make a responsible decision.[51] Judicial peek facilitates the responsible exercise of the judicial function where courts may be lacking the material necessary to responsibly determine whether the record falls within the exemption claimed. Both in camera review in the United States and section 46 in Canada empower courts to call for additional evidence to enable them to properly adjudicate disputes concerning access to information. As the Canadian Federal Court of Appeal has held, the power to examine privileged records under section 46 "goes beyond a mere inspecting power: it includes the ability for the Courts to use privileged

[49] See Section 46 of the Canadian Access to Information Act above n 30.

[50] *Rubin v Canada (Canada Mortgage and Housing Corp)* [1989] 1 FC 265 (FCA) at 276.

[51] Similarly, in South Africa, courts are required under section 82 of PAIA to make an order that is just and equitable.

communications as evidence to decide the merits of the exemption claimed and the legality of the refusal to disclose."[52]

[42] Section 80 does not spell out the circumstances under which the power to examine the record may be exercised. 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. 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.

[43] The requester may be constrained by lack of access to the record sought when attempting to challenge claims by the record holder that the record is exempt from disclosure. The hands of the body holding the information may also be tied by the provisions of sections 25(3)(b) and 77(5)(b) of PAIA, which preclude the record holder from referring to the protected contents of the record sought in justifying its refusal. Both of these factors could result in the court having insufficient information and material necessary for it to responsibly fulfil its duty to decide whether the exemption is rightly claimed. In these circumstances, section 80 provides courts with the power to use the

[52] *Canada (Minister of Environment) v Canada (Information Commissioner)* [2000] FC Case No A-761-99 (FCA), judgment delivered from the bench, 6 April 2000, at 6.

record in question as additional evidence to decide whether the exemption is lawfully claimed.

[44] Courts should exercise their discretion to call for additional evidence in the form of the contested record only where there is the potential for injustice as a result of the unique constraints placed upon the parties in access to information disputes. This injustice, as I have pointed out above, may arise because either the requester or the holder of information is prevented by factors beyond its control from presenting the evidence necessary to make its case.[53]

[45] As a discretionary power afforded to the courts to prevent injustice, 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.

[46] It is neither necessary nor desirable to detail all of the circumstances under which a court may conclude that it would be in the interests of justice for it to exercise its discretion and invoke the provisions of section 80. It will generally be in the interests of justice to invoke section 80 where there is doubt, emerging from the unique limitations parties in access to information disputes face in presenting and refuting evidence, as to whether an exemption is rightly claimed. This may be the case where, through no fault of the state, the evidence put forth by it is insufficient to allow the court to responsibly

[53] See [34]-[35] and [43] above.

determine whether the exemptions claimed are valid, or where the validity of the exemptions claimed cannot responsibly be evaluated without reference to the information sought to be protected.

[47] It may also be in the interests of justice to invoke section 80 where the probabilities are evenly balanced. Ordinarily, where the probabilities are evenly balanced, the rules of civil procedure would require a court to find against the holder of information as the bearer of the burden of proof. Where, however, a court is faced with a record that it acknowledges may or may not be protected, in whole or in part, from disclosure, and the doubt as to the validity of the exemptions claimed can be explained in terms of the limitations placed upon the parties in access to information disputes in presenting and refuting evidence, it would be in the interests of justice for the court to invoke section 80 in order to responsibly decide the merits on the basis of the additional evidence provided by the record.[54]

[48] This is not to say that section 80 should be invoked wherever there is doubt as to the validity of the exemptions claimed. A court may have sufficient evidence to responsibly decide, on the probabilities, that a record likely is or is not protected. Where section 80 is of critical importance is in cases where, because of the limitations the parties face in producing and refuting evidence relating to the specific contents of a record, the

[54] See *Ray v Turner* above n 48 at 1195 (noting that in camera review of a record is preferable to a ruling against the state merely because the evidence on affidavit places the case in doubt or evenly balanced).

court has insufficient evidence to responsibly come to a conclusion on the probabilities. Where there is doubt as to the validity of the exemptions claimed, and it is clear from the affidavits put forth by the parties that they are constrained in their ability, within the framework of PAIA, to lead evidence that may assist the court in responsibly determining the matter on the probabilities, section 80 should be invoked so that the court has the evidence it needs to responsibly discharge its duty.

[49] The Supreme Court of Appeal was correct in holding that a court should not use its powers under section 80 as a "substitute for the public body laying a proper basis for its refusal."[55] It also cautioned that a court "should be hesitant to become a party to secrecy", because the trust that the public places in courts extends from their functioning openly and always giving reasons for their decisions.[56]

[50] By using its powers under section 80 to call for additional evidence in the form of the record, the court is neither supplementing the state's case nor making out a case for the requester. The object of the exercise is to prevent courts from being forced into the role of mere spectators in an adversarial process that, because of the nature of access to information claims, may not produce the factual record necessary for courts to execute their judicial function responsibly. It may be necessary for a court, in responsibly carrying out its duty to make a finding on the probabilities, to take on the inquisitorial

[55] SCA Judgment above n 4 at para 52.

[56] Id.

role that is open to it under section 80. Where a court determines that it is in the interests of justice for it to invoke section 80, it does so in the public interest, for the public has an interest in information held by the state that is not exempt from disclosure being released, and the public likewise has an interest in information that Parliament determined should not be released, under Chapter 4 of PAIA, properly being protected from disclosure.[57]

[51] Other factors that could be relevant to courts in deciding whether it is in the interests of justice to invoke section 80 include the potential to resolve material disputes of fact that relate to whether the record falls within the exemption claimed, and whether a record that is protected may contain portions that do not fall within the exemption claimed and that can be reasonably severed. I am mindful of the fact that the requester will often not be in a position to refute the allegations made by the state by virtue of the fact that the requester does not have access to the contents of the record sought. A court may also consider it to be in the interests of justice to invoke section 80 in order to test the accuracy of the state's representations and thereby restore some degree of adversariness in the proceedings.[58]

[52] The role of section 80 in our constitutional democracy must be stressed. Its very purpose is to test the argument for non-disclosure by using the record in question to

[57] See [11] above.

