REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
Case number: 326/05

In the matter between:

MITTALSTEEL SOUTH AFRICA LIMITED
(previously known as ISCOR LIMITED) **Appellant**

and

MONDLI SHADRACK HLATSHWAYO **Respondent**

CORAM: **MPATI DP, MTHIYANE, CONRADIE, LEWIS JJA and CACHALIA AJA**

HEARD: **22 MAY 2006**

DELIVERED: **31 AUGUST 2006**

SUMMARY

Promotion of Access to Information Act 2 of 2002 – appellant a public body when documents requested by respondent were created – immaterial that appellant now a private body – tests for the determination of whether a body public for purpose of Act.

Neutral citation: This judgment may be referred to as
Mittalsteel SA Ltd v Hlatshwayo [2006] SCA 94 (RSA)

J U D G M E N T

CONRADIE JA

[1] Mr Mondli Hlatshwayo, the respondent, is a very determined student. His interest in factory regimes in state corporations during the late sixties and early seventies led him to what was then known as ISCOR, the largest steel producer in South Africa. He considered their factory regime to be representative of the period, so for his Master of Arts degree in industrial sociology he chose as the topic for his thesis 'The politics of production and forms of worker responses at ISCOR Vanderbijlpark Works, 1965 - 1973'.

[2] The material the respondent needed for his research project was obtainable only from the appellant. Certain records were made available by the appellant but when it came to other records, the appellant took the view that it was not obliged to and would not produce them. That refusal led to an application in the Pretoria High Court before Van der Westhuizen J who in terms of the Promotion of Access to Information Act 2 of 2002 (PAIA) ordered the appellant to make available to the respondent within forty days of the date of the order the following documents or copies thereof:[1]

[1] Other, contingency, provisions of the order are not contentious and need no mention here.

'(a) Reports or minutes of meetings of Iscor Vanderbijlpark works management for the period 1965 to 1973 dealing with labour relations;

(b) Reports or minutes of meetings of compound or hostel managers of the Vanderbijlpark works for the period 1965 to 1973;

(c) Reports or minutes of meetings in respect of wages and conditions of service at the Vanderbijlpark works for the period 1965 to 1973;

(d) Minutes of meetings dealing with health and safety issues at the Vanderbijlpark works for the period 1965 to 1973.'

[3] The appellant sought and obtained leave from the court *a quo* to appeal against its order. In doing so it has abandoned a number of minor points relied upon in that court. In particular, it is no longer disputed that the appellant's change of status from a public to a private body has no impact on any obligation that may rest upon it to make the requested records available. The issue before us is therefore a crisp one: whether the appellant at the relevant time and in creating the requested documents[2] was a ' public body' as that term is to be understood in PAIA. If it was then the respondent is entitled to the documents requested by it in terms of s 11 of PAIA. The section is headed ‘Right of access to records of public bodies’. Subsection 11(1) provides that a ‘requester *must* be given access to a record of a public body if’ (emphasis added) (a) the requester complies with all the procedural requirements of the Act and (b) access to the record is not refused in terms of any ground set out in the provisions of PAIA dealing with the records of public bodies.

[2] The documents are 'records' as defined in s 1 of PAIA: ' "Record" of, or in relation to, a public or private body, means any recorded information:

(a) regardless of form or medium;

(b) in the possession or under the control of that public or private body, respectively; and

(c) whether or not it was created by that public or private body, respectively.'

None of these provisions is applicable to the respondent's request, and compliance with procedural requirements is not in issue.

