THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 570/2010

In the matter between:

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**First Appellant**
THE DEPUTY INFORMATION OFFICER,	
OFFICE OF THE PRESIDENCY	**Second Appellant**
THE MINISTER IN THE PRESIDENCY	**Third Appellant**

and

M & G MEDIA LIMITED	**Respondent**

Neutral citation:	*The President of RSA v M & G Media* (570/10) [2010] ZASCA 177 (14 DECEMBER 2010)
Coram:	NUGENT, VAN HEERDEN, MAYA, CACHALIA JJA and BERTELSMANN AJA
Heard:	**22 NOVEMBER 2010**
Delivered:	**14 DECEMBER 2010**
Summary:	**Promotion of Access to Information Act 2 of 2000 – access to report made to the President – whether grounds shown for refusing access.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Sapire AJ sitting as court of first instance).

The appeal is dismissed with costs that include the costs of two counsel.

JUDGMENT

NUGENT JA (VAN HEERDEN, MAYA and CACHALIA JJA and BERTELSMANN AJA concurring).

[1] Open and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy. That is why the Bill of Rights guarantees to everyone the right of access to 'any information that is held by the state',[1] of which Ngcobo J said the following in *Brümmer v Minister for Social Development*:[2]

'The importance of this right ... in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information.''

[1] Section 32(1)(a): 'Everyone has the right of access to any information that is held by the state…'. Section 31(1)(b) confers a right of access to information held by other persons in certain circumstances but that is not relevant for present purposes.
[2] 2009 (6) SA 323 (CC) para 62.

[2] But few constitutional rights are absolute. Generally they are capable of being limited within the confines of s 36. The right of access to information that is held by the state has indeed been limited by the Promotion of Access to Information Act 2 of 2000 – which fulfils Parliament's constitutional obligation to enact national legislation to give effect to the right. It is the application of those limitations that forms the subject of this appeal.

[3] The appeal concerns a report that is in the possession of the President of the Republic. Two senior judges prepared the report after a visit to Zimbabwe shortly before an election that was held in that country in 2002. They did so at the request of the then incumbent of the Presidency – former President Mbeki. The report has never been released to the public at large.

[4] M&G Media Limited (the respondent) is the publisher of a weekly newspaper called the Mail and Guardian (I will refer to the respondent as M&G). It wants to see the report but the President declines to disclose it. M&G and the then editor of its newspaper applied to the North Gauteng High Court under the provisions of the Act for an order compelling him to do so. Sapire AJ granted the order and the President (and others cited in the application) now appeals with the leave of that court.

[5] The Act creates a mechanism for access to be had to recorded information – what the Act calls a 'record' – that is in the possession of a

public body[3] (and other bodies in certain circumstances). The Act lays down various formalities that need to be complied with. It is not disputed that they have all been met in this case.

[6] A request for access to a record must be made to the 'information officer' of the public body concerned.[4] If the request is refused – in whole or in part[5] – then the applicant is entitled to an internal appeal against the refusal.[6] If the internal appeal fails then the requesting party may apply to a court under s 78(2) for 'appropriate relief'.

[7] In this case the request by M&G was considered and refused by Mr Trevor Fowler (the second appellant). He was a deputy information officer in the Presidency at the time. He also deposed to the answering affidavit on behalf of all the appellants. At the time that he deposed he was the Acting Director-General and Accounting Officer in the Presidency.

[8] Supporting affidavits were filed by Mr Kgalema Motlanthe (the first appellant) – who was the President of the Republic at the time the answering affidavits were filed – and by Ms Mantombazana Tshabalala-

---

[3] Section 1 defines a 'public body' to mean
'(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
(b) any other functionary or institution when –
(i) exercising a power or performing a duty in terms of the Constitution or a provincial Constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation.'

[4] Section 18(1).

[5] In certain circumstances part of the record may be severed from the rest under s 28, which provides as follows:
'(1) If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which –
(a) does not contain; and
(b) can reasonably be severed from any part that contains, any such information must, despite any other provision of this Act, be disclosed'.

[6] Sections 74-78.

Msimang (the third appellant – since deceased) – who undertook the internal appeal. At the time she deposed to her affidavit she was the Minister in the Presidency. An affidavit was also filed by Mr Frank Chikane, who was the Director-General in the Presidency and its information officer at the material time.

