THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case No: 998/2013

In the matter between:

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**FIRST APPELLANT**
THE DEPUTY INFORMATION OFFICER: OFFICE OF THE PRESIDENCY	**SECOND APPELLANT**
THE MINISTER IN THE PRESIDENCY	**THIRD APPELLANT**

and

M & G MEDIA LIMITED	**RESPONDENT**

Neutral citation:	*President of the RSA v M & G Media Ltd* (998/2013) [2014] ZASCA 124 (19 September 2014).
Coram:	Navsa ADP, Brand, Ponnan, Mbha JJA *et* Mathopo AJA
Heard:	**4 September 2014**
Delivered:	**19 September 2014**

Summary: Promotion of Access to Information Act 2 of 2000 (PAIA) – exemption from disclosure of record claimed under sections 41(1)*(b)*(i) and 44(1)*(a)* – 'judicial peek' at record under s 80 – ex parte representations contemplated in s 80(3)*(a)* – what these entail.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Raulinga J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of three counsel.

JUDGMENT

Brand JA (Navsa ADP, Ponnan, Mbha JJA *et* Mathopo AJA concurring):

[1] The litigation in this matter has been ongoing for more than five years. It stems from a request by the respondent pursuant to the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA) for information under the control of the three appellants, who are all part of the Presidency. The respondent is M & G Media Ltd (M & G). It publishes information on matters of public interest, including news and commentary on political issues, in a newspaper, the Mail & Guardian, as well as on its online website. The first appellant is the President of this country, cited in his official capacity. The second appellant is the designated officer to whom requests for information in the Office of the Presidency is to be made. The third respondent is the Minister in the Presidency who is the designated appeal officer to whom internal appeals against adverse decisions by the second appellant lies. For the sake of brevity I shall refer to the three appellants jointly as 'the Presidency'.

[2] The information concerned is contained in a report under the control of the Presidency. It was prepared by two senior judges, Justice Khampepe and Justice Moseneke after their visit to Zimbabwe shortly before the presidential elections that were held in that country in 2002. They did so at the behest of the then President. The report was never released to the general public. On 7 June 2008, M & G applied for access to the report. The second appellant refused the request, citing

s 41(1)*(b)*(i) and 44(1)*(a)* of PAIA as his grounds for refusal. M & G thereupon lodged an internal appeal against the refusal to the third appellant. She dismissed the appeal, essentially on the same grounds as those relied upon by the second appellant. That triggered the present litigation. The high court ordered the Presidency to make the report available to M & G. On appeal to this court, that order was upheld in a judgment which has since been reported as *President of the Republic of South Africa & others v M & G Media (Ltd)* 2011 (2) SA 1 (SCA).

[3] A further appeal by the Presidency to the Constitutional Court met with greater success. In a judgment, since reported as *President of the Republic of South Africa & others v M & G Media (Ltd)* 2012 (2) SA 50 (CC) para 72, that court ordered, by a majority of 5 to 4 that:

'1 The appeal succeeds.

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

3 The case is remitted to the North Gauteng High Court, Pretoria, for that court to examine the record [ie the report] in terms of the provisions of s 80 of [PAIA] and determine the application under s 82 of [PAIA] in the light of this judgment.

4 There is no order as to costs.'

[4] Upon its return to the high court the matter came before Raulinga J who examined the contents of the report as contemplated in s 80 of PAIA and then ordered the Presidency to make it available to M & G. The present appeal against that order is with the leave of the court a quo. The issues that evolved before Raulinga J and again arose on appeal before us, will be better understood against the background of (a) the pertinent provisions of PAIA; (b) the evidence relied upon by the Presidency in the previous round of litigation to justify its refusal of access to the report; and (c) the reasoning that appears from the judgment of the different courts – and particularly the Constitutional Court.