[4] The right of access to information is entrenched in s 32 of the Constitution of 1996:

'(1) Everyone has the right of access to -

(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise and protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

[5] The legislation envisaged by s 32(2) of the Constitution was enacted as the Promotion of Access to Information Act 2 of 2000. Among the objects of PAIA is that stated in s 9(a):

'(a) to give effect to the constitutional right of access to -
(i) any information held by the State; and
(ii) any information that is held by another person and that is required for the exercise or protection of any rights;'

PAIA gives effect to that right subject to justifiable limitations, such as the reasonable protection of privacy and the balancing of that right with other rights.[3]

[6] Section 32 of the Constitution does not mention organs of State. An 'organ of State' in terms of the definition in s 239 means:

'(a) any department of state or administration in the national, provincial or local sphere of government; or
(b) any other functionary or institution -
(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

[3] Section 9(b)(i) and (ii).

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.' [4]

[7] PAIA includes within its scope a body that it calls in s 1 a 'public body', the characteristics of which coincide with those of an 'organ of state':

'public body' means –

'(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when -

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation.'

[8] The 'organ of state' of the Constitution is essentially the 'public body' of PAIA. The only difference between the two is that a 'public body' does not exclude a court or judicial officer.[5] Decisions on the meaning of 'organ of state' in the interim Constitution[6] and the Constitution, of which there are several, are therefore of considerable assistance in determining what the legislature had in mind when it referred to 'public body'.

[9] Moreover, the Promotion of Administrative Justice Act 3 of 2000 (PAJA)

[4] Item 23 of the sixth schedule to the Constitution in force for the period preceding the adoption of legislation in terms of s 32 of the Bill of Rights gives to every person the 'right of access to all information held by the state or any of its organs in any sphere of government…'. The section restricted the right to information required for the exercise or protection of a right.

[5] It was unnecessary to write in this exclusion as part of the definition. Section 12 of PAIA provides that it does not apply to a record relating to the judicial functions of a court referred to in s 166 of the Constitution, that is to say all superior and inferior courts as well as any court established or recognized by an Act of Parliament.

[6] The access to information section of the interim constitution, s 23, gives a person the right to access to information held by the state or any of its organs at any level of government. 'Organ of state' is defined in s 233 as including any statutory body or functionary.

employs the concept 'organ of state' to give effect to the constitutional guarantee of administrative action that is lawful, reasonable and procedurally fair. Among the definitions in s 1 is that of 'administrative action' which means

' . . . any decision taken, or any failure to take a decision, by –
(a) an organ of state, when –
(i) exercising a power in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation; or
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include. . .'.

[10] A body such as that described in ss (b)(ii) of the definition of 'public body' in s 1 of PAIA, one 'exercising a public power or performing a public function in terms of any legislation', has the attributes of a 'public body' only when, in terms of s 8 of PAIA, it produces a record in the exercise of that power or the performance of that function. When it does not produce such a 'public record', it is a private body in relation to whatever record it does produce.[7]

[11] It appears from the nature of their contents, indeed it is beyond dispute, that the records requested were produced in the course of the appellant's usual business as a steel producer. If, in carrying out that business, it can be said to have performed a public function pursuant to legislation the appellant would fall within

[7] A 'record' is defined in relation to both a public and private body as meaning 'any recorded information –
(a) regardless of form or medium;
(b) in the possession or under the control of that public or private body, respectively; and
(c) whether or not it was created by that public or private body, respectively.'

the definition of 'public body' and would be obliged, subject to whatever other defences it might have, to give the respondent access to those records.

[12] It has not been suggested that the appellant at any relevant time exercised a public power in the sense of being able to regulate or control the conduct of others. The only question is whether it created the record sought by the respondent in the performance of a public function in terms of any legislation.

[13] A good starting point for the enquiry is the decision in *Directory Advertising Cost Cutters v Minister for Posts, Telecommunications and Broadcasting and Others*[8] where it was held that the concept 'organ of state'[9] had to be confined to

‘ . . . institutions which are an intrinsic part of government . . . and those institutions outside the public service which are controlled by the State – ie where the majority of the members of the controlling body are appointed by the State or where the functions of that body and their exercise is prescribed by the State to such extent that it is effectively in control. In short, the test is whether the State is in control.'