[9] The Constitution – and consequently the legislation that it has spawned – signals a decided rejection of past odious laws, policies and practices. In *Shabalala v Attorney-General of Transvaal*[7] Mahomed DP expressed that trenchantly in relation to the Interim Constitution (it applies as much to the present Constitution) when he called it a 'radical and decisive break from that part of the past which is unacceptable'. He went on to say:

'There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is "justifiable in an open and democratic society based on freedom and equality". It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment'.

[10] Etienne Mureinik[8] captured the essence of the Bill of Rights[9] when he described it as a 'bridge from a culture of authority … to a culture of justification' – what he called 'a culture in which every exercise of power is expected to be justified.' The Bill of Rights, he continued[10]

'is a compendium of values empowering citizens affected by laws or decisions to demand justification. If it is ineffective in requiring governors to account to people governed by their decisions, the remainder of the Constitution is unlikely to be very

[7] 1996 (1) SA 725 (CC) para 26.
[8] Etienne Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' 1994 (10) *SALJ* 31.
[9] Once more with reference to the Interim Constitution.
[10] Page 32.

successful. The point of the Bill of Rights is consequently to spearhead the effort to bring about a culture of justification. That idea offers both a standard against which to evaluate [the Bill of Rights] and a resource with which to resolve the interpretive questions that it raises'.

[11] The 'culture of justification' referred to by Mureinik permeates the Act. No more than a request for information that is held by a public body obliges the information officer to produce it unless he or she can justify withholding it. And if he or she refuses a request then 'adequate reasons for the refusal' must be stated (with a reference to the provisions of the Act that are relied upon to refuse the request).[11] And in court proceedings under s 78(2) proof that a record has been requested and declined is enough to oblige the public body to justify its refusal.[12]

[12] The proceedings that are contemplated by s 78(2) are not a review of or an appeal from the decision of the information officer or the internal appeal. They are original proceedings for the enforcement of the right that the requester has under s 11(1) to be given access to a record in the absence of grounds for refusing it. The proceedings must be commenced on application. They are 'civil proceedings' to which 'the rules of evidence applicable in civil proceedings' apply.[13] I think that that latter provision contemplates that the civil rules of evidence apply as much to the manner in which evidence is received as it does to the admissibility of evidence.

---

[11] Section 25(3)(a).
[12] Section 81(3)(a): 'The burden of establishing that…the refusal of a request for access…complies with the provisions of this Act rests on the party claiming that it so applies'.
[13] Sections 81(1) and (2).

[13] The approach to evidence in application proceedings is well known and need not be repeated in full.[14] A court will not weigh the veracity of the evidence on the papers alone. Generally, but with exceptions,[15] a court must rely for its decision upon the facts that are alleged by the respondent, together with those alleged by the applicant that he or she cannot dispute. Where an application cannot properly be decided in that way rule 6(5)(g) confers a wide discretion on a court to hear oral evidence.

[14] In cases of this kind the public body bears the burden of proving that secrecy is justified,[16] but the general rules that I have referred to apply as much in such cases.[17] That burden of proof nonetheless casts an evidential burden on the public body to allege sufficient facts that will justify the refusal. The burden of proof in its true sense will come into play if the veracity of the evidence is required to be tested – in which case it is for the public body to satisfy a court that its evidence is probably true.

[15] While the ordinary rules apply generally to applications under s 78(2) there are nonetheless some aspects of such proceedings that call for special mention. The first is that true disputes of fact will seldom arise because the material facts will generally be within the peculiar knowledge of the public body. If an application for information is not to be thwarted by that inequality of arms I think that a court must scrutinise the affidavits put up by the public body with particular care and, in the

---

[14] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634I-635C.
[15] .*Plascon-Evans*, above, at 635C: 'For example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers'.
[16] Section 81(3).
[17] *Ngqumba v Staatspresident* 1988 (4) SA 224 (A).

exercise of its wide discretion that I referred to earlier,[18] it should not hesitate to allow cross-examination of witnesses who have deposed to affidavits if their veracity is called into doubt.

[16] Secondly, it can be expected that an information officer, or other officials of a public body, will most often not have direct knowledge of facts that are material to justifying secrecy, and will necessarily be reliant upon documents and other hearsay sources. Section 3 of the Law of Evidence Amendment Act 45 of 1988 gives a court a wide discretion to admit hearsay evidence and liberal use of that section is quite capable of overcoming difficulties that might be encountered by a public body in that regard.