Pertinent provisions of PAIA

[5] The provisions of PAIA that are pertinent for present purposes start with s 11, which stipulates that requesters for information under the control of a public body (in

contrast with a private body) are entitled as of right to the information sought, provided that the procedural requirements are met. Refusal is only permitted on grounds contemplated by Chapter 4 of Part 2 of PAIA. Since it is common cause that the procedural requirements were met in this case, M & G does not have to justify its request for access to the report. The onus rests on the Presidency to justify its refusal. This is borne out by s 81(3) of PAIA which explicitly provides that:

'The burden of establishing that a refusal of a request for access . . . complies with the provision of this Act rests on the party claiming that it so complies.'

[6] From the outset, the Presidency relied on two grounds contemplated in Chapter 4 of Part 2 of PAIA for refusing M & G's request. They are those contained in s 41(1)*(b)(*i) and 44(1)*(a)*. They state in relevant part:

'41 Defence, security and international relations of Republic

(1) The information officer of a public body may refuse a request for access to a record of the body if its disclosure—

(a) . . .

(b) would reveal information—

(i) supplied in confidence by or on behalf of another state or an international organisation'

And

'44 Operations of public bodies

(1) . . . [T]he 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

(ii) . . .

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.'

[7] Closely related to these grounds of refusal is the public interest override in s 46 of PAIA which provides, under the heading 'Mandatory disclosure in public interest':

'Despite any other provision of this Chapter [ie Chapter 4 of Part 2] the information officer of a public body must grant a request for access to a record of the body contemplated in sections . . . 41(1)*(b)* or . . . 44(1) . . . 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) . . . ; and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.'

[8] In setting out the factual basis for its reliance on these two grounds in its original answering papers, the deponents on behalf of the Presidency indicated that they were hamstrung in doing so by the provisions of sections 25(3)*(b)* and 77(5)*(b)* of PAIA. Section 25(3)*(b)* must be read in the context with 25(3)*(a)*. While the latter section obliges an information officer who refuses a request for access to give 'adequate reasons for the refusal', this is qualified by s 25(3)*(b)* to the extent that these reasons may not rely on 'any reference to the content of the record'. Section 77(5)*(b)* contains a similar embargo against any reference to the content of the record with regard to reasons provided for the dismissal of an internal appeal by the appeal authority, in this instance, the third appellant.

[9] Finally, with regard to the provisions of PAIA, there is s 80 which evolved into the keystone of the majority judgment in the Constitutional Court. It determines in relevant part:

'80(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) . . .

(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.'

Evidence relied upon by the Presidency during the first round of litigation

[10] The evidence relied upon by the Presidency during the first round of litigation was embodied in three affidavits – one by each of second and third appellants and one by Reverend Frank Chikane, who served as Director-General in the Presidency at the time when the report had been commissioned by then President Mbeki and also when it `was subsequently submitted by the two judges. The second appellant was not there at the time. He only took up his position in 2004. All three affidavits consisted largely of a recital of the wording of sections 41(1)*(b)*(i) and 44(1)*(a),* followed by the *ipse dixit* of these officials that the report is covered by the stated provisions. With regard to s 41(1)(*b*)(i) the second and third appellants asserted personal knowledge of the fact that the two judges received information from the representatives of the Zimbabwean Government in confidence. Apropos the purpose for which the report was obtained – which was a relevant consideration in the application of s 44(1)*(a)* – second appellant said (at 155):

'The President at the time, Mr Mbeki, appointed the Justices primarily to assess the constitutional and legal issues that arose prior to the 2002 Presidential elections in Zimbabwe and report to him . . . A related purpose of the mission which arose once the President had sight of the report was that he was able to utilise the report to assist him in the formulation of policy and taking of decisions in the exercise of his powers or the performance of his duties . . .' (Emphasis added.)