[58] Compare *Ray v Turner* above n 48 at 1212 (finding that "an in camera inspection increases the 'adversariness' of the proceeding—or at least provides a minimal substitute for true 'adversariness'—by allowing the court to test the accuracy of the agency's representations").

decide the merits of the exemption claimed and the legality of the refusal to disclose the record. In this sense, it facilitates, rather than obstructs, access to information. The very existence of the court's power to examine the record should, in itself, deter frivolous claims of exemptions. If courts are hesitant to use this powerful tool to examine the record independently in order to assess the validity of claims to exemptions, this may very well undermine the constitutional right of access to information. Quite apart from this, judicial access to the record in cases of this kind is a common feature of other open democracies with well-developed and robust access to information jurisprudence.[59]

[53] In my view, the power of courts to examine the contested record under section 80 in access to information disputes is vital to the vindication of the right of access to information. Properly exercised, the power to examine the record will not undermine public trust in our courts. It is a fundamentally important instrument given to courts to assess claims of exemption independently and thus protect the constitutional right of access to information.

[54] The next question to consider is whether, in the circumstances of this case, the provisions of section 80 should have been invoked, and, if so, whether this Court or the High Court should examine the report.

[59] See [39]-[41] above.

Should the provisions of section 80 have been invoked?

[55] The Supreme Court of Appeal observed: "It might be that the report contains information that was received in confidence, and it might be that it was obtained or prepared for a purpose contemplated by s 44, but that has not been established by acceptable evidence."[60] In the light of the doubt expressed by the Supreme Court of Appeal as to the validity of the exemptions claimed, as well as its finding that the evidence proffered by the state was unacceptable to justify the exemptions it sought, it would have been in the interests of justice for section 80 to have been invoked. This is because: (a) the state alleged that its hands were tied by the provisions of sections 25(3)(b) and 77(5)(b) in presenting evidence in support of its claim to exemptions; (b) M & G was not in a position to effectively challenge the evidence of the state, in particular with regard to the contents of the report and the personal knowledge the deponents asserted of the mandate of the judges who undertook the mission; and (c) there was the question of severability of the report, as the state admitted that portions of it did not contain confidential information.

The allegation that the state's hands were tied

[56] In his affidavit before the High Court, the Deputy Information Officer in the Presidency alleged difficulty in responding to certain of the averments made by M & G in its founding affidavit, citing sections 25(3)(b) and 77(5)(b) of PAIA and pointing out that "[i]f the contents of the report are disclosed in the course of traversing the said averments

[60] SCA Judgment above n 4 at para 53.

it would defeat the very reasons for its non-disclosure."[61] After describing how the judges, in executing their mandate, "held confidential discussions with various representatives of the Republic of Zimbabwe and were supplied information in confidence by or on behalf of that State", he proceeded to explain that he could not give further detail as to how this was reflected in the contents of the report, again citing to sections 25(3)(b) and 77(5)(b).

[57] In its application for leave to appeal to the Supreme Court of Appeal, the state persisted in claiming that its hands were tied by sections 25(3)(b) and 77(5)(b) of PAIA in meeting its statutory burden. It argued that the High Court erred in finding that it had not discharged its statutory burden, because "providing further particularity would, contrary to the provisions of sections 25(3)(b) and 77(5)(b) of PAIA, disclose the very information that the statutory exemptions sought to protect from disclosure." In this Court, the state advanced, as one of its grounds of appeal, the fact that there was no clarity on the evidence that the state could and should produce, in the light of sections 25(3)(b) and 77(5)(b), and urged us to provide clarity on this issue.

[61] Sections 25(3)(b) and 77(5)(b) of PAIA provide that, in furnishing reasons for refusing access to a record, the officers refusing the request (in terms of section 25) and upholding the refusal on appeal (in terms of section 77) must "exclude, from such reasons, any reference to the content of the record". The Supreme Court of Appeal correctly held that this restriction "must have been intended to apply as much when the public body seeks to justify its refusal in court proceedings." See SCA Judgment above n 4 at para 50.

[58] In response to this Court's directions dated 4 August 2011,[62] M & G argued that section 80 should only be invoked in "extraordinary circumstances." It submitted that extraordinary circumstances can arise where the state is unable to discharge its burden of proof due to no fault on its part. It submitted that this will be the case where the state alleges that the record is so secret that its contents can only be dealt with in general terms that are unlikely to discharge its burden. I agree with M & G's submission that section 80 may properly be invoked where the record is so secret that its contents can only be dealt with in such general terms on the papers as are insufficient to discharge the burden of proof. But, without conceding that the information it put forth was in fact insufficient to discharge its burden, this is precisely the claim that was made by the state in this case.

[59] Furthermore, neither the Deputy Information Officer nor the Minister in the Presidency was personally involved in the events preceding the mission of the two judges to Zimbabwe. Their reliance on the exemptions provided in sections 41(1)(b)(i) and 44(1)(a) of PAIA had, perforce, to be based on their assessment of the contents of the report, itself. Apart from this, the exemptions claimed are, in my view, not so inherently improbable or implausible as to be rejected as necessarily untrue. It is not in dispute that the two judges went to Zimbabwe at the instance of the President. It seems more likely than not that they would have spoken to Zimbabwean state officials in the course of their

[62] On 4 August 2011, this Court directed the parties to lodge written argument considering, amongst other things: (a) the proper approach, in the light of section 80, when a court is faced with uncertainty as to whether a record falls within the exemptions claimed; (b) the standard that a court should apply in deciding whether to invoke section 80; (c) the relevance of a dispute of fact as to the severability of the record in applying such standard; and (d) whether this Court should remit the matter to the High Court for reconsideration in the light of the legal principles that this Court may announce for the first time in this judgment.

mission and advised the President as to their findings. Although it does not necessarily follow that their meetings with Zimbabwean officials took place on a confidential basis, or that their reporting back to the President was for the purpose of the formulation of policy, I do not think these possibilities can necessarily be excluded.

[60] In these circumstances, the allegation by the state that it was hamstrung by the provisions of sections 25(3)(b) and 77(5)(b) from presenting further evidence in support of its claim to the exemptions asserted does not appear to me to be implausible. Therefore, to the extent that the state was hampered by its statutorily imposed inability to refer or rely on the contents of the report, the potential prejudice to the state was that it could not provide more specific evidence to justify the exemptions it claimed. This, in my view, is sufficient to trigger the provisions of section 80.

[61] Where the validity of the claim of exemption cannot be responsibly evaluated without the aid of information beyond that contained in the affidavits and the record before the court, and the body refusing access to the record pleads that it cannot provide additional evidence to support its claim to exemption without referring to protected contents in the record and thereby contravening the Act, it is proper for a court to resort to the provisions of section 80.

