

Court's consideration of a record in a request in terms of the Promotion of Access to  
Information Act (PAIA)

by

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### **Acknowledgement**

I would like to thank Professor Brand for his guidance and comments on my work.

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## 1. Introduction:

In this mini-dissertation I consider and discuss the journey of the case of *Mail and Guardian vs The President of RSA and Deputy Information Officer of the Presidency* in relation to the Khampepe Moseneke report.

I discuss the case for what it says about important aspects of access to information in terms of the Promotion of Access to Information Act, Act 2 of 2000 ("The Act").

The case is interesting for this purpose because it travelled the entire journey available to requesters in terms of the Act and the rules of courts.

The background to the request is set out later on in the mini-dissertation.

In particular I consider the reliance on section 41 (1)(b) of the Act by the government / record holder and the invoking of section 80 by the courts.

In this case we see reliance on section 41(1)(b), the exception of "state confidential information" by the government as a ground for refusing access.

The government relied on section 41 as it was of the view that the information contained in the said record was confidential information shared between two states and if revealed could damage the relations between Zimbabwe and South Africa. Where the government could have fallen short on proving this argument is failing to furnish the court with affidavits from the two Justices who travelled to Zimbabwe and provided the report to the President and an affidavit from President Mbeki himself.

The court then invokes section 80 in order to determine if the grounds relied upon by the government are sufficient to refuse access.

The court does this as there is insufficient evidence from the government in order to assist them in making a decision.

Another important factor which M & G utilised in their argument is the reliance on the point of public interest.

The right of access to government held information operates at a political level - the right represents the quest for an accountable, open and transparent government, one of the most important features of a constitutional democracy.<sup>1</sup>

More important it is vital in combating any arbitrary exercise of governmental powers and in promoting the ideal of an open democratic society, Freedom of information is the right that citizens have in finding out “what their government is up to”.<sup>2</sup>

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<sup>1</sup> J Klaaren and G. Penfold “Access to Information” in Woolman (eds) *Constitutional Law in South Africa* (2002) 62.

<sup>2</sup> *The constitutional right of access to information* Konrad Adenauer Foundation Seminar Report (2001) 11.

## 2. History of the Promotion of Access to Information Act 2 of 2000

During and throughout the apartheid government ruling in South Africa, government suppressed access to information on social, economic and security matters in an effort to stifle opposition to its policies of racial supremacy. South Africa saw the fall of the apartheid government and voted in a democratic government. Shortly after the democratic government took office in 1994, the then Deputy President Mbeki appointed the task team on Open Democracy.

Former Deputy President Mbeki appointed a task team in the September 1994<sup>3</sup>. The possible reasons for the appointment of the Task Team were that since 1994 the South African government actively tried to build a culture of transparency and accountability in both private and public institutions<sup>4</sup>. Effect had to be given to the right to access to information.

In the years prior to 1994 when apartheid existed by law there were many tragic events that took place and these were committed in the culture of secrecy and bureaucracy. There was no law that permitted any form of access to information in relation to the events and actions of the government. Maybe if same did exist then some of the tragic events would not have taken place. Hence when the new government took over, being the African National Congress (ANC), - it is clear they wanted to shape South Africa into a country where the rule of law existed and the Constitution stands supreme.

The Task Team produced a set of policy proposals in January 1995 recommending that an Open Democracy Act was needed to give effect to the constitutional ideal of an open and democratic society and a transparent and accountable government. The draft was presented to Cabinet in 1996. Changes and modifications were made to the draft by

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<sup>3</sup> L Johannessen & J Klaaren "A Motivation for Legislation on Access to Information" (1995) 112 SALJ 45.

<sup>4</sup> Task Team on Open Democracy Act for South Africa: Policy Proposals (1995).

both Cabinet and Parliament.<sup>5</sup> By now the Bill was renamed the Promotion of Access to Information Bill.

Cabinet was not amenable to all the suggested inclusions in the draft Bill, i.e: the establishment of Information Courts and an Open Democracy Commission, amongst other suggestions.

The Bill was finally enacted in 2000 after years of debating and modifications.

Currie and Klaaren describe the Act as follows:-

*“The Promotion of Access to Information Act is a legal landmark. Directly mandated by the 1996 Constitution, the Act is freedom of information legislation with application to both the public and private sectors. It gives legislative effect to the right of access to information in section 32 of the Constitution by providing a statutory right of access on request to any record held by the state, with exception of records held by the Cabinet, court records and records held by members of parliament and provincial legislatures. The Act provides a similar statutory right of access to records held by private bodies to the extent that a requested record is required for the exercise or protection of rights. Both private and public bodies are under a duty to provide access to a requested record, or part of it, unless refusal of the request is permitted or required by one or more of a list of grounds in the Act. The grounds of refusal limit the constitutional right of access to information in order to protect other fundamental rights and important aspects of the public interest. The Act provides mechanisms for the resolution of disputes over access to information in the form of a limited system of internal appeals within public bodies and review by courts.”<sup>6</sup>*

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<sup>5</sup> L Johannessen & J Klaaren “A Motivation for Legislation on Access to Information” (1995) 112 SALJ 45 and I Currie and J Klaaren “The Promotion of Access to Information Act commentary” (2002).

<sup>6</sup> I Currie and J Klaaren “The Promotion of Access to Information Act commentary” (2002).

The purpose of the Act is described in full in its Preamble, as follows:-

“RECOGNISING THAT-

- the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations;
- section 8 of the Constitution provides for the horizontal application of the rights in the Bill of Rights to juristic persons to the extent required by the nature of the rights and the nature of those juristic persons;
- section 32(1)(a) of the Constitution provides that everyone has the right of access to any information held by the state;
- section 32(1)(b) of the Constitution provides for horizontal application of the right of access to information held by another person to everyone when that information is required for exercise of protection of any rights;
- and national legislation must be enacted to give effect to this right in section 32 of the Constitution;

AND BEARING IN MIND THAT-

- the State must respect, promote and fulfill, at least, all rights in the Bill of Rights which is the cornerstone of democracy in South Africa;
- the right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution;
- reasonable legislation measures may, in terms of section 32(2) of the Constitution, be provided to alleviate the administrative and financial burden of the State in giving effect to its obligation to promote and fulfill the right of access to information;

AND IN ORDER TO-

- foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information;
- actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.<sup>7</sup>

Currie and Klaaren show us below the effect and purpose that can be drawn from the Preamble as follows:-

**‘ Give effect to**

*The first purpose to draw from both the Preamble and section 9 is that the Act is intended to give effect to the Constitutional right of access to information and that it is enacted in compliance with the requirements of sec 32(2).*

*In the First Certification judgment, the Constitutional Court interpreted the purpose of the give effect to provision as follows:*

*The transitional measure is obviously a means of affording Parliament time to provide the necessary legislative framework for the implementation of the right to information. Freedom of information legislation usually involves detailed requisite conditions for its enforcement. The term give effect to should therefore be read as synonymous with make effective, promote or implement. The Act is required by the Constitution to define the nature and limits of the right and set out procedures for its enforcement. This indicates that, as a starting point of analysis, the Act should as far as possible, be read as co-extensive with the constitutional right of access to information. Section 32 of the Constitution provides as we have seen, an unqualified right of access to all and any information in state hands and access to any information in private hands that is required for the exercise or protection of rights. The right may be limited by law or general application to the extent that the limitation is reasonable and justifiable in an*

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<sup>7</sup> Promotion of Access to Information Act 2 of 2000.