Reasoning of the courts in the previous round of litigation

[11] The critical question therefore turned on whether these claims of personal knowledge by the deponents on behalf of the Presidency were sufficient to place the record within the ambit of the exemptions claimed. The high court held that they were not. None of the deponents, so the court held, were privy to the appointment of

the two judges. Hence these deponents could not of their own knowledge describe the judges' mandate or their terms of reference. Nor could they, on their own account, testify as to what took place in Zimbabwe and as to how, from whom and on what basis the information reflected in the report had been obtained. On appeal this court agreed with the high court that no proper evidential basis had been established by the Presidency for refusing access to the report. On behalf of this court Nugent JA held that not one of the three deponents on behalf of the Presidency could have any direct knowledge of facts which were essential for the grounds upon which the refusal relied. 'It might be', so Nugent JA concluded (in para 33 of his judgment), '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'.

[12] In writing for the majority in the Constitutional Court Ngcobo CJ also concluded that the evidence put forward by the Presidency in its answering papers was insufficient to discharge the onus resting on it in terms of s 81(3), to establish that the report fell within the scope of the exemptions claimed. But, so he held, that was not the end of the matter, because proceedings under PAIA differ from ordinary civil proceedings in several respects (see paras 33-35). One of these differences most pertinent for present purposes, so the Chief Justice said, is that parties to disputes under PAIA may be constrained by factors beyond their control in presenting and challenging evidence. From the requestors' perspective, the facts upon which the exemption is justified, will be exclusively within the knowledge of the holder of the information. In consequence they may have to resort to bare denials of facts relied upon by the holder as justifying refusal of access. On the other hand, holders of information may be compelled to rely on the contents of the record itself to justify the exemption. But they will be precluded from doing so by the provisions of ss 25(3)*(b)* and 77(5)*(b)* of PAIA. The second feature distinguishing PAIA disputes from ordinary civil proceedings, which is pertinent in this case, so the Chief Justice continued, is that courts are afforded the discretion to call for additional evidence in

the form of the contested record itself and have, what is referred to in the parlance of American jurisprudence, ‘a judicial peek’ at its contents.

[13] As to when courts should exercise their discretion in favour of resorting to a judicial peek into the contested record, Ngcobo CJ held (in para 44) that it should be reserved for the situation where an injustice may result from the unique constraints placed upon the parties in PAIA disputes: where, for instance, the holder of the information had failed to discharge its burden under s 81(3), but indicated that it was prevented from doing so by the provisions of PAIA, the courts should generally invoke s 80 (para 46). Or where the probabilities are evenly balanced and the doubt as to the validity of the exemptions claimed can be explained in terms of the limitations placed on the parties to adduce evidence (para 47).

[14] In concluding that the provisions of s 80 should have been invoked by the high court in the circumstances of this case, Ngcobo CJ was primarily swayed by three considerations (paras 54-66). First, the conclusion of the SCA that the refusal of access to the report might have been justified, but since this had not been established by acceptable evidence, disclosure of the report was inevitable. Secondly, that the Presidency had alleged in its answering papers that its hands were tied by sections 25(3)*(b)* and 77(5)*(b)* of PAIA in presenting evidence in support of its claim to exemptions. Thirdly, that even if refusal of access to the report as a whole was justified, s 28 of PAIA provides for disclosure of information that is not protected and that can reasonably be severed from the protected part. Although the Presidency asserted that the report was not severable, M & G was placed at a disadvantage in challenging this assertion as it did not have access to the report. In consequence, the assertion of non-severability could not be decided without having regard to the content of the report.

[15] In his minority judgment Cameron J also held that the Presidency had failed to justify its refusal of access to the report under PAIA. Where he differed from the majority, however, was that in his view the Presidency had failed to provide a

plausible basis for a plea that PAIA made it impossible to provide adequate reasons for its refusal (para 79). As to why he was not persuaded by the 'hands tied' plea of the Presidency, Cameron J inter alia said (in para 113-119):

'[113] . . . 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 [second appellant'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 afterthought when the opposing affidavits were drafted. . . .

[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.

[116] The person who mandated the judges to go to Zimbabwe was then-President Mbeki. President Motlanthe, who held office when *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] . . .

[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.'