Inability of M & G to challenge the evidence

[62] Both the Deputy Information Officer and the Minister in the Presidency concluded, based on their reading of the report, that it contained information given to the judges in confidence by Zimbabwean officials and that it was produced for the purpose of assisting the President in formulating policy. Insofar as the Deputy Information Officer and Minister put forth evidence that was based on their reading of the report itself, M & G was severely constrained in its ability to directly challenge their evidence. This is because M & G could not challenge the reading of a report it had never seen.

[63] The Director-General in the Presidency submitted an affidavit in support of the decisions by the Deputy Information Officer and the Minister to refuse access to the report, and asserted personal knowledge of the judges' mandate. It does not seem improbable that the Director-General in the Presidency would have had personal knowledge of the judges' mandate, based on his position as a senior official in the Presidency at the time that the Zimbabwe mission was planned and the judges were instructed. However, because the Director-General did not provide precise detail in his affidavit as to how his post afforded him the opportunity to have acquired personal knowledge of the judges' mandate, M & G was constrained in challenging his assertions relating to the purpose and conditions of the mission.

[64] Given the constraints M & G faced in challenging the affidavit evidence put forth by the state, both in relation to state officials' reading of the report to which M & G did

not have access, and in relation to the personal knowledge state officials asserted as to the judges' mandate, it would have been in the interests of justice for the High Court to invoke section 80.

Severability

[65] Section 28 of PAIA requires that any information in a record that is not protected and that can reasonably be severed from the protected parts of the record be severed and disclosed.[63] There is no discretion to withhold information that is not protected. The unprotected material must be disclosed "despite any other provision" of PAIA, unless it "cannot reasonably be severed" from the protected portions.

[66] The state admitted that portions of the report contain information that is not confidential. However, deponents to the affidavits provided on behalf of the state assert personal knowledge, based on their each having read the report in question, that the report is not severable. It does not appear from the record whether, at any stage prior to litigation, the state considered the release of these portions of the report. Non-severability was asserted for the first time in the High Court. M & G was placed at a

[63] Section 28(1) provides:

> "If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which—
>
> (a) does not contain; and
>
> (b) can reasonably be severed from any part that contains,
>
> any such information must, despite any other provision of this Act, be disclosed."

disadvantage in challenging this assertion, as it did not have access to the report. In these circumstances, the allegation of non-severability could not be decided without having regard to the report.

[67] In all the circumstances, this is a case in which the High Court should have invoked the provisions of section 80. It therefore erred in not doing so. It remains to be considered whether this matter should be remitted to the High Court for it to apply the provisions of section 80.

Disposal of the case

[68] I have concluded that the High Court should have invoked the provisions of section 80. However, 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,[64] conducting the hearing,[65] and potentially prohibiting the publication of information in relation to the proceedings.[66] 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.

[64] Section 80(3)(a).

[65] Section 80(3)(b).

[66] Section 80(3)(c).

[69] M & G has argued that remittal will necessarily entail wasted costs when "the matter will in all likelihood end up before this Court for final determination again." It is not necessary to speculate on whether the matter will return to this Court, or even to the Supreme Court of Appeal for that matter. Suffice it to say, we have articulated the applicable legal principles and there is no reason to believe that these principles will not be properly applied by the High Court if the matter is remitted. Nor can we say, at this stage, whether the Supreme Court of Appeal or this Court will grant leave to appeal were the matter to appear before us again.

[70] In all the circumstances, the just and equitable order to make is to remit the matter to the High Court to enable it to examine the report pursuant to the provisions of section 80 and thereafter to decide the merits of the exemptions claimed and the lawfulness of the refusal to disclose the record.

Costs

[71] It is just and equitable to order no costs in the High Court, the Supreme Court of Appeal and this Court.

Order

[72] The following order is made:

1. The appeal succeeds.

2. The orders of the High Court and the Supreme Court of Appeal are set aside.

3. This case is remitted to the North Gauteng High Court, Pretoria, for that Court to examine the record in terms of the provisions of section 80 of the Promotion of Access to Information Act 2 of 2000 and to determine the application under section 82 of the Promotion of Access to Information Act in the light of this judgment.

4. There is no order as to costs.

YACOOB J:

[73] I have read the judgments of Ngcobo CJ and Cameron J and concur in the conclusion reached by Ngcobo CJ. I also agree with all the reasoning in that judgment except that related to when a court should have recourse to the information sought. I accept though that the appropriate standard to be employed in exercising the discretion is the interests of justice.[1] The application of that standard drives me however to a conclusion that, in my view, is more invasive of the state power of secrecy. I have followed the debate about the circumstances in which the interests of justice would require a court seized with an application concerning an exemption claimed in response

[1] Judgment of Ngcobo CJ at [45].

to a request for a document with considerable interest and sometimes with some perplexity.

[74] After careful consideration, I have concluded that it would ordinarily be impossible for me, or for any other judge, to come to any conclusion about an order that should be made in terms of section 82 of PAIA[2] without having regard to the contents of the document or record concerned, and without carefully analysing it in relation to the claims made by both parties. I cannot understand how it is possible to perform the judicial function of making a section 82 order without examining the document, if that document is available to the court. I cannot associate myself with an approach that suggests that judges, by having recourse to the documents, somehow become entangled into or associated with state secrecy.

[75] It is a reality that some things must be secret. More importantly, however, secrecy must be subjected to the tightest control. The judicial duty that secrecy should be as limited as possible is one that is vital to the success of our democratic order. We cannot ignore this. We must do our judicial duty, however unpleasant it might be.

[2] The Promotion of Access to Information Act 2 of 2000.

[76] In my view, therefore, unless there are circumstances in which a judicial officer is completely satisfied that it is possible to make an appropriate order without recourse to the document (and I cannot now conceive of a situation of this kind), or unless the document is for some legitimate reason not available, the record must be carefully examined.

FRONEMAN J:

[77] I concur in the judgment of Ngcobo CJ, except to the following extent: in my view, the interests of justice only calls for additional evidence in the form of a record in circumstances where either of the parties is constrained in presenting evidence in relation to the dispute or where severability under section 28 of PAIA is at issue, as in this case. To the extent that paragraphs [45] to [47], [49] and [51] of the judgment go beyond that, I consider that to be unnecessary for deciding this matter.