*open and democratic society based on human dignity, equality and freedom. In addition to the general limitation clause, sec 32(2) contains a special limitation clause applicable to the information right, requiring the enactment of national legislation to give effect to the right but also permitting such legislation to provide for reasonable measures to alleviate the administrative and financial burden on the state. The AIA therefore legislation giving effect to the constitutional right and a law of general application limiting the right in the interests of privacy, commercial confidentiality and effective, efficient and good governance and in order to protect other rights.”<sup>8</sup>*

Taking into considering the history of the Act, as set out earlier in this section it is clear that there was a requirement for an Act that will serve the public interest by allowing disclosure whether full or not of government activities and policy. The act which came about allows for such disclosure but also does not allow interests of the public to halt the business of government.

This Act took nearly five (5) years of revisions so extensive that not even the original name of the Act survived.

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<sup>8</sup> I. Currie and J Klaaren “The Promotion of Access to Information Act Commentary” (2002).

### 3. Introduction the case of Mail and Guardian vs President of RSA & others

In 2002 there was a presidential election in Zimbabwe. Former President Thabo Mbeki sent two judges to Zimbabwe and upon their return they produced a report for the former President. The report was never made public.

The Mail & Guardian is a newspaper that is published on a weekly basis. The Mail & Guardian made a request to the Presidency's Information Officer in June 2008 wherein they requested the following records:

*"The Khampepe-Moseneke report compiled by the Honourable Justices in 2002 containing their conclusions regarding factors relevant to the fairness of the presidential elections in Zimbabwe in 2002"*

The request was refused by the Deputy Information Officer in the Presidency. The two grounds relied upon for refusal were, firstly that the disclosure of the report would reveal information supplied in confidence by or on behalf of another state or an international organization and secondly that the report was 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 imposed by law.

The Deputy Information Officer refused access to the record and relied on sections 41(1)(b)(i) and 44(1)(a) of PAIA as grounds for refusal.

Sections 41(1)(b)(i) and 44(1)(a) state as follows:

*Section 41 (1)(b)(i)*

*41 Defence, security and international relations of the 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).....

i)

ii)

iii)

b) would reveal information –

i) *supplied in confidence by or on behalf of another state or international organisation.*

*Sections 44(1)(a)*

*44) Operations of public bodies*

*1) Subject to subsections (3) and (4) the information officer of a public body may refuse a request for access to a record of the body-*

*a) if the record contains-*

*(i) an opinion, advice, report or recommendation obtain or prepared; or”*

M&G lodged an internal appeal against the refusal under section 74 of PAIA

Section 74 of the Act states as follows:

*“74 Right of appeal to relevant authority*

*(1)*

*(a) to refuse a request for access, or;*

*(b) taken in terms of section 22, 26(1) or 29(3) in relation to that requester with the relevant authority.*

(2) *A third party may lodge an internal appeal against a decision of the information officer if a public body referred to in paragraph 9(a) of the definition of public body in section 1 to grant a request for access.”*

The internal appeal was dismissed by the internal appeal authority of the Presidency and the grounds put forward for dismissing the internal appeal were identical to the grounds relied upon by the Deputy Information Officer.

At this stage the prolonged court battle begun in the year 2009 and endured for five (5) years.

The High Court ordered the President to make available to the M & G the report in its entirety.<sup>9</sup> The order was upheld in December 2010 by the SCA.<sup>10</sup>

The Constitutional Court by a narrow majority upheld an appeal by the President and remitted the case to the High Court to examine the record in terms of section 80 of PAIA and to determine the application in the light of the Constitutional Court's decision and such examination.<sup>11</sup>

This was despite the fact that the procedural issue arose before the High Court at first instance, the SCA and the Constitutional Court was precisely the entitlement of a court in terms of section 80(1) of PAIA to take a judicial peek at the report.

The Constitutional Court held that this was a case in which the High Court ought to have exercised its powers to call for and consider the report under section 80. The Constitutional Court remitted the matter to the High Court for it to examine the report and determine the application in the light of its contents.<sup>12</sup>

Despite the Constitutional Court's clear decision in this regard, at the inception of the hearing before the High Court on remittal from the Constitutional Court which

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<sup>9</sup> *Mail and Guardian vs President of RSA & 2 others* NGHC 2009, 1242/09.

<sup>10</sup> *President of RSA & 2 others vs Mail and Guardian*, SCA, Case no: 570/2010.

<sup>11</sup> *President of RSA & 2 others vs Mail and Guardian*, Constitutional Court, 03/11.

<sup>12</sup> Constitutional Court judgment under case no: 03/11 70.

commenced on 14 June 2012, the President persisted in his argument that it was not necessary for the court to invoke the provisions of section 80 of PAIA. The High Court dismissed this contention and held that it was required to have regard to the report.<sup>13</sup>

Upon remittal to the High Court the President applied in terms of Rule 6(5) of the Uniform Rules of Court for an affidavit of ex-President Mbeki to be received as further evidence. Further to this the President then applied to have ex-President Mbeki's affidavit attached along with a new affidavit of President Zuma to its ex-parte representation in terms of section 80(3). The court ruled that these affidavits cannot be admitted into evidence.<sup>14</sup>

The High Court also went further in their judgment and granted access to the report. This was after the court had consideration of the report ("judicial peek") that is then reached the decision to release the report. The court found that the reliance on section 41(1)(b)(i) of the Act by the respondents does 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 organization. They also found after the "judicial peek" that there was no indication that the report was prepared for the purpose of assisting the President to formulate policy as allowed by section 44(1)(a) of the Act.<sup>15</sup>

On 31 October 2013 Raulinga J refused to grant the President leave to appeal to the full bench of the High Court,- instead he granted leave to appeal to the SCA. The SCA ruled as follows:

*"Despite the Presidency's patent efforts to plug holes in its case identified by Cameron J, it therefore left this important one unplugged.*

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<sup>13</sup> *M & G Media Ltd v President of the Republic of South Africa and Others* (1242/09) [2013] ZAGPPHC 35; [2013] 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP) (14 February 2013) 6.

<sup>14</sup> *M & G Media Ltd v President of the Republic of South Africa and Others* (1242/09) [2013] ZAGPPHC 35; [2013] 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP) (14 February 2013) 16 and 53.

<sup>15</sup> *M & G Media Ltd v President of the Republic of South Africa and Others* (1242/09) [2013] ZAGPPHC 35; [2013] 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP) (14 February 2013) 59.

*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 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 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....."<sup>16</sup>*

Thus after travelling through the courts for five (5) years the matter came to finality.

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<sup>16</sup> SCA Judgment, 31.

#### 4. Reliance on section 41 and 44

The High Court in their judgment of February 2013<sup>17</sup>, refuted the argument of the respondent wherein they relied on sections 41(1)(b)(i) and 44(1)(a) of the Act. The court was of this view, after the “judicial peek” had taken place. In this chapter I shall take a closer look at these two (2) sections:-

PAIA places limitations on the right of access to information. It does this by giving the record holder reasons to refuse certain information from disclosure. PAIA recognises in its Preamble that there are “reasonable and justifiable” limitations on the right of access to information, even in an open and democratic society. 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:-, economic interests and financial welfare of the Republic and commercial activities of public bodies 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.<sup>18</sup>

The Khampepe-Moseneke report documented the judges findings on the conduct of the elections and goes to legal and constitutional matters related to this. The M&G made out their case that section 41(1)(b)(i) of PAIA cannot be invoked to refuse access to the report.