Proceedings before Raulinga J

[16] This brings me to the proceedings before Raulinga J. These were set down for hearing on 14 June 2012, which is about six months after the remittal by the Constitutional Court. On 13 June 2012, the night before the hearing, the Presidency applied, in terms of Rule 6(5) of the Uniform Rules of Court, for an affidavit of President Mbeki to be received in further evidence. The declared purpose for introducing the affidavit was to support an attempt by the Presidency to persuade the high court – contrary to the clear directions of the Constitutional Court – not to resort to a judicial peek into the contents of the report under s 80 after all. In order to achieve this purpose, the affidavit clearly tried to plug some of the holes in the case of the Presidency that were pointed out in the judgments of the courts in the previous round of litigation and particularly in the minority judgment of Cameron J in the Constitutional Court. In the event, so counsel for the Presidency told us, the rule 6(5) application was, however, abandoned in the face of the 'strong view' expressed by Raulinga J that the Constitutional Court had directed him to take a judicial peek at the report and that he consequently proposed to do so.

[17] Thereupon Raulinga J ordered the Presidency to make the report available to him to facilitate the judicial peek directed by the Constitutional Court. He then examined the report and made the following rulings:

(a) By virtue of s 80(2), the report would not be made available to the legal representatives of M & G;

(b) The parties were invited to submit ex parte representations as contemplated by s 80 (3)*(a)*; and

(c) There would not be an in camera hearing under s 80(3)*(b)*.

[18] The Presidency then proceeded to file the affidavit by President Mbeki, which was the subject matter of its abandoned application under Rule 6(5), as part of its representations in terms of s 80(3)*(a)*. In addition, it also filed an affidavit by the current President, Jacob Zuma, deposed to on 17 July 2012. What president Mbeki said in his affidavit was essentially that:

(a) As Head of State he appointed the two judges to go to Zimbabwe in order to observe and report to him on the legal and constitutional challenges that had arisen in the period leading up to the 2002 presidential elections in that country. He had asked Chief Justice Chaskalson to release them from their judicial functions and he acceded to the request.

(b) His reason for sending the two judges to Zimbabwe was primarily to assist him to enhance his ability to execute his functions as President and, in particular to have facts at his disposal for purposes of formulating appropriate policy driven intervention in Zimbabwe.

(c) He had made arrangements with President Robert Mugabe of Zimbabwe for 'these two envoys' to be received by his Government. He also requested that they be given full access to whatever information they sought and persons they wanted to meet, including Government ministers and officials. This the Government of Zimbabwe did. 'It is commonly understood' so President Mbeki said, 'that communications to Presidential envoys are of necessity confidential in nature, no matter how innocuous.'

(d) On the return of the two judges they met with President Mbeki and later gave him their report which forms the subject matter of these proceedings. 'I regard that report to be confidential. It continues to inform South African mediation efforts in Zimbabwe.'

[19] In his affidavit President Zuma inter alia:

(a) Emphasised the mediation roles that he and his predecessors played and continued to play in Zimbabwe as facilitators appointed by the Southern African Development Community (SADC).

(b) Referred to the statement by his predecessor that he, President Mbeki, appointed the two judges to gather information which would assist him in formulating appropriate policy driven interventions in Zimbabwe.

(c) Stated that the report by the two judges continued to be relevant to his policy driven interventions and that the SADC facilitation process was ongoing and critical to Zimbabwe as it moved towards and election based on the terms and requirements

of the Global Political Agreement, which was entered into by the three political parties in Zimbabwe on 15 September 2008.

(d) Explained that conflict resolution and peace-making by South Africa is a sensitive area; that premature and piecemeal disclosure of information of a confidential nature, as in the case of the report under consideration, could seriously impact on the efforts that are made in Zimbabwe and that these consequences would negatively impact on Zimbabwe, South Africa and the SADC region.