CAMERON J (Jafta J, Nkabinde J and Van der Westhuizen J concurring):

[78] What should a court do when government fails to justify a refusal to release information it holds to the public? That is the question before us. The Khampepe/Moseneke report on the 2002 Zimbabwe presidential election is at stake. The *Mail & Guardian* newspaper (M&G) asked for it, and the Presidency said No. Both the High Court[1] and the Supreme Court of Appeal[2] found the refusal unjustified under the Promotion of Access to Information Act (PAIA).[3] That statute was enacted mainly to give effect to the constitutional right of access to information held by the state.[4] It puts the burden on the refuser to establish statutory justification for refusing access.[5] The High Court and the Supreme Court of Appeal accordingly ordered the Presidency to release the report.

[79] In my respectful view, those orders were correct, and this Court's decision to set aside the decisions of the High Court and Supreme Court of Appeal, and to remit the parties' dispute for re-adjudication, is wrong. In my view, the present application should succeed because the Presidency failed to justify its refusal of the record under PAIA, and

[1] *M & G Limited and Another v President of the Republic of South Africa and Others* [2010] ZAGPPHC 43; Case No 1242/09, 4 June 2010, unreported.

[2] *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA).

[3] Act 2 of 2000.

[4] Section 32 of the Bill of Rights is set out in [6] above.

[5] Section 11(1) of PAIA provides that, in the absence of a statutorily-sanctioned ground for refusal, a requester "must" be given access to a record of a public body, provided the statute's procedural requirements have been met. Section 81(3) provides that the burden of establishing that a refusal of a request for access complies with the Act "rests on the party claiming that it so complies."

further failed to provide a plausible basis for a plea that the statute made it impossible for it to provide adequate reasons for its refusal. More generally, in my view the provisions that permit secret judicial examination of a disputed record should be invoked only where government has laid a plausible foundation for a plea that its hands are tied, or where government has laid a basis for claiming an exemption, but a court considers that doubt exists about its validity. Secret judicial examination should, in other words, be used to amplify access.

[80] In explaining my conclusion, I first set out my reasons for finding the Presidency's evidence grievously lacking. Then I consider the outcome proposed in the judgment of Ngcobo CJ.

Evidence

[81] No one disputes that then-President Mbeki sent two judges, Justice Khampepe[6] and Justice Moseneke, to Zimbabwe to report to him on constitutional and legal issues relating to the 2002 presidential election. The mission was cleared with then-Chief Justice Chaskalson, but its precise terms, and how the judges fulfilled it, have never been disclosed.

[6] Then Judge of the South Gauteng High Court, Johannesburg.

[82] We know this: the official in the Presidency statutorily charged with dealing with PAIA requests, the deputy information officer,[7] Mr Trevor Fowler, gave two grounds for refusing the M&G's request. First, he said he had "thoroughly examined the contents of the report" and was of the view that disclosure "will reveal information supplied in confidence by or on behalf of another state or an international organisation." This explanation merely recounted the wording of section 41(1)(b)(i).[8] Second, he stated that PAIA entitled him to refuse a request "if the record contains an opinion, advice, report or recommendation 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

[7] The effect of PAIA's definitions is that a public body's information officer is its chief executive officer or equivalent, and the national department's information officer is its Director-General, head, executive director or equivalent. Section 17(1) requires every public body to designate as many deputy information officers "as are necessary to render the public body as accessible as reasonably possible for requesters of its records."

[8] Section 41(1) provides:

> "The information officer of a public body may refuse a request for access to a record of the body if its disclosure—
>
> (a) could reasonably be expected to cause prejudice to—
>
> (i) the defence of the Republic;
>
> (ii) the security of the Republic; or
>
> (iii) subject to subsection (3), the international relations of the Republic; or
>
> (b) would reveal information—
>
> (i) supplied in confidence by or on behalf of another state or an international organisation;
>
> (ii) supplied by or on behalf of the Republic to another state or an international organisation in terms of an arrangement or international agreement, contemplated in section 231 of the Constitution, with that state or organisation which requires the information to be held in confidence; or
>
> (iii) required to be held in confidence by an international agreement or customary international law contemplated in section 231 or 232, respectively, of the Constitution."

imposed by law." This likewise recounted the wording of section 44(1)(a).[9] He recorded that he refused the request "in terms of sections 41(1)(b)(i) and 44(1)(a)".

[83] PAIA requires an information officer who refuses a request to "state adequate reasons for the refusal, including the provisions of this Act relied upon".[10] This means that a decision-maker must give adequate reasons in addition to stating the statute's provisions on which he or she relies. Mr Fowler did not do so. He merely recited the provisions of the statute.

[84] Mr Fowler made no reference in his reasons to the provisions of the statute that prohibit a decision-maker from making any reference to the content of the record when giving reasons for a refusal.[11]

[85] The newspaper took this refusal on internal appeal. The statutory appeal authority within the Presidency was then-Minister Tshabalala-Msimang. Her response to the

[9] Section 44(1)(a) provides:

> ". . . 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 a 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".

[10] Section 25(3)(a).

[11] Section 25(3)(b) provides that an information officer who refuses access must exclude from the reasons stated "any reference to the content of the record". Section 77(5)(b) is the parallel provision for internal appeals.

request echoed that of Mr Fowler. She said she was "also of the view that the disclosure of the contents of the said report would reveal information envisaged in section 41(1)(b)" and further that the request could be refused in terms of section 44(1)(a) of PAIA, whose provisions her letter also set out. As a result, she said, she had "no option" but to refuse the appeal.

[86] Minister Tshabalala-Msimang's reasons, like those of Mr Fowler, merely recited the provisions of the statute. They failed to provide adequate reasons in addition to stating the provisions of the statute relied on. She, too, made no reference to any difficulty in stating her reasons arising from the statute's provisions precluding any reference to the content of the record when giving reasons for a refusal.[12]

[87] In response, the M&G went to court.[13] The basis of its challenge is important. Its founding papers specify three grounds on which the newspaper maintained that the Presidency's refusal was without merit. First, the M&G said, "the state is required to justify any claims to secrecy", since "unwarranted and unjustified claims to secrecy undermine the very foundations upon which South Africa's constitutional democracy is

[12] Section 77(5)(b) provides that a decision-maker on an internal appeal who refuses access must exclude from the reasons stated "any reference to the content of the record".