Very scantily I will set out their reasons for this:

1. M&G submitted that the President cannot rely on the provisions of section 41(1)(b)(i) because he did not bring himself within its scope. A mere allegation

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<sup>17</sup> *M & G Media Ltd v President of the Republic of South Africa and Others* (1242/09) [2013] ZAGPPHC 35; [2013] 2 All SA 316 (GNP); 2013 (3) SA 591 (GNP) (14 February 2013).

<sup>18</sup> Constitutional Court judgment 11.

that the report “*would reveal information .....supplied in confidence by or on behalf of another state or an international organization*” is insufficient to defeat a requestor’s right of access to information. Thus the jurisdictional fact required for the exercise of the right to refuse the request was not satisfied.

2. It is not apparent in the context of commissioning of the report by ex President Mbeki why the Zimbabwean government would have provided confidential information to the judges. Nor is it apparent why such information would be included in the report. The President, whose duty it is to bring himself within the exception he seeks to invoke, has not provided any factual basis for his contentions in this regard.
3. In *Kuijter vs EU Council (2002) 1 WLR 1941 (Ct of 1<sup>st</sup> Inst. EC)* the court had to consider whether a request for a report was correctly refused on the basis that it contained very sensitive information about the political, economic and social situation in the country concerned which was provided by the heads of the European Union member state missions in that country and because its disclosure could harm international relations. The court accepted that generally the disclosure of reports of this nature could harm international relations but nevertheless reversed the refusal to disclose the report in question. The court held that the report did not qualify under the relevant international relations exemption. It held that “*the mere fact that certain documents contain information of negative statements about the political situation or the protection of human rights, in a third country does not necessarily mean that access to them may be denied on the basis that there is a risk that the public interest may be undermined. That fact in itself and in the abstract is not a sufficient basis for refusing a request for access. Rather refusal for access to the reports in question must be founded on an analysis of factors specific to the content or the context of each report, from which it can be concluded that because of certain specific circumstances disclosure of such a document would pose a danger to a particular public interest. As regards their contents the reports at issue do not concern directly or primarily the relations of the European Union with the*

*countries concerned. They contain an analysis of the political situation and of the position as regards the protection of human rights in general in each of those countries and also refer to the ratification of international treaties concerning human rights. They also contain more specific information on the protection of human rights, the possibility of international migration to escape persecution, the return of nationals to their country of origin and the economic and social situation.”<sup>19</sup>*

Both section 44 and 41 provide some form of refusal for access to records by the record holder. Government may argue from time to time when faced with the requests for access to information that disclosure will only serve to undermine the authority of the government administration. Access to information may in turn inhibit the free and frank discussion on policy issues within government.

Below Klaaren and Penfold describe the purpose and nature of section 44(1)(a) as follows:

**“ Pre-decisional records**

*Section 44(1)(a) protects against the disclosure of records containing information gathered or prepared for the purpose of assisting to formulate a policy or take a decision in the exercise of power or performance of a duty conferred or imposed by law. The ground provides a content based categorical basis for refusal: if a record contains information of the type identified it is protected by the ground and need not be disclosed. If a record contains an opinion, advice, report or recommendation obtained or prepared for purposes of formulating a policy or taking a decision its disclosure may be refused. The provision is designed to permit frank and uninhibited discussions within public bodies about the formulation of policy and the making of decisions. The idea is that secrecy helps to promote uninhibited discussion of policy options, not only when negotiating with outsiders but also during internal discussions within a government agency. If decision making processes were exposed to public view, disagreements and controversial views might not be aired at all. Similarly a government agency is less likely*

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<sup>19</sup> M&G heads of argument, SCA, Case no: 998/13.

*to develop a coherent position if it is unable to explore the disparate options with which it is confronted.”<sup>20</sup>*

In the matter of the *Unrecognised Traditional Leaders*, the court stated the following:

*“15] The proper interpretation of subsection 44(1)(a) depends largely on the meaning to be ascribed to the phrase obtain for the purpose of formulating policy. According to the Shorter Oxford English Dictionary obtain means to procure or gain, as a result of purpose and effort or to acquire or get. The word obtain is capable of both a narrow and a wide meaning. There are no indications in the Act itself, either textual or purposive, which point in one direction of the other.*

*16] However, the genesis of the legislation was the Constitution and the Act must be interpreted with due regard to its terms and spirit. The right of access to information held by the state is couched therein in wide terms. Subsection 44(1)(a) must be construed in the context of s32(1)(a), read with sections 36 and 39(2) of the Constitution (cf *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004(4) SA 490 (CC) para 72*). It is clear that subsec 44(1)(a) limits the right of access to information and s 36 of the Constitution requires that the scope of such a provision be restricted only to an extent which is reasonable and justifiable. Section 39 (2) obliges every court to promote the spirit purport and objects of the Bill of Rights when interpreting any legislation. It must also be borne in mind that the Act was enacted in order to give effect to access to information and promote the values of openness, transparency and accountability which are foundational to the Constitution.”<sup>21</sup>*

The reasons put forward by the respondent in the case at hand were heavily rooted in two (2) exemptions found in sections 41(1)(b)(i) and 44(1)(a). In the case mentioned above the court raises the issue of section 44(1)(a) limiting the access to records and

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<sup>20</sup> Same as footnote 1.

<sup>21</sup> *Minister for Provincial and Local Government of the Republic of South Africa vs Unrecognised Traditional Leader of the Limpopo Province* [2004] ZASCA 93 2005 (2) SA110 (SCA) [2005] 1 All SA 559(SCA).

then we have Section 32 of the Constitution that promotes the values of openness, transparency and accountability. In the above case of the *Traditional Leaders* the court highlights that although the Act allows for some limitation to the right of access to information we also have section 36 of the Constitution which requires that the scope of such provision be restricted only to an extent which is reasonable and justifiable. The High Court in the matter at hand also had to apply the same principle when considering the matter.

## 5. Section 41 (1)(b)(i) – Confidential State Information

The government needs to be responsive to its citizens. Once it is conceded that a vital aspect of democracy is this right of active participation by citizens both at elections and in between them, it must be conceded as a logical necessity that participants need access to information to make their participation effective and worth its while.<sup>22</sup>

It is required that government must concede same but it is also required that certain information held by government should remain secret and the intention of this is to protect the country from negative forces.

It is for this reason that PAIA includes sections that instill limitation on access to certain information.

The backdrop to this court case was that the President appointed two judges to travel to Zimbabwe to observe and come back and report to him as the Head of State and Head of the National Executive, of the constitutional and legal challenges that were unfolding in Zimbabwe during the voting period.

The Constitution confers powers on the President in terms of section 84 and 85 of the Constitution<sup>23</sup>. The President exercised his powers and made a decision to appoint envoys to travel to Zimbabwe and to report to him upon their return.

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<sup>22</sup> Anthony S Mathews *The Darker Reaches of Government*, 1978.

<sup>23</sup> "Powers and Functions of President

84 (1) The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.

(2) The President is responsible for –

- a) assenting to and signing bills;
- b) referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality
- c) referring a Bill to the Constitutional Court for a decision on the Bills constitutionality
- d) summoning the National Assembly, National Council of Provinces or Parliament to an extraordinary sitting to conduct special business
- e) making any appointments that the Constitution and or legislation requires the President to make other than as head of the national executive
- f) appointing commissions of enquiry

The President was also tasked with the mediatory role of assisting Zimbabwe to resolve its political/presidential challenges.