The outcome of the case was that Telkom South Africa Ltd was found to be an organ of State:[10]

'Telkom's answering affidavit emphasises that it is incorporated as a company and has a supervisory board of directors which determines basic policy and a management board, which is vested with executive authority. It contends that although the State is its sole shareholder, the State has no more powers than any other sole shareholder of a company. That argument misses the point. A sole shareholder has total control, as he can control the appointment of directors who run the company. In addition, the State has the veto powers in terms of s 7(2) and Telkom is bound hand and foot to the object of the State to render a public telecommunication service. Telkom's function is a function of the executive. It is in my view an executive organ of State.'

[14] The same approach was followed, also under the interim Constitution, in

[8] 1996 (3) SA 800 (T).

[9] The term was analysed in relation to the definition of 'organ of state' in the Interim Constitution.

[10] 808F-G.

Mistry v Interim National Medical and Dental Council of South Africa[11] and in *Wittmann v Deutscher Schulverein, Pretoria.*[12] Before the enactment of PAIA, under the transitional provisions of the Constitution,[13] the reasoning was followed in *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd*[14] and *Goodman Bros (Pty) Ltd v Transnet Ltd*.[15]

[15] *Directory Advertising Cost Cutters* was approved by a full bench of the Transvaal Provincial Division in *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd,*[16] an access to information case under s 23 of the Interim Constitution. After an analysis of the composition of the board of trustees and the objects of the trust the court concluded that:

'From the above it is clear that the board is government-appointed and that its tenure exists at the pleasure of the government. In addition . . . in determining whether LMT is an organ of State the board is of little consequence in view of its advisory function. LMT is in fact controlled by its trustee (the President) and his delegate, the Minister. To this can be added the fact that . . . the accounts of the trust shall be audited annually by the Auditor-General, material provisions in the Exchequer Act 66 of 1975 are applicable *mutatis mutandis* and the Auditor-General's report is to be tabled in the Legislative Assembly. In terms of s 19 of the Act the Minister, in consultation with the trustee, may make regulations pertaining to, *inter alia*, the regulation of the conduct of the business of the trust. There can be no doubt that this is an organ of state.'

[16] In *Transnet Ltd v Goodman Brothers (Pty) Ltd*[17] Schutz JA, in the context of fair administrative action, dealt with the rejection of the respondent's tender for the

[11] 1998 (4) SA 1127 (CC).
[12] 1998 (4) SA 423 (T) at 454B-E.
[13] Item 23(2)(a) of Schedule 6.
[14] 1998 (2) SA 109 (W) at 113B-E.
[15] 1998 (4) SA 989 (W).
[16] 2002 (3) SA 30 (T) at 36.
[17] 2001 (1) SA 853 (SCA) paras 7 and 8.

supply of watches to the appellant in the following way:

'Turning to the first question, whether administrative action was involved, it has already been held in this Court that the State Tender Board's handling of tenders for transport service for the government constituted administrative action — in *Umfolozi Transport (Edms) Bpk v Minister van Vervoer en Andere* [1997] 2 All SA 548 (SCA) at 552j -553a Howie JA pointed out that the steps that had preceded the conclusion of a contract were purely administrative actions and decisions by officials, whilst in addition public money was being spent by a public body in the public interest. Naturally, said Howie JA, in such a case the subject is entitled to a just and reasonable procedure. I agree entirely. Moreover, the same considerations apply to Transnet. I do not think that anything can be made of the fact that Transnet is now a limited company. The government still owns all the shares in it and thus has ultimate control. It still provides a general service to the public, even though it is now competition- and profit-orientated. It still has a near-monopoly over rail transport.'

