

SAHA Dialogue Forum PAIA and strategic litigation

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At tale of four public interest cases from 2011

- Mail & Guardian v Presidency Nov 2011 Con Court
 - **Khampepe-Moseneke report of 2002**
- Centre for Social Accountability v Secretary of Parliament July 2011 ECG
 - **Names of Travelgate accused**
- De Lange & Media 24 v Eskom August 2011 SGHC
 - **Eskom – Billiton price formula**
- Avusa Eastern Cape v Qoboshiyane Oct 2011 ECP
 - **Kabuso report into Nelson Mandela Bay Metro**

Access to Khampepe-Moseneke Report

In 2002 the former President, Thabo Mbeki, dispatched two sitting judges (Deputy Chief Justice Dikgang Moseneke and Justice Sisi Khampepe) to Zimbabwe to conduct an investigation on the elections



Access to Khampepe-Moseneke report

Report completed in 2002

M&G requests report under PAIA
28 July 2008: Request refused by the
Deputy Information Officer

60 days to lodge an appeal under the
Promotion of Access to Information
Act – appeal unsuccessful

M&G applies to the High Court
Judgment: 4 June 2010; ordered to
grant *M&G* access to the report

President appeals to the SCA
Judgment: 14 December 2010; appeal
dismissed

President appeals to the CC
Judgment: 29 November 2011;
remitted to High Court

14 and 15 June 2012: Preliminary
hearing on "judicial peek" before
High Court

6 and 7 August: Full argument on
"judicial peek" and merits before
High Court

SCA, then Con Court?

Access to Khampepe-Moseneke report

- **Grounds of refusal:**
 - Section 41(1)(b): info provided in confidence
 - Section 44(1)(a): report used to assist in policy formulation towards in Zimbabwe
- **Public interest override in section 46:**
 - Disclosure would reveal evidence of (1) substantial contravention or failure to comply with law; or (2) imminent and serious public safety or environmental risk; and
 - Public interest in disclosure clearly outweighs harm contemplated by exemption

Khampepe-Moseneke report : Disclosure the rule

- PAIA at its best and at its worst
- **PAIA at its best**, because as a result of Con Court decision:
 - “impossible to hold accountable a government that operates in secrecy”
 - “disclosure of information is the rule and exemption from disclosure is the exception”
 - “exemptions are narrowly construed”
 - “neither the 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”

Khampepe-Monseneke report: Access delayed is access denied

- **PAIA at its worst**, because access delayed is access denied
- Costly and time consuming, and if succeed at High Court, still appeals to SCA and Con Court again
- **Delay cured or exacerbated by amendments to PAIA by Protection of Personal Info Bill?**
 - Requester can now approach Information Regulator or court in first instance to apply for relief where requests are refused
 - May have effect of minimising court action as jurisprudence of Information Regulator develops

Robust application of public interest override: Travelgate MPs

- Parliament bought claims by a travel agency against MPs who had allegedly defrauded travel voucher system; agreement dated 17 February 2009
- Access sought to schedule to agreement listing names of MPs and nature and quantum of claims
- Request under PAIA made 16 March 2009; appeal on 17 April 2009; then appeal on 12 August 2009 by third parties (MPs) against decision to grant access and decision not to grant access on 24 September 2009
- Case heard on 21 October 2010 and decided on 28 July 2011
- Ground of refusal: section 34(1) – unreasonable disclosure of personal information of MPs
- Court rejected ground of refusal – circumstances in which claim travel benefits not private
- In any event public interest override: substantial contravention of law + public interest in disclosure outweighs harm of breach of privacy

Robust application of public interest override: Kabuso report

- Report into maladministration in Nelson Mandela Bay Metro by Kabuso CC for MEC in Dept Local Government, Eastern Cape
- PAIA request refused on 15 December 2010; appeal rejected on 21 January 2011
- Case heard 1 September 2011 and decided 20 October 2011
- Ground of refusal:
 - Section 44(1)(a): report to assist in taking of decision in exercise of power or performance of duty
 - Section 44(1)(b): disclosure would frustrate deliberative process in public body
- But public interest override in section 46:
 - Acts of maladministration in province
 - Response to report by Nelson Mandela Bay Metro outstanding for long time – against accountability of public bodies
- On appeal – 14 Nov 2012

Robust application of public interest override: Eskom/ BHP contracts

- Contracts between Eskom and BHP Billiton companies in relation to price of supply of electricity at Richards Bay and Maputo aluminium smelters
- PAIA request on 18 September 2009; refused 13 November 2009
- Case heard 11 April 2011; decided 29 July 2011
- Ground of refusal:
 - Section 36(1)(b): pricing information would cause harm to BHP because not available to its competitors ; would reveal input/ production costs at its smelters
 - Section 36(1)(c): pricing info could put BHP at disadvantage in contractual negotiations and prejudice BHP in commercial competition
- But public interest override in section 46 justified disclosure to Media 24
 - Short supply of electricity can cause serious harm to country
 - Contracts linked to short supply
 - Would reveal imminent and serious public safety or environmental risk
- Appeal – 8 Nov 2012

Conclusion

- PAIA has been used successfully in strategic litigation, and will continue to be
- Positive responses by courts so far on “public interest” override
- However, major obstacles are legal costs in bringing applications to court, and “wheels of justice” turning very slowly
- Access to information delayed is access denied