The reasons why the President sent these envoys to Zimbabwe appears from the affidavit of one - Mr Trevor Fowler.<sup>24</sup>

The information from the affidavit firstly sets out the importance held by a special envoy<sup>25</sup> and that they are sent as representatives of the President of a country to go and be his eyes and ears for a particular project and reason. It is clear from this that a President can therefore only choose certain persons that he believes are capable of carrying out the task for him.

Following the above then there has to be some protection of the information brought back by the envoys. PAIA has section 41 which sets out certain circumstances under which certain information can be protected. I mention certain information as section 41 of PAIA sets out criteria that must be met in order for the information to be protected by PAIA.

Fowler clearly sets out above the reasons that the Justices were sent to Zimbabwe. The question that arises is can a report not be kept confidential and/or secret if a President decides so. One had to take into account the context of the on-going mediatory efforts of the Head of State. The Information Officer and appeal Authority must have taken the

- 
- g) calling a national referendum in terms of an Act of Parliament
  - h) receiving and recognising foreign diplomatic and consular representatives
  - i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives
  - k) conferring honours.

#### Executive Authority

85(1) The executive authority of the Republic is vested in the President

2) The President exercises the executive authority together with the other members of the cabinet, by-

- a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise
- b) (developing and implementing national policy
- c) coordinating the functions of state departments and administrations
- d) preparing and initiating legislation; and
- e) performing any other executive function provided for in the Constitution or in National Legislation.

<sup>24</sup> Affidavit of Mr Trevor Fowler dated 18 March 2009.

<sup>25</sup> Para 14 of Affidavit of Mr Trevor Fowler dated 18 March 2009.

view that the right of access to information requested would have jeopardised any trust and confidence they had built with Zimbabwe.

Formulated with regard to the exemptions provided for in PAIA, the view of the Information Officer and Appeal Authority was that the context within which the decision to refuse access to the record requested by the M & G related to:

- 1) The interaction and communication between heads of government;
- 2) The confidentiality of such communications, however innocuous, and
- 3) The discretion that resides in a head of State who is also the head of the national executive to commission and utilise information obtained in those capacities in the formulation of domestic and regional policy.

The information officer and the Appeal Authority independently formed the view that the context in which the requested report was sought and was to be utilised constituted a reasonable and justifiable basis for refusing access. The basis for this view was that the information that they had at their disposal indicated that:

1. The information sought would reveal confidential communications supplied by or on behalf of another state envisaged in section 41 (1)(b) of PAIA adversely impacting the relationships between those states;
2. The records sought constituted an opinion, advice, report or recommendation obtained prepared or; 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 policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law as envisaged in section 44(1)(a) of PAIA.

The decision to refuse access to the report requested by M&G was most definitely informed by the public body's understanding and appreciation of the policy and diplomatic undercurrents surrounding the interaction and communication between heads of state and the perceived confidentiality of such communications. Discretion resides with the head of the country and who is also the head of the national executive

to commission and utilise information obtained in the aforementioned capacities in the formulation of domestic and regional policy.

The above is illustrated by Currie and Klaaren as follows:

**“International Relations**

*International relations information is treated differently from information affecting defence and security. Obviously the public has a considerable and legitimate interest in information about the conduct of the Republic’s foreign relations. However, given the delicacy with which diplomacy must sometimes be conducted, the government may equally justifiably wish to keep some details confidential so as to not to weaken the Republic’s bargaining position or prejudice international relations.....*

**Confidential international information**

*Whereas s 41(1)(a)(iii) protects the public interest in protecting the conducting of international relations from undiplomatic revelations, s 41(1)(b) protects information that is specifically subject to international obligations of confidentiality. The obligations identified by s 41 (b) are essentially of 2 types: those arising from the fact that information has been supplied in confidence by another state or international organizational, and those imposed by an international agreement or customary international law. Because the two types of obligation are specifically distinguished, it is clear that supplied in confidence is the less stringent of the two categories, referring to a general understanding that particular information is to be treated in confidence.*

.....

*Information supplied by the Republic to another state or international organization is subject to the more stringent requirements of para (b)(ii). What is being protected by the ground is the harm to international relations that would result from a breach of trust. A foreign state which entrusts information to the Republic with an expectation that it will be kept confidential and which it finds that the information leaked or disclosed is likely to be wary about supplying such information in future. The implication is that the category will*

*continue to be applicable to information that was supplied in confidence but which is later publicly disclosed by the supplier.*

*Paragraph (b)(ii) and (b)(iii) protect information that is subject to specific obligations of confidentiality, covering both information supplied by the Republic (b)(ii) and information supplied to it (b)(iii)”<sup>26</sup>*

When considering the comments of Currie and Klaaren above with regard to confidential international information, without sight of the contents of the report it could have been assumed that it related to secret information the envoys gathered in Zimbabwe. This of course is a random thought that may be open to immense criticism in this era of openness and transparency.

Openness and transparency in relation to PAIA was given birth to by Section 32 of the Constitution.

*The constitutional right of access to information held by the state*

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”.

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<sup>26</sup> Currie and J Klaaren “Promotion of Access to Information Act commentary”(2002).

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.*
- 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.”*

In *Brümmer v Minister for Social Development and Others*<sup>27</sup>, 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*

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<sup>27</sup> *Brümmer v Minister for Social Development and Others* (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC) ; 2009 (11) BCLR 1075 (CC) (13 August 2009).

*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."*

In *Mthembi-Mahanyele vs Mail & Guardian Ltd 2004 (6) SA 329 (SCA)* para 66 Lewis JA held:

*"The State and its representatives, by virtue of the duties imposed upon them by the Constitution, are accountable to the public. The public has the right to know what the officials of the State do in the discharge of their duties. And the public is entitled to call on such officials or member of Government to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comments that their conduct attracts."*

There are several Constitutional provisions aimed at achieving this provision. Section 1(d) provides that the Republic of South Africa is a democratic state founded upon a number of values, including a multi- party system of democratic government, to ensure accountability, responsiveness and openness.

Section 41(1)(c) provides that all organs of state must provide effective transparent accountable and coherent government for the Republic as a whole.

Section 59(1)(b) states that the National Assembly must conduct its business in an open manner and hold its sittings and those of its communities in public.

Section 59(2) provides that the National Assembly may not exclude the public, including the media from a sitting of a committee unless it is reasonable and justifiable to do so in an open democratic society.

Section 182(5) states that any report issued by the Public Protector must be open to the public, unless exceptional circumstances require that it be kept confidential.

Section 188(3) states that the Auditor-General's reports must be made public.

In *Minister for Provincial and Local Government vs unrecognised Traditional Leaders, Limpopo Province 2005 (2) SA 110* para 16, the SCA interpreted the provisions of PAIA in light of section 32 of the Constitution, stating that:

*"....the genesis of the legislation was the Constitution and the Act (PAIA) must be interpreted with due regard to its terms and spirit. The right of access to information held by the state is couched therein in wide terms.....It must be also be borne in mind that the Act was enacted in order to give effect to access to information and promote the values of openness, transparency and accountability which are foundational to the Constitution"*

As is evident from its long title, PAIA was enacted "to 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" 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. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.

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.

The core of PAIA’s birth is for transparency and accountability to prevail and without this 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. In a democratic society such as our own, the effective exercise of the right to vote 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.

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, even in an open and democratic society. These limitations are housed in Chapter 4 of PAIA and provide exemptions to disclosure.

Chapter 4 is placed in PAIA to also provide a balance with what information can be disclosed and the information that should be protected.