[17] An article by V K Moorthy entitled *'The Malaysian National Oil Corporation -- Is it a Government Instrumentality?'*[18] has attracted attention in three decisions of our courts.[19] The issues were different to those now under consideration. The courts were concerned with ascertaining the extent of the doctrine of sovereign immunity and thus determining whether the assets of a body said to be an organ or agent or instrumentality of a foreign government were liable to be attached. The test put forward by the author is nevertheless valuable for the present enquiry as well. He writes:[20]

'The courts have evaluated the relationship between the Government and a statutory corporation for the purpose of determining whether or not the corporation is a Government instrumentality by the application of various tests.

The tests are as follows:

(1) Whether the body has any discretion of its own; if it has, what is the degree of control by the Executive over the exercise of that discretion;

[18] (1981) 30 *International and Comparative Law Quarterly* 638.

[19] *Banco de Mocambique v Inter-Science Research and Development Services (Pty) Ltd* 1982 (3) SA 330 (T); *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 (1) SA 550 (A); *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 (1) SA 866 (SCA).

[20] Pp 640—641.

(2) Whether the property vested in the corporation is held by it for and on behalf of the Government;
(3) Whether the corporation has any financial autonomy;

(4) Whether the functions of the corporation are Governmental functions.'

Commenting on the application of the various tests, the author says:[21]

'Of all the above-mentioned test the courts have tended to regard the test of control as the most important factor, although in some cases the question of whether the function of the body is a governmental function has also received some consideration. If the degree of control is significant, the functional test has been held to be of little or no importance.'

[18] This court adopted the approach that control, although important, was not the only feature to be considered when it said in *Greater Johannesburg Transitional Metropolitan Council v Eskom*: [22]

'The CWRSC and the appellant are statutory bodies entrusted with wide functions of government at regional or local level. They have the power to raise money from the public and the duty to spend their income on the supply of essential services in the public interest. In determining whether these bodies are organs of the State the question of control is not decisive. What is of importance is the need to decide what functions they perform — whether they carry out functions of government at a local level.'

[19] *Minister of Education, Western Cape and others v Governing Body Mikro Primary School*[23] gave this court the opportunity of pointing out that 'any institution exercising a public power or performing a public function in terms of any legislation is an organ of State'. That is, with respect, correct and was as far as it was necessary for the court to go. The control test was not needed. The school

[21] P 641.
[22] Para 12.
[23] 2006 (1) SA 1 (SCA) para 20.

governing body was obviously performing a public function and thus was an organ of State. The control test is useful in a situation when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead. This converts a body like a trading entity, normally a private body, into a public body for the time and to the extent that it carries out public functions.

[20] English jurisprudence follows the same road. De Smith Woolf and Jowell in *Judicial Review of Administrative Action*[24] say this:

'For a great many years the way in which the courts have identified the activities which are subject to public law is by deciding whether or not they are activities to which the High Court's supervisory jurisdiction of judicial review may be invoked by aggrieved persons. In the past this was mainly done by asking what was the *source of the power* being exercised by the decision-maker whose action was impugned. Where the power was statutory or, more recently, derived from the prerogative, then that jurisdiction could be invoked. Where, however, powers were conferred solely by a contract (such as an arbitration agreement or an agreement governing the relationship between members of an unincorporated association), judicial review generally was not available. Today, the courts recognise such an approach is too restrictive and they are now influenced by the type of *function performed* by the decision-maker whose action is challenged. Where a body is carrying out a public function (such as that undertaken by a non-government regulatory organisation in relation to the area of activity which is subject to its control), the courts will consider intervening to require compliance with the principles of judicial review. This is the case even if the body is non-statutory, exercising powers which are not derived either from legislation or the prerogative.

A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides "public goods" or other collective services, such as health care, education and personal social services, from funds raised by taxation.'

[24] (1995) 5 ed p 167.