[17] The founding affidavit in this case contains a host of media and other reports concerning the political travails that have afflicted Zimbabwe over many years. In the answering affidavits the appellants objected to that evidence on the basis that it was hearsay. It seems to me that the material was tendered only to demonstrate the wide public interest in and concern for events that were alleged to have occurred in that country at the time the report was prepared and for that purpose it is not hearsay at all. But in any event the travails of that unfortunate country, and their consequences for South Africa, are so notorious that we would be myopic not to accord them judicial notice.

[18] The feature of this case that strikes me most forcefully is the gulf between the observations that I referred to earlier in this judgment and the affidavits that have been filed by the appellants in purported justification

[18] *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions* (Pty) Ltd 1949 (3) SA 1155 (T) at 1163; *Plascon Evans*, above, at 635A-B.

of secrecy. At another time courts were regularly confronted with laws that precluded them from going behind conclusions and opinions formed by public officials. For example, at one time the Minister of Justice was entitled to prohibit a person from being in a specified area 'whenever the Minister is satisfied' that the person was promoting feelings of hostility between different sections of the inhabitants of the country (*Sachs v Minister of Justice; Diamond v Minister of Justice*[19]). Emergency regulations permitted arrest and detention if 'in the opinion of [a police officer]' that was necessary for the maintenance of public order etc (*Minister of Law and Order v Dempsey*[20]). Deportation could be ordered if a government functionary was 'satisfied' that the person concerned was dangerous to peace, order, good government etc. (*Winter v Administrator-in-Executive Committee*[21]). There are many other examples. As Corbett J observed in *South African Defence and Aid Fund v Minister of Justice*,[22] they were all instances in which

'the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the pre-requisite fact, or state of affairs, existed prior to the exercise of the power'.

[19] The affidavits that have been filed by the appellants are reminiscent of affidavits that were customarily filed in cases of that kind. In the main they assert conclusions that have been reached by the deponents, with no evidential basis to support them, in the apparent expectation that their conclusions put an end to the matter. That is not how things work under the Act. The Act requires a court to be satisfied that secrecy is justified and that calls for a proper evidential basis to justify the secrecy.

---

[19] 1934 AD 11.
[20] 1988 (3) SA 19 (A).
[21] 1973 (1) SA 873 (A).
[22] 1967 (1) SA 31 (C) at 35A-B.

[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 recording at least the mandate upon which the judges embarked. Once more there is no evidence of that kind and no 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 imbedded in the Act.

[21] There are three grounds upon which the appellants seek to justify the secrecy of the report. The first can be disposed of briefly. The Act excludes from its ambit a record 'of the Cabinet and its committees'.[23] That was not the basis upon which access was initially refused by Mr Fowler and Ms Tshabalala-Msimang. Both say that while at first they were under the impression that the Act applied to a record of the President they were subsequently advised, and accept the advice, that the Act does not apply to a record that is held by the President because he is the head of the cabinet. That contention was wisely not pressed in argument before us. The President is not the cabinet. Moreover, there is no suggestion that the report ever served before the cabinet.

[23] Section 12(a).

[22] Some provisions of the Act make secrecy mandatory and others make it discretionary. The sections with which we are concerned are both discretionary. Section 41(1)(b) permits access to a record to be refused if its disclosure

'would reveal information supplied in confidence by or on behalf of another state or an international organisation.'

Section 44 allows access to a record to be refused

'if the record contains an opinion, advice, report or recommendation obtained or prepared … or an account of a consultation, discussion or deliberation that has occurred … 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.'

[23] I have pointed out that the present proceedings are neither a review nor an appeal. But the reply that Mr Fowler gave to the request, and the outcome of the internal appeal, are nonetheless instructive when considering the affidavits as a whole.

[24] Mr Fowler was required by s 25(3)(a) to 'state adequate reasons for the refusal, including the provisions of the Act relied on'. The 'reasons' that he furnished to M&G were couched as follows:

'I have thoroughly examined the contents of the report and I am of the view that the disclosure of the contents thereof will reveal information supplied in confidence by or on behalf of another state or an international organisation.

Further, the PAIA entitles me to refuse a request for access to a record of the body if the record contains an opinion, advice, report or recommendation obtained or prepared for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law.

Consequently, access to the record that you have requested is hereby refused in terms of sections 41(1)(b)(i) and 44(1)(a) of the PAIA.'