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; the economic interests and financial welfare of the Republic and commercial activities of public bodies; and the formulation of policy

and taking of by public bodies in the exercise of powers or performance of duties conferred or imposed by law. <sup>28</sup>

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<sup>28</sup> Politicsweb.

## 6. Admission of Evidence

In the sections above I have laid out the different grounds that the government utilised to deny access to the information. The court criticized the government for their failure to produce any evidence in the form of affidavits from former President Mbeki to corroborate the reasons and defense put forward to the court. Instead they filed affidavits of persons who were not directly involved.

I include this section to consider the importance of the affidavits and/or evidence from the people directly involved and the effect it could have had on the outcome of the matter had this been produced to the court.

An application in terms of section 78 of PAIA are governed by section 81 of PAIA which sets out as follows:

### ***“81 proceedings are civil***

- (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.”***

Section 81(2) clearly sets out that the rules of evidence in civil proceedings will therefore apply. This means that the evidence will be on a balance of probabilities.

From the reading of section 81(3) the burden of establishing and proving that the refusal of the request was justifiable rests with the public body or private body, being the person that refused access.

Then we have the prescript of section 80(1) which states as follows:

***“ 80 Disclosure of records to, and non-disclosure by the court***

***(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 records may be withheld from the court on any grounds***

.....

The reason for highlighting the issue of evidence and on whom the burden of proof rests when access is denied is due to the fact that the Constitutional Court took issue in their judgment with the fact that the affidavits that were put before the court were deposed to by officials who did not have personal of the following:

- 1) regarding the appointment of the judges to prepare the report;
- 2) were able to attest to the reasons for the appointment of the judges and /or their mandate;
- 3) had any knowledge of what transpired in Zimbabwe during their visit and how and from whom the information was gathered that was put into their report.

There is a duty on the State in litigation to produce affidavits that must justify and set out solid reasons for not wanting to disclose the record. The reasons need to adequately describe the reasons for non- disclosure in order for the requester to adequately understand the reasoning.

Admittedly there is a difficulty on the part of the requester in a PAIA matters that reach the litigation stage. I express this view with regard to the fact that the requester must argue that the record owner's reason for non- disclosure are unfounded. This argument must formulated without having sight of the contents of the record itself.

In this way the requester begins the litigation process on the back foot and there is a distinct disadvantage in their attempts to refute the record owners claim regarding the nature and contents of the record.

In *Hayden vs National Security Agency* 608 F 2d 1381 (DC Cir 1979) the District of Columbia Circuit Court of Appeals summarized the appropriate procedures to be used by trial court 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 documents and the justification for non disclosure. (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 courts discretion.....(5) the court should require the release of reasonably segregable parts of documents that do not fall within the FOIA exemptions.”<sup>29</sup>*

With regard to the Presidency's ground for refusal relating to the formulating of foreign policy the High Court found that the President only decided to use the Report to formulate policy after he had received the report.

On analysis of this finding of the High Court, one may border on the impression that the court may have far reached with this conclusion. Should it not be safe to assume that the President had an intention when he appointed the Justices and requested that they travel to Zimbabwe. When requesting the justices to travel to Zimbabwe a mandate and description of what the President is seeking to find out must have had to have been set out to them.

I fear to think that they would be sent to simply observe and report back. How would they conduct their fact-finding? They would need some terms of reference in order for

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<sup>29</sup> Constitutional Court judgment pages 10-11.

them to be effective in their mission. We are speaking of learned judges with immense experience, I dare not think that they would simply agree to travel to another country without a proper and fully set out mandate for their appointment and mission. In order for the President to comply with the aforementioned he would have to have an idea of what he wanted and what he needed the information for. Hence I battle to accept the High Court's findings that the President only decided to use the report to formulate policy after he received the report.

The flaw identified by the High Court and the Supreme Court of Appeal in the case of the Presidency was that there were no affidavits by the Justices and President Mbeki to give any backing and proof to substantiate the grounds of refusal that the Presidency relied upon to refuse the record.

In the Supreme Court of Appeal judgment the court noted that in cases such as this, true disputes of fact will seldom arise because the relevant facts will almost always be in the peculiar knowledge of the public body. In order to guard against the inequality of arms arising from this state of affairs, a court must scrutinize the affidavits presented by the public body with particular care. The court accepted that information officers will seldom have personal knowledge of the relevant facts and that this challenge can be overcome by relying on the discretion of the court to admit hearsay evidence under section 3 of the Law of Evidence Amendment Act 45 of 1988. However, the Court held that affidavits filed by the Presidency did not contain any evidence to support the factual assertions made by the deponents and amounted to little more than rote recitation of the relevant sections and bald assertions that the report falls with their terms.<sup>30</sup>

The courts all criticized the Presidency for submitting evidence (affidavits) of deponents that did not have personal knowledge and/or that the personal knowledge was insufficient and did not set out how the knowledge was acquired.

The court set out as follows in their judgment: <sup>31</sup>

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<sup>30</sup> Supreme Crt of Appeal judgment, para 20 and Constitutional Court Review , There and Back Again.

<sup>31</sup> *President of the Republic of South Africa and Others v M & G Media Limited* (998/2013) [2014] ZASCA 124; 2015 (1) SA 92 (SCA); [2014] 4 All SA 319 (SCA) (19 September 2014).

*“36 Abandoning reliance upon Mr Fowler counsel for the appellant referred us to the affidavit of Mr Chikane who said that he had personal knowledge*

*that the Justices were appointed on the grounds of their skill and positions and 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, including the impact or possible impact of the Zimbabwean situation on South Africa.*

*Counsel submitted that the assertion by Mr Chikane that he had personal knowledge of the matter was a sufficient evidential basis to establish the truth of the assertion.*

*37 Knowledge of occurrence of an event might come to a person on one of three ways. It might come to him or her through directly experiencing the occurrence of the event. Or the occurrence might be reported to him or her by someone else. Of he or she might deduce that the event occurred by inference from other facts. If knowledge of the occurrence of the event has come to a witness from direct observation then his or her evidence is admissible to prove that it occurred. If that knowledge was acquired from someone else then a proper basis must be laid for admitting it as hearsay and enabling its weight to be evaluated. And if the knowledge was acquired only by inference then that is not evidential material at all: it is for a court to draw the inference itself upon proof of primary facts.*

*38 A court is not bound to accept the ipse dixit of a witness that his or her evidence is admissible. Particularly in cases of this kind, in which information is within the peculiar knowledge of the public body, proper grounds need to be demonstrated for the admissibility of the evidence. Merely to allege that information is within the personal knowledge of a deponent is of little value without some indication, at least from the context, of how that knowledge was acquired so as to establish that the information is admissible, and if it is hearsay, to enable its weight to be evaluated. In this case there is no indication that the facts to which Mr Chikane purports to attest came to his knowledge directly and no other basis for its admission has been laid. Indeed the*

*statement of Mr Chikane that I have referred to is not evidence at all: it is no more than bald assertion.*

*39 It was submitted by Counsel for the appellants that it is probable that Mr Chikane had direct knowledge of the purpose for which the appointment was made by reason of the office that he held at the time. We are not concerned with probability. In any event I see no reason to assume that the Director-General in the Presidency is privy to everything that the President does. The bald assertion by Mr Chikane might just as easily be founded upon the same reasoning that led Mr Fowler to make his similar assertion. Indeed, if Mr Chikane had direct knowledge of the purpose for which the judges were commissioned it is inconceivable that he would not have told Mr Fowler who would not then have needed to resort to absurd reasoning.....”*

The SCA continued to criticize the Presidency and expressed concern that no affidavits had been filed by the only three people who had direct knowledge of the pertinent facts, namely President Mbeki, Justice Khampepe and Justice Moseneke.