[21] The authors also discuss various tests employed by English courts to determine whether a body is subject to judicial review of its actions. They are, in summary:[25]

1 Whether, but for the existence of a non-statutory body, the government would itself almost inevitably have intervened to regulate the activity in question;

2 Whether the government has encouraged the activities of a body by providing underpinning for its work or weaving it into the fabric of public regulation or has established it under the authority of government;

3 Whether the body was exercising extensive or monopolistic powers.

[22] I mention these approaches not because the control test is inappropriate in the present case but to emphasise that the test may, under given circumstances, not be the most suitable one. In an era in which privatization of public services and utilities has become commonplace, bodies may perform what is traditionally a government function without being subject to control by any of the spheres of government and may therefore, despite their independence from control, properly be classified as public bodies.

[23] The appellant was incorporated by the Iron and Steel Industry Act 11 of 1928 under the name of the South African Iron and Steel Industrial Corporation Limited. Later it was called ISCOR and later still changed its name to Mittalsteel South Africa Limited. It was converted into a public company under the

[25] P 170.

Companies Act 61 of 1973 by the Conversion of Iscor, Limited, Act 57 of 1989 and is now listed on the Johannesburg Securities Exchange. It is common cause that it is now free from government control and that, whatever its status between 1965 and 1973, it is no longer a 'public body' as envisaged in PAIA.

[24] The purpose of the 1928 Act appears in its preamble:

> 'To promote the development in the Union of the Iron and Allied Industries and for that purpose to constitute the South African Iron and Steel Industrial Corporation Limited.'

The company was to be established by proclamation and was empowered, subject to the Act and the regulations, to do whatever was necessary to carry out its objects in terms of the Act. The proclamation was deemed to be Iscor's memorandum of association, a document that could not be amended otherwise than by an Act of Parliament. Iscor's operations were controlled by a board of directors of whom the majority were, in the manner prescribed by regulation, appointed by the Governor-General (later the State President), who was also empowered to appoint as managing director any member of the board, as well as the chairman of the board from among the directors appointed by private shareholders.

[25] The conditions of appointment, eligibility for re-appointment and remuneration of members of the board appointed by the State President were determined by him. The tenure of board members appointed by private shareholders was governed by regulation. Rules made by the board were subject to

ministerial approval.

[26] Shares could be issued only with the approval of the State President and any conversion of shares, an increase of share capital or the issue of debentures (the repayment of which was guaranteed by the State) required his approval. The distribution of dividends was prescribed by the Act. A large part of its business was even prescribed by the Act which required a ten-year contract to be entered into obliging Iscor to sell steel to the South African Railway and Harbour Administration.

[27] The government held 'A' shares in Iscor while the public held 'B' shares but the shareholding was structured in such a way that the votes exercisable by the government always exceeded by one the total number of votes by all the other shareholders. Within fourteen days of the commencement of every session of parliament an audited balance sheet and profit and loss account signed by Iscor's auditors for the preceding financial year and an annual report detailing all its operations had to be tabled in the two Houses of Parliament. The appellant was without a doubt subject to the State's control, perhaps indirect, but firm all the same. And it most certainly meets the tests for being a public body discussed in the literature and cases set out above.

[28] The appellant was thus, at the relevant time, and when exercising the

functions in respect of which the respondent requested records, a ‘public body’ for the purpose of s 11 of PAIA. It was not seriously contended that the documents did not come into existence in the course of Iscor's pursuing its activities. The respondent is thus entitled to access to those records.

[29] There is disagreement between deponents for the appellant on whether the requested documents have been destroyed or whether they still exist and, if they do, whether there is a reasonable prospect of finding them. It was therefore sensible for the court *a quo* to have allowed the appellant a period of forty days to mount a reasonable search for them. Our order must make allowance for the period to start running from the date of this judgment.

[30] Where the expression 'this order' appears in paragraphs 1 and 3 of the order of the court *a quo* it should be read as if it refers to the order of this court. Save for this emendation, the appeal is dismissed with costs.

J H CONRADIE
JUDGE OF APPEAL

CONCUR:

MPATI DP
MTHIYANE JA
CONRADIE JA
LEWIS JA
CACHALIA AJA