[20] For some or other reason it apparently escaped Raulinga J that the Presidency had abandoned its application to have the affidavit by President Mbeki admitted in terms of rule 6(5). In consequence he proceeded to consider that application and eventually dismissed it as unsustainable. On appeal before us the Presidency contended that this constituted a misdirection in that the court a quo's focus on the rule 6(5) application had resulted in its failure to consider whether the affidavit by President Mbeki and the one by President Zuma should be admitted as representations under s 80(3)*(a)* of PAIA. But I find this criticism unjustified. To me it is apparent that, after refusing the rule 6(5) application, the court a quo indeed considered admitting these affidavits into evidence under s 80(3)*(a)*, but refused to do so. Its reasons for this refusal – which are admittedly somewhat tersely formulated – were that (para 35):

'Section 80 . . . does not open the floodgates for one party to sneak in new evidence through the back door. A court should not use its powers under section 80 as a substitute for the public body laying a proper basis for its refusal . . .'

[21] As to the contents of the record which was revealed by the judicial peek, the court a quo were at pains not to disclose anything that may compromise a potential appeal. Yet, he inter alia, said

'The terms of reference of [the Judicial Mission] were to observe and to report to the President of South Africa on whether in the period before, during and shortly after the elections:

(i) the Constitution, electoral laws, and other laws of Zimbabwe relevant to the elections ('the legislative framework') could ensure credible or substantially free and fair elections, and

(ii) the elections had been conducted in substantial compliance with the legislative framework.

[59] The contents of the report do not support the first ground that the 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. There is also no indication that the report was prepared for the purpose of assisting the President to formulate executive policy on Zimbabwe, as contemplated in section 44(1)*(a)* of PAIA. The terms of reference above are opposite to this conclusion. It can be mentioned at this stage that the report gives a balanced overview of the events prior to, during and shortly after the elections. In fact the report criticises and gives credit to the parties concerned where it is necessary.

. . .

[62] . . . I can now reveal what the report reflects. This can never reasonably be construed as information supplied in confidence by or on behalf of another state. In my view most of the information is public knowledge. The report itself does not reveal that it was intended to be kept secret. Further, information provided by individuals who happen to be members of the public service cannot be said to be information supplied by or on behalf of another state. Moreover, the information was supplied also by persons who do not qualify as members of another state, Information was also supplied by independent lawyers.

. . .

And under the heading 'The Section 46 of PAIA override' (in para 67):

'Without disclosing the details of the contents of the report I can reveal that the report potentially discloses evidence of a substantial contravention of, or failure to comply with the law. . . . I am of the view that the public interest supersedes the harm that may ensue should the report be released.'

Issues on appeal

[22] Pruned down to its essentials, the Presidency's case on appeal amounted to this:

(a) The court a quo should have admitted the two affidavits by President Mbeki and President Zuma as representations under s 80(3).
(b) In the light of these affidavits, read with the contents of the report itself, the refusal of access to the report was justified in terms of s 41(1)*(b)*(i) and 44(1)*(a)* of PAIA. Conversely stated, the Presidency did not contend on appeal that the court a quo's rendition of the contents of the report in its judgment was inaccurate or unfair. Nor did it contend that the court a quo erred in finding that the content of the report in itself did not justify any reliance on either s 41(1)*(b)*(i) and 44(1)*(a)*. Ultimately, the Presidency's argument on appeal thus revolved around its proposition that the two affidavits which it sought to introduce, should have been admitted in evidence. To that proposition I now turn.

[23] To start with, I believe it can be accepted with confidence that, as a matter of principle, the representations contemplated in s 80(3)*(a)* must be directed at the contents of the record that the court had ascertained through taking a judicial peek. After all, s 80(3) is addressed to 'the court contemplated in subsection (1)', which is the court that has decided to examine the record. The purpose of s 80(3) is therefore not to afford an opportunity to any of the parties to adduce new evidence, extraneous to the record, which should have been introduced as part of its original case.