The court states as follows:

*“20 There is another striking feature of this case. There are three people who have direct knowledge of the mandate that was given to the judges – Mr Mbeki and the two judges – and two people who have direct knowledge of how that mandate was executed – the two judges themselves. Theirs would naturally have been the best evidence on those issues but it has not been forthcoming, without explanation. Indeed there is no suggestion that such evidence has even been sought. Moreover, one might justifiably expect in high matters of state that there would be contemporary documentation of some kind of recording at least the mandate upon which the judges embarked. Once more there is no evidence of that kind of explanation for its absence. What the appellants’ case amounts to is little more than rote recitation of the relevant sections and bald assertions that the report falls within their terms. That is not the stark and dramatic contrast with the past that was referred to by Mahomed DP. Nor does it reflect*

*the culture of justification that was referred to by Mureinik and which is embedded in the Act.”*

The question that arises in my mind is that if the SCA expressed such strong views regarding the evidence set out in the affidavits filed and the fact that this matter journeyed through the justice system on more than one occasion, should that have not been the opportunity for the Presidency to file affidavits by the three justices and former President Mbeki?

After the Constitutional Court’s judgment when the matter was referred back to the High Court for the judicial peek in terms of section 80 of PAIA, the Presidency made a dash to submit the affidavit of President Mbeki in terms of section 80(3).

*“ The reason why the AIA envisages the substitution by a court of its own access decision for that of a public or private body is the extent of information available to the court in most cases. In terms of sec 80, a court hearing an application may examine any record including obviously the record that is the subject of dispute. Given the objective basis for most of the grounds of refusal, I will be possible for a court to determine whether a record is disclosable, without any need to refer the matter back to the applicable body for reconsideration. Note however that the power to substitute a new decision on appeal should not be read as conferring a power on a reviewing court to second-guess the merits of an exercise of a discretionary power under the Act – notably a decision not to disclose information subject to a ground of refusal.”<sup>32</sup>*

#### Admission of Evidence in relation to the High Court Judgment of February 2013

Section 80(3) states as follows:

*“(3) Any court contemplated in subsection (1) may-*

- (a) Receive representations ex parte;*
- (b) Conduct hearings in camera*

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<sup>32</sup> Same as footnote 1.

*(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.”*

In para 32 of the judgment the High Court judgment of 2013 states that it ‘begs the question why the affidavit of former President Mbeki was not produced at the initial state and in particular during appeal proceedings in the SCA and the Constitutional Court. Moreover, both the High Court and the SCA raised the issue of insufficient evidence to justify the exemptions claimed. The Respondents nevertheless concede that the new evidence was filed late and that it could have been tendered at an earlier stage. It is also common cause that the hands of the applicant are tied by the fact that the record was not available to them and as a consequence they cannot refer to its contents..... If the affidavit is received as new evidence the applicant will suffer real prejudice. Only the most exceptional circumstances could justify the admission of the supplementary material sought to be tendered. Such circumstances simply do not exist.”

In para 9 of the High Court judgment the court refers to the manner in which it is expected to exercise its discretion. It elected to apply the ex parte representations procedure, and accepted the ex parte representations of the Presidency, which it found to be consistent with and in compliance with the requirement of PAIA, Rule 4(1)(a).

The court had this to say regarding the above:

*“ The implication of section 80(3)(a) read with Rule (4) (a) of PAIA*

*16 I am minded to reiterate that after having had a judicial peek at the record I invited the parties to file ex parte representations in terms of section 80(3)(a) read with Rule 4(1)(a) of PAIA. In line with the audi alteram partem rule, once the ex parte submissions were made available to the court, the court in its discretion brought the contents of these representations to the attention of the opposing parties. Once the ex parte representations were exchanged the parties argued the matter based on the said representations. It transpired after the submissions were made that although the*

*applicants' ex parte representations were in writing they were not made under oath and therefore not in compliance with Rule (4)(1)(a).*

17....

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19 *On the other hand the respondents submit that there are two parts to the provisions of Rule 4(1)(a). First the representation made must be made under oath in writing. Second, where applicable, documentary proof may be annexed to such representations. In casu the representations of the respondents were in the form of two affidavits deposed to by current President of the Republic of South Africa and former President Mbeki including two annexures constituting documentary proof that supported the averments made in his affidavit. I agree that these representation are consistent with and in compliance with requirement of rule 4(1)(a).*

20. ....

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At para 24 of the judgment the Court states that:

*“the application will be decided on the factual allegations made by respondents in their ex parte affidavits as well as the records itself.”*

Para 25 the court reverts to the hearing of June 2012 and the application to have the affidavit of President Mbeki admitted in evidence.

In para 32 the court went on to state; *“...begs the question why the affidavit of former President Mbeki was not produced at the initial state and in particular during appeal proceedings in the SCA and the Constitutional Court.....if the affidavit is received as new evidence the applicant will suffer real prejudice. Only the most exceptional circumstances could justify the admission of the supplementary material sought to be tendered. Such circumstances simply do not exist.”*

In para 34 the court concluded that; *“It is incumbent upon this court to mention that it is aware of the serious consequences which may ensue to the state of refusal to permit the evidence of both former President Mbeki and the current President Zuma to be received, but the due administration of justice would be greatly prejudiced if such permission were lightly granted.”*

The Constitutional Court’s decision that the evidence by the deponents on behalf of the President was sufficient

Para 9 of the Constitutional Court judgment states as follows:

*“(9) As is evident from its long title, PAIA was enacted to 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 be given access to the report so long as the request complies with the procedure outlined in the Act and the records requested is not protected from disclosure by one of the exemptions set forth therein. Under our law, therefore the disclosure of information is the rule and exemption from disclosure is the exception.”*

Judge Ngcobo explains that in PAIA proceedings a court does not conduct a review of the refusal of access to information. Instead, a court decides the claim of exemption from disclosure afresh, engaging in de novo reconsideration of the merits.<sup>33</sup>

Section 81 of PAIA sets out the manner in which evidence in PAIA court proceedings must be delivered and entered into a matter.<sup>34</sup>

Section 81 requires the body refusing access to prove that the refusal was justified. The reasons provided must be just and not unreasonable. An alternative way of thinking of it would require the requester to prove that the refusal was unjustified. This would then

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<sup>33</sup> Constitutional Court judgment para 14.

<sup>34</sup> Section 81 of PAIA.

place the burden of proof with the requester and would be unfair and contrary to the intention of PAIA as intended and read with section 32 of the Constitution.

Para 15 of the Constitutional Court judgment states as follows:

*(15) The imposition of the evidentiary burden 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 the information has access to the content 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 the information and not with the requester.”*

In para 16 of the judgment Ngcobo CJ carries out a comparative assessment of judicial jurisprudence dealing with comparable legislation as encouraged by section 39(1)(c) of the Constitution.<sup>35</sup>

Para 22 sets out the conclusion of the comparable analysis as follows;

*“(22) It is apparent from the comparative analysis of the standards applied by the 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.....”*

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<sup>35</sup> Section 39(1)(c) of the Constitution states as follows:

*“39 (1) When interpreting the Bill of Rights, a court, tribunal or forum*

*(a)...*

*(b)...*

*(c) may consider foreign law”.*

*“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 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.”*

One can adduce from the comment made above by Ngcobo CJ that the question before court is whether the evidence submitted to court, was enough and sufficient.