[25] The first troubling feature of that reply is that Mr Fowler purports to have concluded that the report contained information that had been given by either ‘another state’ or by ‘an international organisation’. An ‘international organisation’ is defined in the Act to mean ‘an international organisation (a) of states or (b) established by the governments of states’. Purely as a matter of logic it is difficult to see how he could genuinely have concluded that the report contained information that had been given by either the one or by the other. Information is capable of being provided by one entity to the exclusion of the other, or of being provided by both, but it could not have been provided by the one or the other in the alternative (assuming that such information was given at all).

[26] Moreover, it is difficult to see how the report could possibly have contained information given by an ‘international organisation’. There is not the slightest suggestion in the affidavits that the judges were tasked to have dealings with such an organisation or that they received information from such an organisation. In response to our queries counsel for the appellants suggested that Mr Fowler had adopted a ‘belt and braces’ approach. An honest information officer who fulfils his or her duty to establish the true facts – which are not capable of occurring in the alternative – and then to apply the provisions of the Act will have no need for ‘belt and braces’. ‘Belt and braces’ are called for only where the information officer is determined to refuse access on any account, whatever the true facts.

[27] As for s 44 Mr Fowler said no more than that the section ‘entitles me’ to refuse access if the record fell within its terms. It is difficult to see why he thought that section to be relevant in the absence of a factual finding that the report fell within its terms.

[28] But if a record falls within the terms of either of those sections then the information officer has a discretion to allow or to refuse access. There is no indication in the reply of Mr Fowler that he exercised a discretion at all.

[29] The reasons given by Ms Tshabalala-Msimang for refusing the internal appeal are no less troubling. She said no more than the following:

> 'After considering your client's appeal record including the contents of the requested report, I am also of the view that the disclosure of the contents of the said report would reveal information envisaged in Section 41(1)(b) of the [Act].
> I am, further, of the view that the [Act] entitles the Deputy Information Officer to refuse a request for access to a record of the Presidency, if the said record contains an opinion, advice, report or recommendation obtained or prepared; for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law. This is in terms of Section 44(1)(a) of the PAIA.
> As a result of the aforesaid, I consequently have no option but to refuse your Appeal to access the Khampepe-Moseneke Report.'

[30] Once more those are not reasons but perfunctory conclusions. Once more s 44 is called in aid only because the section 'entitles' an information officer to refuse access in the specified circumstances and not because those circumstances were found to exist. And once more it is clear that no discretion was exercised. Indeed, the statement by Ms Tshabalala-Msimang that she had 'no option' but to refuse the appeal stands in stark contrast to the allegation in her affidavit that she exercised a discretion. Once more one is left with the impression that the report was refused oblivious to the demands of the Act.

[31] I have said that a court must scrupulously examine the grounds upon which secrecy is claimed, particularly because the facts that purport to found a claim of secrecy will generally be within the peculiar knowledge of the public body concerned, if the rights of a requester are not to be thwarted. Those perfunctory and dismissive responses to the request do not inspire confidence that the appellant's case will improve on the affidavits and indeed it does not.

[32] Section 44 defines a record that falls within its terms by reference to the purpose for which it was obtained or prepared. I need not deal in this judgment with the proper construction to be placed on the section[24] because the evidence does not bring the report within its terms no matter how widely the section is construed.

[33] In his affidavit Mr Fowler alleges on numerous occasions that

'the report was obtained and prepared for the purpose of informing the President, and assisting in the formulation of policy and the taking of decisions in the exercise of his power or performance of his duty as Head of State and the National Executive'.

He furnishes no evidential basis for those assertions but he does reveal a startling explanation for his conclusion. After explaining the 'mission' upon which the judges were allegedly sent (I return to that later) he states the following:

'A related purpose of the mission *which arose once the President had sight of the report* was that he was able to utilise the report to assist him in the formulation of policy and taking of decisions in the exercise of his powers or the performance of his duties in the aforementioned capacities in relation to the Zimbabwe situation…'

And yet later:

'Taking into account the contents of the report *it would have been of assistance in formulating policy* and taking decisions of the nature referred to in section 44(1)(a),

[24] Cf. Philip Coppel *Information Rights* (2004) pp. 591-595.

concerning, inter alia, the political situation in Zimbabwe, and the President's and South Africa's position and role in that regard. *It is reasonably conceivable that the report was of assistance.*'

(In each case the emphasis is mine.)