[13] Section 78(1) of PAIA provides:

> "A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74."

built". Second, the newspaper said the public have an interest in ensuring that government's grounds for refusing access to a document are "legitimate, transparent and justifiable under the Constitution".

[88] The third reason is significant to the evidence the Presidency presented in response. The M&G stated that Mr Fowler's and Minister Tshabalala-Msimang's grounds for refusal "constitute unjustified bald assertions" which are "manifestly without any substance or merit".

[89] So the terrain was clearly marked. In the face of the M&G's characterisation of the Presidency's stance, the task the statute set the Presidency was to show that its refusal complied with PAIA. Far from doing so, the Presidency's affidavits resorted to the same approach Mr Fowler and Minister Tshabalala-Msimang took earlier. They largely incanted the provisions of the statute.

[90] In his deposition, Mr Fowler alleged that the two judges were appointed "as something in the nature of envoys" of the President to assess "the constitutional and legal challenges" in Zimbabwe, and to report back to him directly and in confidence. He also stated that the President "wanted legal experts to advise him on [Zimbabwe's] constitutional matters, and appointed the two Justices to undertake this diplomatic mission". He stated that "the Justices were received in Zimbabwe and granted interviews

in their capacity as envoys of the President of South Africa", and that all who were party to these talks thought they were confidential and in furtherance of diplomatic relations.

[91] He gave no ground for these assertions. Nor did he appear to have any. On the contrary, his affidavit indicated that he had assumed his duties in the Presidency only in 2004 – two years after the judges' mission.

[92] The newspaper's founding affidavit claimed, no doubt provocatively, that it "understood" that the report detailed "material irregularities apparent in the electoral process, and the failure of Zimbabwe's legal system to permit a valid challenge to the results of the election." The affidavit also claimed that the report "reportedly reflects a number of factors that rendered the election not free and fair". It repeats this assertion a number of times. Mr Fowler did not deal directly with it. Instead, he stated that the newspaper's averments "call for a disclosure of the contents of the report", which would defeat the Presidency's reasons for non-disclosure and which the statute prohibits. Here he invoked the provisions of the statute requiring the exclusion of the contents of a record from the reasons for its refusal.

[93] Mr Fowler also invoked these provisions in responding to the newspaper's assertion that the statute had introduced a culture of justification and accountability, which required a public body to justify properly any limitation. His response alluded to

the provisions requiring that a requester be informed of a decision,[14] and again referred to the provisions requiring the decision-maker to provide adequate reasons, to exclude from them any reference to the content of the record, and to inform the requester of the right to take further steps.[15]

[94] Mr Fowler's affidavit added one revealing detail. He said that when the M&G requested the report in 2008, then-President Mbeki had been asked by the contesting parties in Zimbabwe to help find a solution to their political challenges, and had been appointed as a facilitator by the Southern African Development Community and the African Union. It was crucial to this role, Mr Fowler said, that former President Mbeki "be and be seen as impartial". Disclosure of the report, Mr Fowler added, would be "detrimental to peace in Zimbabwe". He did not explain how a report by two judges about an election six years earlier could be seen to affect Mr Mbeki's impartiality in 2008, or be detrimental to peace in Zimbabwe. More importantly, he nowhere invoked the statute's provision that permits refusal of a request if the disclosure could reasonably be expected to cause prejudice to South Africa's international relations.[16]

[95] Then-Minister Tshabalala-Msimang also deposed to an affidavit. Hers, though much shorter, followed the form and substance of Mr Fowler's. She, too, said that

[14] Mr Fowler mentioned section 56(1)(b), which requires a head of a private body to whom a request is made to notify the requester of the decision. The parallel provision for public bodies is section 25(1)(b).

[15] Section 25(3)(a), (b) and (c).

[16] See section 41(1)(a)(iii) above n 8.

disclosing parts of the report was not possible "without undermining the very reasons for not disclosing it". She recorded her view that the provision of PAIA that requires disclosure in the public interest[17] was not applicable, and further that "the harm that would result if the report was disclosed clearly outweighed any benefit in disclosing it".

[96] Significantly, she echoed the fear Mr Fowler signalled about events current in 2008-2009.[18] She said that "the delicacy of the situation in Zimbabwe" and the "important facilitating roles" played there by former President Mbeki and his successor would mean that disclosure "would probably have a serious debilitating effect". Her refusal of the M&G's appeal did not seek to place reliance in refusing the request on prejudice to South Africa's international relations.

[97] Neither Mr Fowler nor Minister Tshabalala-Msimang claimed to have any direct personal knowledge about the judges' mission or its terms. This gave especial importance to the third affidavit filed in opposition to the M&G's application. This was

[17] Section 46 of PAIA provides:

> "Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if—
>
> (a) the disclosure of the record would reveal evidence of—
>
> (i) a substantial contravention of, or failure to comply with, the law; or
>
> (ii) an imminent and serious public safety or environmental risk; and
>
> (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

[18] The M&G formally asked for the report on 17 June 2008. Mr Fowler refused it on 22 July 2008 when President Mbeki still held office. The appeal was dismissed on 13 November 2008 by which time President Mbeki was no longer in office. The litigation challenge was lodged on 13 January 2009. The opposing affidavits of the officials in the Presidency were dated 18-19 March 2009.

from Reverend Frank Chikane. At the time of his affidavit, March 2009, he was Secretary of the Cabinet, and had been Director-General of the Presidency, and its statutory information officer, until the end of October 2008. Since he indicated that he had served in the Presidency from President Mandela's time, there was no dispute that he held high administrative office there at the time of the judges' mission.

[98] There was much contention during argument before us about the value of Mr Chikane's evidence. His affidavit was short, and terse. He said that he had "personal knowledge" of aspects of the mission. These were that the judges were appointed "as special envoys"; that they were appointed on the grounds of their skill and position "to assess the constitutional and legal matters" in the Zimbabwean elections; that their report "was commissioned by the President and prepared for the purpose of assisting him with the formulation of policy and the taking of decisions pertaining to the situation in Zimbabwe"; and that on their return they were "expected to report directly and in confidence to the President".

[99] Mr Chikane described the judges' visit to Zimbabwe as a "diplomatic mission", and said that their exchanges "included interactions with representatives of the government of Zimbabwe" who spoke to them in confidence.