[24] Thus understood, I believe there are various reasons why the affidavit by President Mbeki falls outside the ambit of what s 80(3)*(a)* is aimed at. First of all, this affidavit was initially the subject of an application under rule 6(5) which was in turn designed to persuade the court a quo not to take a judicial peek at the contents of the report. As I see it, the Presidency thereby gave away its strategy which was to introduce new evidence through the backdoor that should have been introduced in its answering papers. The fact that the Presidency thereafter abandoned its application under rule 6(5) and then sought to reintroduce the same affidavit under s 80(3)*(a)*, is of no consequence. The contents of the affidavit remained the same and so did the purpose for which it was sought to be introduced. The other side of

the coin is that the affidavit could never have been aimed at the purpose contemplated by s 80(3)*(a)*, namely, to deal with the contents of a record to which the court already had access. That again is the inevitable conclusion from the fact that the affidavit was deposed to at a time when the Presidency was still seeking to persuade the court not to take a judicial peek at all. In addition, it is also clear from the text of the affidavit itself that it was prepared without any heed to the contents of the report at all.

[25] However, I believe the most telling reasons why the affidavit by President Mbeki was rightly disallowed, derive from the facts of this case itself. As I have said earlier, the affidavit is a clear attempt to plug the holes in the Presidency's case that were underscored in the previous judgments, particularly the minority judgment of Cameron J in the Constitutional Court. Paradoxically, though, in doing so the Presidency destroyed the very basis on which the majority of the Constitutional Court afforded it another opportunity to exclude access to the report by M & G. As we know the majority did so on the assumption that the Presidency was hamstrung in motivating its refusal of access by the provisions of s 25(3)*(d)* and 77(5)*(d)* of PAIA. One thing that the affidavit of President Mbeki shows, however, is that Cameron J rightly suspected that the Presidency's failure to make out a case had nothing to do with being hamstrung at all. But there is more. At the time when the Presidency sought to file this affidavit, it knew what was in the report. By inevitable inference it must therefore have realised that the lifeline which the majority of the Constitutional Court had thrown it, could not save its case from drowning, since the contents of the report did not support the grounds of refusal upon which it relied. What it then tried was to head off the consequence of a judicial peek by tendering evidence which should have been adduced at the outset during the first round of litigation. It clearly did so in the hope that this would persuade the court to refuse M & G's application on a basis which had nothing to do with the contents of the report. The Presidency therefore attempted to use the referral back to the high court for a purpose which was the exact opposite of what the Constitutional Court had in

mind. In my view this conduct amounts to an abuse of process which cannot be tolerated.

[26] As to the affidavit of President Zuma, I agree with the court a quo's reasoning that this affidavit could not support the Presidency's refusal of access to the report based on s 41(1)*(b)*(i) and 44(1)*(a)*. President Zuma simply did not say that he had personal knowledge of the facts on which these grounds sought to rely. Insofar as President Zuma referred to the potential impact of the disclosure of the report on relations with Zimbabwe, it must be borne in mind that the Presidency never sought to rely on s 41(1)*(a)*(iii) of PAIA which justifies refusal of access to a record on the basis that it could 'cause prejudice to the international relations of the Republic'. But I think the affidavit of President Zuma could potentially be relevant for the purpose of considering the public interest override in s 46. For that purpose the affidavit should, strictly speaking, have been admitted. Yet this override could only come into consideration once it has been established that the Presidency was entitled to refuse the access to the report on the grounds upon which it relied. Hence it was only in that event that the Presidency could have been prejudiced by the consequences of the court a quo's refusal to allow this affidavit.

[27] As I have said, the Presidency did not argue that the contents of the report by itself could justify the refusal of the access sought by M & G. On the invitation of counsel on both sides, we also took a judicial peek into the report. In that light, I am satisfied that an argument to the effect that the contents of the report supports the case of the Presidency, could not be sustained. Since this might still not be the end of the matter, I shall refrain from disclosing the contents of the report. But I believe the court a quo gave a fair summary of that content in its judgment and I did not understand the Presidency to argue otherwise. Suffice it therefore to say that I agree with the court a quo's conclusion, ie that there is nothing in the report that supports the grounds upon which the Presidency refused the access sought by M & G. In this light the public interest override in s 46 of PAIA does not even come into play. The appeal cannot succeed.