Para 27 of the judgment reiterates same:

*“27) The question here is not one of the admissibility of evidence, but the sufficiency of evidence. The deponent 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.”*

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.

The court relied on *Barclays National Bank vs Love*<sup>36</sup> where it was said that in the context of summary judgment, *“although 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 have acquired personal knowledge of the facts which he deposes to.”*

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<sup>36</sup> 1975(2)SA514.

The Court went on to affirm in its judgment as follows:

*“The principle articulated in Love is sound. It is 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 taken.”*

At this point the court splits, but very narrowly.

Cameron J expressed the view that the present application should succeed because the Presidency failed to justify its refusal of the record under PAIA, and 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.<sup>37</sup>

Cameron J was also critical of the fact that both Msimang and Fowler merely recited the provisions of the statute and failed to provide adequate reasons in addition to stating the provisions of the statute relied on.

Cameron J carried out in his judgment an analysis of Fowler’s, Msimang’s and Chikane’s evidence and criticism of the contents of the evidence in relation to personal knowledge which he held that all three lacked.

He finally set out his stance as follows:

*“107) As the Supreme Court of Appeal pointed out 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*

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<sup>37</sup> Para 79 of judgment.

*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.*

*109) So in the case of every assertion to personal knowledge that 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 evidence. The assertion of personal knowledge about ti is not evidence enough.”*

Cameron J concluded that the witness offered not reasons but perfunctory conclusions.<sup>38</sup>

The question arose in Cameron J's judgment regarding why there was no affidavit from Mbeki and the two Justices that travelled to Zimbabwe. All three were alive at the time that the matter was before court. The Counsel for the Presidency was aware of all the criticism it faced regarding the evidence is provided and the lack of evidence from the persons pivotal to the matter but still did not persist to correct this.

Was it a blatant arrogance or simple bad legal advice?

Ncobo CJ appears to find a way to identify the possible and tries to find the logic in the thinking of the approach of the state in their approach to the matter.

*“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 section 41(1)(b)(i) and 44(1)(a) of PAIA had, perforce to be based on their assessment of the contents of*

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<sup>38</sup>Constitutional Court judgment, CCT03/11 (2001) ZACC32 118.

*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 seem more likely than not that they would have spoken to Zimbabwean state officials in the course of their 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.”*

The state argued that it was bound by section 25(3)(b) and 77(5)(b)<sup>39</sup>of PAIA and could not disclose the reasons and if they were to provide further particularity would contrary to these sections aforementioned disclose the very information that the statutory exemptions sought to protect from disclosure.<sup>40</sup>

The provisions of section 25(3)(b) and 77(5)(b) allow the refuser of a request when giving reason for the refusal to abstain from giving any such reasons, reasons that make any reference to the content of the record.

Ngcobo CJ stated in his judgment that he does not find this assertion by the state that it was hamstrung by these aforementioned provisions implausible.

He states the following in para 60 of the judgment:

*“In these circumstances, the allegation by the state that it was hamstrung by the provisions of section 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*

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<sup>39</sup> Section 25(3)(b)

“3) if the request for access is refused, the notice in terms of subsection (1)(b) must-

a)....  
b) exclude from such reasons, any reference to the content of the record; and  
Section 77(5)(b)

(5) The notice in terms of subsection(4)(a) must-

a)..  
b) exclude from such reasons any reference to the content of the record..”.

<sup>40</sup> Para 57 of judgment.

*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”*

It may be argued by persons not in favour of the approach of the state that the reasons that could have been given by the state need not have identified the actual content word for word but only needed to provide a general sense of what the record contains. This argument and approach appears plausible.

It appears that the state refused to even venture down this possible road and remained stuck on their reliance on the provisions mentioned above for their refusal.

Ngcobo CJ in his judgment set out: *“The question is not whether the best evidence to justify refusal has been provided but whether the information provided is sufficient for a court to conclude on the probabilities that the record falls within the exemption claimed.....”*

Under PAIA the burden of proof rests with the record holder and the standard of proof is a balance of probabilities.

## 7. Section 80

The court relied on the utilization of section 80 (“judicial peek”) in order to have sight of the record and make the decision whether to release same or not.

This “judicial peek” also allowed the court to consider the reasons and defence for refusal of the government. After such consideration of the record the court was able to make a ruling. Therefore consideration must be given to section 80:

*“80 Disclosure of records to, and non-disclosure by the court*

*(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, or the relevant authority of that body or internal appeal, in refusing to grant access to a record in terms of section 39(3) of 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*

*(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”*

It is clear from the reading of section 80 that this section prohibits the withholding of a record held by a private or public body from a court seized with a matter concerning that report. This section also ensures the discretion of the court with a matter where section 80 needs to be invoked.

The SCA said the following in its judgment:

*“There is one further aspect of the procedures that are provided for in the Act that I ought to mention. Section 80(1) permits a court to take what counsel for M&G described a judicial peek at the record in issue. A court that does that is prohibited from disclosing to any person, including the requester, any record.....which on request for access may or must be refused. Courts earn the trust of the public by conducting 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.”<sup>41</sup>*

I needed to highlight the comments of the SCA above as it gives some clarity regarding the utilization of this section 80 in that this section is an exceptional tool and is only resorted to when it is in the interests of justice to do so.

The Constitutional Court pointed out in its judgment that *“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.”*

The Constitutional Court differed from the SCA regarding the viewing of the record as permitted by section 80. Ngcobo CJ went further on at para 33 of his judgment to indicate that despite the fact that applications under section 78 of PAIA are civil proceedings and are governed by the rules of evidence applicable to civil proceedings, proceedings under PAIA differ from ordinary civil proceedings of PAIA in the following aspects:

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<sup>41</sup> SCA judgment 52.

“PARA 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 emphasized however is that proceedings under PAIA differ from ordinary civil proceedings in certain key respects. First these disputes involve 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.”*

The Chief Justice at the time also addressed the challenges that the record holder may face when refusing access as the Act requires that reasons must be given and the record holder needs to provide same and be careful not to make reference to the contents of the record.<sup>42</sup>

When considering this above, I do think that the Courts would have to exercise the same caution when delivering their judgment after invoking the provisions of section 80. Another issue that is highlighted to me is when a court invokes the provision of section 80 and after having regard to the contents of the record does the information contained therein not influence the decision of the court?

Ngcobo CJ went on to issue a caution to courts that they must ensure to approach these court challenges mindful of both the disadvantage at which requesters are placed in challenging evidence out forward by the holder of the record and the restraints placed on the record holder in terms of how it may refer to the content of the record in justifying refusal of access

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<sup>42</sup> Constitutional Court judgment 35.

So the Chief Justice cautions the courts that section 80 should be used sparingly and highlights this in his judgment.

It appears that Ngcobo CJ had such a strong view on the issue that he went on to state that courts have been empowered by section 80 to call for additional evidence in the form of the contested record to that they may test the validity of the exemptions claimed.<sup>43</sup>

In *Arieff vs United States Department of Navy*<sup>44</sup> it was held 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.

Ngcobo CJ referred to this case along with the case of *Ray vs Turner*<sup>45</sup> when stating the following:

*“(39) Section 80 (a) 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 emphasized that in camera review should only be undertaken as a last resort or only where absolutely necessary. There, courts resort to judicial peek when 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 records 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 affidavits are insufficient for a responsible de novo decision.”*

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<sup>43</sup>Constitutional Court judgment 36.