[100] Although he had served in the Presidency for many years, Mr Chikane gave no indication of how or from what he gained personal knowledge of the matters in issue. He

gave no details as to any personal involvement in commissioning the judges or in arranging their mission or of taking part in meetings, if any, during which the mission was arranged. Nor did he suggest that he had any first-hand knowledge of how or on what terms the judges were received in Zimbabwe or who they met.

[101] The Presidency appears to have abandoned in this Court, as it did in argument before the Supreme Court of Appeal,[19] the suggestion it had persistently maintained, that the two judges were "envoys" or that they were on a "diplomatic mission" to Zimbabwe. Rightly so. It would be surprising to find judges performing so plainly an executive function.[20] In his submissions in this Court, counsel for the Presidency conceded that the judges' status as "envoys" was irrelevant.

[102] The grounds pressed before us were that the disclosure of the report would reveal information "supplied in confidence by or on behalf of another state" under section 41(1)(b)(i), and that it was prepared "for the purpose of assisting to formulate a policy" under section 44(1)(a).

Information "supplied in confidence by or on behalf of another state or international organisation"

[19] *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA) at para 51.

[20] For this reason, the Supreme Court of Appeal rightly noted that it would require clear and substantiated evidence to establish that the judges assumed a diplomatic role. Id at para 49.

[103] The difficulty with the "confidential state information" ground is that there was no evidence at all to support it. Aside from the assertions by Mr Fowler and Minister Tshabalala-Msimang, which echoed the statute's wording, that disclosure would reveal information supplied in confidence by or on behalf of another state, there was no evidence to indicate, even in general terms, who had supplied the information on behalf of the Zimbabwean government. And there was no direct evidence about whom the judges had met with in Zimbabwe.

[104] Besides, counsel for the Presidency rightly conceded that the judges must also have talked to persons who did not supply confidential state information to them. PAIA makes it obligatory for a public body to disclose every part of a record that does not contain information that may or must be refused, and can reasonably be severed from the parts that do.[21] Why could the confidential state information not be redacted from the report? Mr Fowler and Minister Tshabalala-Msimang did not say. And why could those

[21] Section 28 of PAIA is headed "Severability" and provides:

> "(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which—
>
> (a) does not contain; and
>
> (b) can reasonably be severed from any part that contains,
>
> any such information must, despite any other provision of this Act, be disclosed.
>
> (2) If a request for access to—
>
> (a) a part of a record is granted; and
>
> (b) the other part of the record is refused,
>
> as contemplated in subsection (1), the provisions of section 25(2) apply to paragraph (a) of this subsection and the provisions of section 25(3) apply to paragraph (b) of this subsection."

portions of the report that did not contain confidential state information not be released? Again, they did not say.

Policy formulation and claims of personal knowledge

[105] Two difficulties beset the policy formulation ground. First was its decidedly curious presentation in the evidence. Mr Fowler's affidavit said at two points that the report was used for policy-formulation only *after* the Presidency had received it.[22] There is good authority[23] that to fall under PAIA's policy-formulation exemption the statute requires that a report must have been obtained for the specific purpose of policy formulation. In other words, that must have been its object from the start. The exemption does not cover a report, obtained for other purposes, that is later roped in to help with policy formulation. During argument counsel for the Presidency conceded, rightly, that this is correct. Hence, if Mr Fowler's account is accurate, the policy-formulation ground cannot apply.[24]

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[22] Mr Fowler said that President Mbeki "was able to utilise the report to assist him in the formulation of policy" and that this purpose "arose once the President had sight of the report". Seemingly underscoring that this sequence was not a slip, Mr Fowler's affidavit later repeated that the report was obtained to inform President Mbeki about issues in Zimbabwe – "and later after receiving the report, to assist in the formulation of policies".

[23] *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)* 2005 (2) SA 110 (SCA) at paras 16-7.

[24] *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA) at para 34 where the Supreme Court of Appeal said this of Mr Fowler's evidence on this aspect:

> "The section does not render a report subject to secrecy if it is 'reasonably conceivable' that it has been of assistance in formulating policy etc. It does not even render it subject to secrecy if it 'would have been of assistance'. Nor even if the President 'was able to utilise the report to assist him'. It is subject to secrecy only if it was obtained or prepared for that purpose. And it is only in the world that exists beyond the looking glass that the purpose for which a report was obtained or prepared is capable of '[arising] once the [reader] had sight of the report'."

[106] But the Court is in any event left to grapple with the opaque effect of Mr Chikane's claim that he had "personal knowledge" about the purpose of the judges' mission. And this was the Presidency's second problem, for Mr Chikane's assertion that he had "personal knowledge" that the report was commissioned for policy-formulation is not evidence that it was.

[107] As the Supreme Court of Appeal pointed out,[25] one can gain personal knowledge of an event in three very different ways: by experiencing it directly; by receiving a report that it happened (which is hearsay); or by deducing from other signs that it took place. Mr Chikane does not tell us in which of these ways he acquired personal knowledge. This leaves a court unable to perform its most elementary function, which is to assess the quality, strength and reliability of his knowledge in determining whether the fact to which he deposes is true. The mere assertion that he has personal knowledge gives no help in that duty. It follows that his assertion is without value as evidence of the fact in issue.

[108] And it is futile to urge, as counsel for the Presidency did, that it is overwhelmingly likely that Mr Chikane, as administrative head of the Presidency, had personal knowledge of the judges' mission. This is because a court cannot find that an event happened just because it is probable that a witness knew it happened. The court must know why and how the witness claims to have personal knowledge of it, so that it can itself assess the probity and reliability of the witness's knowledge of the event.

[25] Id at para 37.

[109] So in the case of every assertion to personal knowledge the court has to ask: why does the witness say he knows it? Evidence is not constituted by a probability that a witness is able to provide it. The witness must provide the evidence. The assertion of personal knowledge about it is not evidence of it.[26]

[110] There is a further point. It is no more nor less probable that Mr Chikane knew of the purpose of this particular mission than that he knew of anything else that happened during the time he worked in the Presidency. And he cannot have known everything that happened there.[27] Hence it is impossible for the Court to determine whether Mr Chikane knew the nature of the judges' mission unless he says why he claims knowledge of it.