[28] Nonetheless, for the sake of completeness, I may add that even if the affidavit by President Mbeki were to be allowed, it would not, in my view, be enough to satisfy the onus that rests on the Presidency to justify its refusal of access to the report. As to the reliance on s 41(1)*(b)*(i) President Mbeki simply started out from the *petitio principii* that the two judges were diplomatic envoys, and that, because this is so, 'it is commonly understood that communications provided to these presidential envoys are of necessity confidential in nature, no matter how innocuous'. To this he added that, in any event, he regarded the report as confidential. With regard to the proposition that the two judges were diplomatic envoys, Cameron J said the following (in para 101):

'The Presidency appears to have abandoned in this court, as it did in argument before the Supreme Court of Appeal, the suggestion that 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. 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.'

[29] In the face of this clear exposition the bald, unmotivated acceptance of the unlikely proposition that the judges were envoys, borders on the cynical. In any event, it appears from those parts of the record which are reflected in the judgment of the court a quo that the two judges were not on a diplomatic mission but were deputed to focus on matters of law. In this way the further unmotivated statement that communications to envoys are 'of necessity confidential', loses the *petition principii*, to wit, that the judges were envoys, on which it depends. What is more, s 41(1)*(b)(*i) is far narrower in ambit than what the statement by President Mbeki presupposes. The section does not include 'all information conveyed to envoys'. It is confined to communications conveyed in confidence on behalf of a foreign state. The report itself reflects that its contents were gathered from many sources, including private individuals and organisations, without any indication as to what information came from whom. The fact that the President regarded the report as confidential, is not a ground for exemption. This is particularly so where the contents

of the report itself does not indicate that the two judges were told that their report would be regarded as confidential.

[30] With regard to the ground of refusal contemplated in s 44(1)*(a)*, President Mbeki again largely incants the exact wording of the section without any factual motivation as to why he thought that a report by two judges on matters of law would assist him in taking policy decisions. Especially at a time when the Presidency knew that the court a quo had looked at the contents of the report, it would be reasonable to expect some reference to that content in motivating what otherwise consists of no more than mere incantation. In addition, I have alluded to the testimony of the second appellant in his original affidavit, to the effect that it was decided to use the report for policy formulation only after the Presidency had received it. During the previous round of litigation both this court (in para 34 of its judgment) and Cameron J (in para 105), pointed out that this statement took the report outside the ambit of s 44(1)*(a)*, because the section requires that the report be obtained or prepared for the purpose of formulating policy (see also *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhune Land)* 2005 (2) SA 110 (SCA) in para 16-17). In this light, so Cameron J recorded (in para 105), counsel for the Presidency conceded in the Constitutional Court that if the second appellant's account is accurate, the policy formulation ground cannot be sustained. Yet, despite all this, President Mbeki does not say that the second appellant was mistaken when he made that express statement. Despite the Presidency's patent efforts to plug the holes in its case identified by Cameron J, it therefore left this important one unplugged.

[31] In the end it appears to me that, after all is said and done and when the matter is shorn of the intricacies which the Presidency sought to introduce in the second round of litigation, the position simply boils down to this:

(a) The majority of the Constitutional Court agreed with the minority that the Presidency had not made out a case for its refusal to grant access.

(b) For the reasons appearing from its judgment, the majority decided, however, not to grant M & G's application for access, but to remit the matter to the high court for final decision after the court had taken a judicial peek at the contents of the record.

(c) The high court did exactly that and thereafter arrived at the conclusion that there is nothing in the contents of the record which would justify the refusal of access.

(d) For my part, after having also had a judicial peek, I am not persuaded that the high court was mistaken in arriving at that conclusion.

[32] For these reasons the appeal is dismissed with costs, including the costs of three counsel.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

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