[34] The section does not render a report subject to secrecy if it is 'reasonably conceivable' that it has been of assistance in formulating policy etc. It does not even render it subject to secrecy if it 'would have been of assistance'. Nor even if the President 'was able to utilise the report to assist him.' It is subject to secrecy only if it was obtained or prepared for that purpose. And it is only in the world that exists beyond the looking glass that the purpose for which a report was obtained or prepared is capable of '[arising] once the [reader] had sight of the report'. As Jafta AJA said in *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland):*[25]

'In the context under discussion [the word 'obtain'] must mean procuring information for any of the purposes referred to in the subsection.'

[35] Counsel for the appellants submitted that those allegations by Mr Fowler were erroneous and should be ignored. I cannot see why allegations that have been made with deliberation under oath should simply be ignored. That the reasoning is absurd does not demonstrate that the allegations were made erroneously – it demonstrates only that the reasoning is absurd.

[25] 2005 (2) SA 110 (SCA) para 17.

[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 position; 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 the occurrence of an event might come to a person in 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. Or he or she might deduce that the event has 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.[26]

[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

[26] Cf *Die Dros (Pty) Ltd v Telefon Beverages CC* 2003 (4) SA 207 (C) para 28.

grounds need to be demonstrated for the admissibility of the evidence. Merely to allege that 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. But 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.

[40] But the main thrust of the objection to the production of the report was directed to s 41(1)(b) of the Act – which allows a public body to refuse access to 'information supplied in confidence by or on behalf of another state or an international organisation.' I have pointed out that in this case there is no suggestion – not even by bald assertion – that the judges met with or received information from an 'international

organisation'. The assertion is that they received such information from the government of Zimbabwe.

[41] On several occasions all the deponents allege that the mandate of the judges was to 'assess and report on the constitutional and legal challenges' that had arisen in the period leading up to the election. Precisely what 'constitutional and legal challenges' were required to be assessed has not been disclosed but I will accept for present purposes that that was indeed their mandate.

[42] Assessing 'constitutional and legal challenges' pertaining to another state does not entail that information is necessarily acquired from that state, nor that information that might be acquired is necessarily supplied in confidence. No doubt it was to fill those gaps that the appellants turned to what I consider to be no more than a contrivance so as to bring the report within the terms of the section.

[43] The case that the appellants advanced to justify the secrecy of the report rests on three legs (though they were not necessarily advanced in this order). First, the appellants sought to cast the judges in the role of diplomats (they called them 'envoys'[27]) who embarked upon a diplomatic mission (I return to that later). Then they described the nature of diplomacy, pointing out that it is 'generally accepted' in diplomacy that information is exchanged in confidence. And finally it was asserted – as if that were fact – that the judges were indeed received and dealt with in Zimbabwe as diplomats.

[27] Shorter Oxford Dictionary: 'A public minister sent by one sovereign or government to another for the transaction of diplomatic business. Now, *esp.* a minister plenipotentiary, ranking below an ambassador, and above a 'charge d'affaires'.

[44] On that last leg it was asserted, variously, that the judges were 'received in Zimbabwe and granted interviews in their capacity as envoys of the President' and that 'all parties shared the understanding that the meetings and discussions arranged for and by the envoys were confidential in nature'; that they 'held confidential discussions with various representatives of the Republic of Zimbabwe and were supplied information in confidence on behalf of the state'; that the judges 'were received and hosted as special envoys by the Government of Zimbabwe' on the 'understanding that any communications between the representatives of the Government of Zimbabwe and the [judges] was in confidence'; that the government of Zimbabwe 'facilitated the necessary exchanges required for purposes of the diplomatic mission' which included 'interactions with representatives of the government of Zimbabwe and other officials who communicated their views to the two [judges] in confidence'.

[45] Even then, the appellants do not assert that the judges received information only from the government, but say that they received information from the government 'amongst others'. Where a record contains partly information that may or must be refused and partly other information, then the public body is obliged by s 28(1) to provide access to the latter if the former can reasonably be severed. In this case there is no more than a bland assertion that severance of one from the other is not reasonably possible, without explanation for why that is so, and without even an indication of the source and nature of the unprotected information.

[46] But more important for present purposes, there is no evidential basis at all for the purported assertions of fact that I have referred to. Not

Mr Fowler nor Ms Tshabalala-Msimang nor Mr Chikane accompanied the judges on their visit to Zimbabwe and none purports to have direct knowledge of how the judges went about their business or of the information that they received. Nor has a basis been laid for establishing those purported facts upon hearsay evidence. On the face of it those assertions seem simply to have been constructed and they can be summarily discounted.