[111] It has long been established in money disputes that a witness who claims personal knowledge of a cause of action in summary judgment proceedings must "either set out the circumstances from which the Court would be justified in coming to the conclusion that the facts are within his knowledge, or it must appear from the nature of his evidence

[26] A witness's claim that he has personal knowledge that the sun shone in Pretoria on a specific day is not evidence that it did. It is evidence only that he claims personal knowledge that it did. It would be evidence of sunshine on that day only if he explains that he was himself in Pretoria and saw the sun shining; or that he was told that the sun was shining; or that he inferred from meteorological records (or other oblique facts) that the sun was shining. That Pretoria is the witness's normal place of residence, and that he was therefore "probably" there on the specified day takes the matter no further. Nor does the fact that the sun is known to shine on many days a year in Pretoria, and that it therefore "probably" shines on any particular day, since it may have rained. The question is whether the sun shone on the particular day in issue and on this the claim to personal knowledge is by itself worthless. All this is elementary, but in view of the argument urged on us, necessary to state.

[27] *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA) at para 39 where Nugent JA noted that there is "no reason to assume that the Director-General in the Presidency is privy to everything the President does."

that the facts are within his knowledge."[28] It seems evident, though it may be necessary to state, that these are not ordinary commercial proceedings, but a determination involving the constitutional right of access to government-held information.

[112] The Supreme Court of Appeal was thus correct that Mr Chikane's statement was not evidence at all, but was "no more than bald assertion."[29] That Court was in my view also correct to remark on the entire absence of persuasive evidence from the Presidency's depositions. The Court rightly noted that the Presidency's case amounts to "little more than rote recitation of the relevant sections and bald assertions that the report falls within their terms."[30] The witnesses offered not reasons, but "perfunctory conclusions".[31] This, the Court said, provided a stark contrast with the culture of accountability and transparency that our constitutional era promised.[32] Indeed, the Supreme Court of Appeal likened the approach in the affidavits of the Presidency's witnesses to that under apartheid, where government officials exercising wide powers were able simply to assert that they had fulfilled the requirements of the statute, without offering any evidential basis for this.[33]

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[28] *Raphael & Co v Standard Produce Co (Pty) Ltd* 1951 (4) SA 244 (C) at 245E. See also *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP) at paras 7-8 and *FirstRand Bank Ltd v Beyer* 2011 (1) SA 196 (GNP) at paras 8, 9 and 12.

[29] *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA) at para 38.

[30] Id at para 20.

[31] Id at para 30.

[32] Id at paras 9-11.

[33] Id at paras 18-9.

The "hands-tied" plea

[113] What are we to make of Mr Fowler's complaint that he was hamstrung by the statute's provisions[34] that preclude reference to the contents of the disputed record in providing reasons for its refusal? There may be circumstances where a plea of this nature will raise credible issues requiring the court to consider whether it should itself, under the powers the statute vests in it, examine the record in camera and without the parties' presence. That is not the case here. The plea fails to meet even a baseline standard to warrant further probing.

[114] First, there are substantial reasons for approaching Mr Fowler's invocation of the "hands-tied" argument with reserve. There was no mention of it when the request was refused. It appears to have been added as an after-thought when the opposing affidavits were drafted. And his reliance on the argument must be seen in the light of the affidavits' most prominent feature – their formulaic incantation of the statute's provisions. That diminishes its plausibility.

[115] There is a second reason for not being swayed by the "hands-tied" plea. It is the Presidency's failure to explain why evidence that seems to have been readily available was not produced.

[34] Section 25(3)(b) and section 77(5)(b).

[116] The person who mandated the judges to go to Zimbabwe was then-President Mbeki. President Motlanthe, who held office when the M&G went to court in January 2009, supplied an affidavit. President Zuma, who held office when the Presidency applied to appeal to this Court in January 2011, supplied an affidavit. So there was no inhibition against presidential deposition. Neither former President Motlanthe nor President Zuma could cast light on the judges' mission. President Mbeki could, but there was no affidavit from him. So the question is – why did President Mbeki not testify? Was he asked or not asked? If asked, did he refuse? Or if not asked, why?

[117] Perhaps even more telling was the absence of evidence from the two judges. They, like former President Mbeki, are living and seemingly available. Why did they not testify? Were they asked? If not, why? A simple affidavit from any of them may have put a quick end to the issues.

[118] These questions necessarily raise a further difficulty. Would the evidence of the judges and former President Mbeki have supported the grounds of exemption the Presidency claimed? That testimony from none of them was proffered raises unavoidable questions about what they might have said if asked. This bears on the plausibility of the "hands-tied" argument. The Presidency's hands were not tied. It could have obtained direct evidence from any one of the three people most intimately involved in the mission. It failed to do so. More even, it failed to explain why.

[119] The evidence the Presidency failed to present from the former President who commissioned the report, and the judges who wrote it, need not have referred to the contents of the report. It could have recounted quite simply whether one of the reasons the judges were sent to Zimbabwe was to assist in policy formulation, or whether the disclosure of their report would reveal information supplied in confidence by the state of Zimbabwe.

[120] The "hands-tied" argument must at least be plausibly raised before the Court considers what it should do in response. That was not done here. I should explain that this is not to demand that the state in providing adequate reasons for refusing a request for information must produce "the best evidence". It is simply to point out the patent holes in the evidence the Presidency did put forward, to point out that these holes were not explained, and to conclude that this precludes plausible invocation of the "hands-tied" argument.

[121] What we are left with is thus a set of depositions that plainly failed to satisfy the test the statute prescribes, namely to discharge the burden of establishing that the refusal of the report was justified. In these circumstances, the order granted by the High Court, and confirmed by the Supreme Court of Appeal, was equally plainly right. It should be confirmed and the appeal dismissed with costs.

[122] It follows from this conclusion that the question does not arise whether the Presidency should have severed any part of the report in accordance with the statute's injunctions.[35] Nor does the question arise as to what this Court should do when there is uncertainty about how the matter should be decided. Its outcome is in my view quite clear. The newspaper's application should succeed.

Secret judicial examination of the disputed record

[123] It is nevertheless necessary to consider the course proposed in the judgment of Ngcobo CJ. The judgment affirms the ambit and importance of the right of access to information;[36] notes that disclosure is the rule and exemption is the exception;[37] observes that in comparable foreign jurisdictions, the state must show that the record is covered by the exemption claimed;[38] requires government to produce evidence to show that, on the probabilities, the information falls within the exemption;[39] and disclaims recitation of statutory language and *ipse dixit* formulaism[40] – but nevertheless decides on remittal so

[35] Section 28(1) provides:

> "If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which—
>
> (a) does not contain; and
>
> (b) can reasonably be severed from any part that contains,
>
> any such information must, despite any other provision of this Act, be disclosed."