<sup>44</sup> 712 F2d 1462, 1470-1 (DC Cir 1983).

<sup>45</sup> 587 F 2d 1187,1195 (DC Cir 1978).

Section 80 should be invoked as a last resort. When section 80 is invoked then the proceedings must take place in camera. The court would have to resort to this section of PAIA when there is insufficient evidence from the affidavits put before the court to make a decision. It is clear that the courts will be reluctant to utilise this section. The state was aware at the different courts that their evidence in the affidavits put before court were insufficient but made no attempt to supplement them by having the three persons pivotal to the report depose to an affidavit. The state may have pushed the hand of the court by failing to put sufficient evidence before the court and therefore the court was unable to make a decision on the matter and had to invoke section 80 in order to assist them in determining on whether the records fell within the exemption claimed.

A court would exercise its discretion to utilising section 80 of PAIA in the interests of justice and in preventing an injustice being perpetrated. Some examples where the court may in the interests of justice resort to taking a judicial peek are the following:

- where 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 exemptions claimed can be explained in terms of the limitation 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;<sup>46</sup>
- The potential to resolve material disputes of fact that relate to whether the record falls within the exemption claimed and whether the record is protected may contain portions that do not fall within the exemption claimed and that can be reasonably severed.<sup>47</sup>

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<sup>46</sup> Constitutional Court judgment 47.

<sup>47</sup> Constitutional Court judgment 51.

- 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.<sup>48</sup>

Ngcobo CJ remarked in his judgment that by applying section 80 the court:

*“50) By using its powers under section 80 to call for additional evidence in the form of a record, the court is neither supplementing the state's case nor making out a case for the requester. The object for 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 the access to information claims, may not be produce the factual record necessary for the 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 the inquisitorial 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 the 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 protected from disclosure.*

*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 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 states representations and thereby restore some degree of adversariness in the proceedings.*

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<sup>48</sup> Constitutional Court judgment 51.

*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 decide the merits if the exemption claimed and the legality of the refusal to disclose the record. In the sense its facilities, rather than obstructs access to formation. The very existence of the court's power to examine the record should in itself, deter the 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."*

The above extracts from the judgment show Ngcobo CJ's explanation that the main purpose of Section 80 is to enable the court to properly assess the legality of the refusal. The judicial examination in camera should facilitate rather than obstruct access and its existence should deter the state from raising unmeritorious exemptions.

In the judgment of Ngcobo CJ he referred to the observation of the SCA in their judgment:

*"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."*<sup>49</sup>

Ngcobo CJ held that in light of this uncertainty it was in the interests of justice for section 80 to be invoked. He further found that the interests of justice favoured a judicial peek also because of the constraints M&G faced in challenging the affidavit of evidence put forth by the state, both in relation to state officials reading of the report to which M&G do not have access, and in relation to the personal knowledge state officials asserted as to the judges mandate. Moreover the allegation of non-severability could not be decided without examining the Report: the M&G was placed at a disadvantage in challenging this assertion.<sup>50</sup>

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<sup>49</sup> SCA judgment 53.

<sup>50</sup> Constitutional Crt judgment 64 65 66.

A more narrow approach of section 80 was set out by Froneman J who concurred with Ngcobo CJ. He contended that the interests of justice only requires judicial examination where: a) either party is constrained in presenting evidence or b) the issue of severability is in dispute.<sup>51</sup>

Section 80 should not be used as a substitute for requiring government to discharge its burden, nor to avoid an order of disclosure when government has failed to do so.<sup>52</sup>

Cameron J pointed out that section 80 should only be used when government plausibly asserts the hands tied argument or a ground of exemption, but doubt exists whether the exemption is rightly claimed.<sup>53</sup>

Para 127 & 128 state as follows

*“127) The provision should in my view be invoked only when government plausibly asserts the hand-tied argument or a ground of exemption, but doubt exists whether the exemption is rightly claimed. The provision should in other words, be used to amplify access and not to occlude it. It should only be a last resort. 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.*

*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 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 ,a second, the indispensable attribute of the administration of justice, its openness, is shrouded. These are consequences that we should be reluctant to countenance to readily.”*

From a study of both the majority and minority judgment it is clear that the dissenting judgment took the view that the majority judgment was not entirely satisfactory because

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<sup>51</sup> Constitutional Crt judgment 77.

<sup>52</sup> Constitutional Crt Judgment 126.

<sup>53</sup> Constitutional Crt Judgment 127.

its effect was to turn upside down the two fundamental principles of administration of justice that the adversary nature of the parties in dispute, in which the court is disinterested arbiter, is suspended; and second, the indispensable attribute of the administration of justice, its openness, is shrouded.

The view of the minority was that secret judicial examination of disputed records should be avoided if at all possible because of the untenable risk that the parties' dispute will be decided on the basis of a court's secret conclusions from a secret process.<sup>54</sup>

The court expressed this view very well in para 129 and 130

*"126) 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 a suspicion of unfairness and is inconsistent with our traditions." The blunt risk is that the parties dispute will be decided on the basis of a court's secret conclusions from a secret process. 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 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.*

*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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<sup>54</sup> Constitutional Crt judgment 129.

In order to give equal functional life to both section 80 and 81 of PAIA, the only appropriate balance between them is as follows:- Only once the refuser has tendered sufficient evidence to establish, on a balance of probabilities, that the refusal is justified, can the court examine the record to test the truth of that evidence. The proper purpose of section 80 is not to complete the refuser's case. It serves to compare it to the record in question in order not to test the sufficiency of the refuser's evidence but rather to test the reliability of the evidence. It does not follow that judicial examination would be invariably necessary once a refuser has discharged its burden under section 81.

In *Minister for Provincial and Local Government of the Republic of South Africa vs Unrecognised Traditional Leaders of Limpopo Province*<sup>55</sup> the SCA held as follows; “*the exemption provisions in PAIA limit the right of access to information and thus section 36 of the Constitution requires that the scope of such provision be restricted only to an extent which is reasonable and justifiable.*”

Ngcobo CJ held that “*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 however remains a value judgment. Ngcobo CJ tried to reason this as the reality remains that in practice it will be extremely difficult to resolve the finding that section 80 should be applied whenever a court cannot responsibly decide disclosure, without first examining the requested record.

It is to be determined by the circumstances of each case.

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<sup>55</sup> [2004]ZASCA 93, 2005 (2) SA 110(SCA),[2005] 1 All SA 559 (SCA).

## 8. Conclusion

This case travelled through the courts twice, and Mail and Guardian finally were granted access to the record they fought so vehemently to have access to.

They forced the government to hold up section 32 of the Constitution but unfortunately had to do this through the courts.

Birkinshaw made a comment that, *“I, or others on my behalf, extract accountability, responsiveness, efficiency, responsibility, [as well as] financial regularity from government.”*<sup>56</sup> This means that the people of the country need and deserve to have this accountability from government. Gone are the days when society lived in darkness and had no idea what the government was doing and decisions they were making. Having the system of access to information now exposes the wrongdoing and wrong doers in government and allows for the true effect of section 32 to be fully implemented and constitutional democracy from government to be realized.

There is an unequal relationship of authority between organs of the state and the public. This will always exist.

The Act has assisted greatly in ensuring that the organs of the state exercise this power lawfully, procedurally fairly and reasonably.

Access to information also contributes to the ideal of a responsive government and transparent.

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<sup>56</sup> Birkinshaw Patrick J, *Freedom of information and openness: Fundamental Human Rights?* (2006).

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