[47] We are left with assertions that the judges were despatched on a diplomatic mission – from which we are evidently expected to infer – at best for the appellants – that they received information from the government of Zimbabwe and received that information on conditions of diplomatic protocol.

[48] At first the appellants cast the judges in the role of diplomats rather tentatively. Mr Fowler described them initially as no more than 'something in the nature of envoys' but the appellants became emboldened as the affidavits unfolded. Later it was said that the judges were on a 'diplomatic mission'; yet later that they were 'special envoys' to the President; and finally that they were 'in essence the embodiment of the President'.

[49] Diplomacy is an executive and not a judicial function. I would need clear and substantiated evidence to persuade me that judges would assume that role, or that it would be approved by the Chief Justice (who is alleged to have approved their mission). While judges might from time to time perform functions that are not strictly judicial Chaskalson P

pointed out in *SA Association of Personal Injury Lawyers v Heath*[28] that 'there are limits to what is permissible'. He went on to say:

'Certain functions are so far removed from the judicial function that to permit Judges to perform them would blur the separation that must be maintained between the Judiciary and other branches of government. For instance, under our system a judicial officer could not be a member of a legislature or cabinet, or a functionary in government, such as the commissioner of police. These functions are not "appropriate to the central mission of the Judiciary". They are functions central to the mission of the Legislature and Executive and must be performed by members of those branches of government.'

[50] Once more an evidential basis for the assertions is entirely absent. Neither Mr Fowler nor Mr Chikane (and also not Ms Tshabalala-Msimang) has direct knowledge of how the judges went about their business, whom they met, what they discussed, and on what terms their discussions took place. No basis is even laid for advancing hearsay evidence to that effect. Of course, it is possible that they have gleaned those facts from the report itself, but as Mr Fowler was at pains to point out, s 25(3) requires an information officer to exclude from his or her reasons for refusing a request 'any reference to the content of the record', and I think that must have been intended to apply as much when the public body seeks to justify its refusal in court proceedings. Indeed, the approach that was taken at least by Mr Fowler seems to me to be rather unfortunate. On the one hand he purports to rely upon the contents of the report to reach at least some of his conclusions, while on the other hand he tells M&G and this court that he is prohibited by law from revealing the content of the report. I have pointed out that if facts are to be established by inference then it is for the court – and not the witness – to draw those inferences. The role of a witness or witnesses is only to place

[28] 2001 (1) SA 883 (CC) para 35.

the primary facts before the court to enable the inference to be drawn. No such primary facts have been established in this case.

[51] Counsel for the appellants ultimately found himself obliged to abandon even the assertions that the judges went about their business as diplomats, with all that diplomacy entails. He said candidly that the most that could truly be found on the affidavits was that the judges were received in Zimbabwe with the courtesies that are ordinarily accorded to diplomats. I have little doubt that judges who visit another country on official business will usually be accorded courtesies of that kind but none of the further assertions that are made by the appellants necessarily follows from that fact.

[52] 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 as a 'judicial peek' at the record that is in issue. A court that does that is prohibited from disclosing to any person, including the requester, 'any record … which on a request for access, may or must be refused'. Courts earn the trust of the public by conducting their business openly and with reasons for their decisions. I think a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust. There will no doubt be cases where a court might properly make use of those powers but they are no substitute for the public body laying a proper basis for its refusal.

[53] In my view no evidential basis has been established by the appellants for refusing access to the report. 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. What the affidavits perhaps establish by inference is that the judges were commissioned to report on ‘constitutional and legal issues’ pertaining to the election. By itself that does not bring the report within the terms of the sections that were relied upon.

[54] There is no need to relate the findings of the court below in full. It is sufficient to say that it found that no evidential basis had been laid for the refusal. For the reasons I have given its conclusion cannot be faulted. If the Constitution and the Act are indeed a bridge to a culture of justification it seems to me that for the appellants in this case it has been a bridge too far.

[55] The appeal is dismissed with costs that include the costs of two counsel.

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	M T K Moerane SC L Gcabashe Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
For respondent:	J J Gauntlett SC F Ismail F B Pelser Instructed by: Webber Wentzel, Johannesburg Honey Attorneys, Bloemfontein