[36] See [8] above.

[37] See [9] above.

[38] See [20] above.

[39] See id.

[40] See [24] above.

that the High Court can invoke section 80 of the statute. In my respectful view this is wrong.

[124] Section 80 permits a court in all circumstances to examine the disputed record itself, but the examination must be secret and the parties excluded.[41] This provision can indeed, as Ngcobo CJ states, be employed to test claims of secrecy and to facilitate, rather than obstruct, access to information.[42] But its provisions should be invoked with care. The M&G urged that judicial examination of the disputed record (a "judicial peek")[43]

[41] Section 80 provides:

> "(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.
>
> (2) Any court contemplated in subsection (1) may not disclose to any person, including the parties to the proceedings concerned, other than the public or private body referred to in subsection (1)—
>
> (a) any record of a public or private body which, on a request for access, may or must be refused in terms of this Act; or
>
> (b) if the information officer of a public body, or the relevant authority of that body on internal appeal, in refusing to grant access to a record in terms of section 39(3) or 41(4), refuses to confirm or deny the existence or non-existence of the record, any information as to whether the record exists.
>
> (3) Any court contemplated in subsection (1) may—
>
> (a) receive representations ex parte;
>
> (b) conduct hearings in camera; and
>
> (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."

[42] See [51] and [53] above.

[43] The judgment of the Supreme Court of Appeal ascribes responsibility for this label to counsel for the M&G. *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA) at para 52.

should be resorted to only in exceptional circumstances. I agree. There are two reasons for this conclusion.

[125] First, a cautious approach to section 80 accords with the structure of the statute. The Constitution creates an entitlement to information held by government, which the statute has limited under the Bill of Rights. The structure of PAIA is to stipulate the process required to claim access, and to enumerate the instances where it may be refused. The statute creates an over-riding judicial power to examine the record, but goes on to provide explicitly that the burden of establishing that an exemption is properly invoked lies on the party claiming it. If the object of the statute were to create a novel form of proceeding in access disputes, and invest courts with inquisitorial powers for ready use in disputes, its provisions would not have included so plain an imposition of the burden on the holder of information.

[126] Both the onus and the judicial examination provisions must be given effect, but within their appropriate fields of application. Judicial examination should not be a substitute for requiring government to discharge its burden of showing that the statute's exemptions applied. Still less should it be invoked to avoid an order of disclosure when government has failed to establish its case under the statute.

[127] The provision should in my view be invoked only when government plausibly asserts the hands-tied argument or a ground of exemption, but doubt exists whether the

exemption is rightly claimed.[44] The provision should, in other words, be used to amplify access, and not to occlude it. It should only be a last resort.[45] It should not be used to help government make its case when it has failed to discharge the burden the statute rightly places on it.[46]

[128] Second, the very provisions of section 80 make it plain that the power it confers should be of rare recourse. The provision makes the court a party to the secrecy claimed, and prohibits it from disclosing the disputed record to any person, "including the parties to the proceedings concerned". In effect, two fundamental principles of the administration of justice are here upended: first, the adversary nature of the parties' dispute, in which the court is a disinterested arbiter, is suspended; and, second, the indispensable attribute of the administration of justice, its openness, is shrouded. These are consequences that we should be reluctant to countenance too readily.

[44] Compare *Weissman v Central Intelligence Agency* 565 F 2d 692, 698 (DC Cir 1977) where a first-instance court had found that the respondent agency had established grounds for exemption, but the citizen claimant asserted that the court was obliged to conduct an in camera examination before sustaining the claim to exemption. The Circuit Court of Appeals for the District of Columbia affirmed the decision that the exemption had been established, taking the opportunity to warn against over-ready resort to judicial examination of the disputed record: "Where it is clear from the record that an agency has not exempted whole documents merely because they contained some exempt material, it is unnecessary and often unwise for a court to undertake such an examination." (Footnote omitted.)

[45] See *Phillippi v Central Intelligence Agency* 546 F 2d 1009, 1013 (DC Cir 1976) where the Circuit Court of Appeal for the District of Columbia emphasised that courts should not resort to judicial examination of the disputed record until they have created as complete a public record as possible. *Weissman* (at 697) went further, to say that courts should only engage in judicial examination of the disputed record as a "last resort".

[46] The power to conduct de novo review of classification decisions contested in litigation under the Freedom of Information Act was vested in the federal courts of the United States by an amendment to U.S.C. § 552 enacted in 1974. "National Security and the Public's Right to Know: A New Role for the Courts under the Freedom of Information Act" (1974-1975) 123 *University of Pennsylvania Law Review* 1438, 1447.

[129] Secret in camera examination of disputed records requires courts to lay aside the foundations of their precious-won authority. As the United States Circuit Court of Appeals for the District of Columbia has stated, a "denial of confrontation creates suspicion of unfairness and is inconsistent with our traditions."[47] The blunt risk is that the parties' dispute will be decided on the basis of a court's secret conclusions from a secret process.[48] That may sometimes be necessary. The power the statute creates is for cases of necessity. But the risks inherent in resorting to secret judicial examination are so grave that it should be avoided if at all possible. The Supreme Court of Appeal rightly said of this:

> "Courts earn the trust of the public by conducting their business openly and with reasons for their decisions. I think a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust. There will no doubt be cases where a court might properly make use of those powers but they are no substitute for the public body laying a proper basis for its refusal."[49]

[130] Nor should the public ever fear that courts may assist in suppressing information to which the Constitution says they are entitled. To give secret judicial examination of disputed records a central place in deciding claims to exemption, instead of enforcing the burden government rightly bears to justify withholding information, is in my view a grave error.

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[47] *Weissman v Central Intelligence Agency* 565 F 2d 692, 697 (DC Cir 1977).

[48] See generally Askin "Secret Justice and the Adversary Process" (1991) 18 *Hastings Constitutional Law Quarterly* 745.

[49] *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA) at para 52.

[131] The statute itself provides for the outcome where the refuser fails to justify refusal of the record. It is that the record be released.

Conclusion

[132] In these circumstances the Court should not hesitate to let the Constitution and the statute take effect. The report should be released.

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For the Respondent:	Advocate J Gauntlett SC, Advocate F Ismail and Advocate F Pelser, instructed by Webber Wenzel Attorneys.