There and Back Again: The Long Road to Access to Information in *M&G Media v President of the Republic of South Africa*

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The Road goes ever on and on
Out from the door where it began.
Now far ahead the Road has gone,
Let others follow it who can!

Bilbo Baggins[1]

I Introduction

This comment chronicles the ongoing uphill journey of a single case – landmark litigation on the right of access to information – through three courts, and back again, over six years. We survey the view from the summit – the proceedings before the Constitutional Court – to consider and critically analyse how the Court's treatment of the matter has defined the landscape of litigation in factual disputes about whether information held by the state has been justifiably hidden from public sight. We identify four flaws in the Court's approach. These flaws, we argue, are likely to discourage the public from effectively enforcing their right to know.

Before we begin this adventure, we believe it necessary and wise to traverse briefly the map provided to the public for the exercise of the right of access to information. The Promotion of Access to Information Act 2 of 2000 (PAIA) was enacted in terms of s 32(2) of the Constitution ('Final Constitution' or 'FC'), to give effect to the right of access to any information held by the state,[2] and to any information held by another person, which is required for the exercise or

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[1] JRR Tolkien *The Lord of the Rings: The Return of the King* (1955) Book 6 Chapter 6. Authored by avid Tolkien enthusiasts, this case comment takes its headings and subheadings from the chapters of JRR Tolkien *The Hobbit: There and Back Again* (1937).

[2] FC s 32(1)*(a)*.

protection of any rights.[3] Among other things, PAIA provides mechanisms for persons to request information from both public and private bodies (in Parts 2 and 3 of PAIA, respectively) and for the bodies from whom information is requested to refuse access to information on specified grounds of justification.

Most importantly for present purposes, Part 4 of PAIA provides the public with procedural remedies against unjustified refusals of requests for information. The first chapter of Part 4 provides for the lodging of an internal appeal against the decision of an information officer of a public body.[4] The second chapter provides for an application to court by a person aggrieved by the refusal of her request or the dismissal of an internal appeal.[5] Such an application does not constitute an appeal or a review of the refusal or dismissal. It is a *de novo* assessment by the court of whether valid grounds exist for the refusal of access to the requested record.[6]

An application to court in terms of s 78 of PAIA is governed by two procedural prescripts: one general and one special. The general prescript is set out in s 81 of PAIA. It provides that proceedings under PAIA are civil proceedings.[7] The civil rules of evidence apply, under which the required standard of proof is a preponderance of probabilities.[8] Significantly, s 81(3) of PAIA states that the person refusing a request for information bears the burden of proving that the refusal is justified.[9] The special prescript is set out in s 80 of PAIA. It provides that a court may examine the requested record,[10] may receive representations from any of the parties in private,[11] and may restrict public access to the proceedings.[12]

In *President of the Republic of South Africa & Others v M&G Media Limited*, the Constitutional Court faced, for the first time, the challenge of ascertaining the proper application of Part 4 of PAIA.[13] In particular, it was obliged to determine the appropriate interplay between ss 80 and 81 of PAIA. This problem split the Court – five votes to four. The two judgments differed drastically on two vital questions. First, what quality and quantum of evidence is required from a public body seeking to justify refusing a request for access to information? Second, what should a court do if it has any doubt as to whether the tendered evidence establishes such grounds?

In this comment on *M&G CC*, we first set out its history before it reached the Constitutional Court. Thereafter, we critically analyse the judgment of the

[3] FC s 32(1)*(b)*.

[4] No internal appeal is required in respect of a private body.

[5] See PAIA s 78: sets out the circumstances in which a court application may be made. See PAIA s 82: sets out the relief that may be granted.

[6] This principle was articulated by the Pretoria High Court in *M&G Media Limited and Another v President of the Republic of South Africa & Others* [2010] ZAGPPHC 43 (4 June 2010)(*M&G HC*). The High Court responded to The Presidency's assertion that the proceedings were a form of review. The High Court's position was upheld by the Supreme Court of Appeal and the Constitutional Court.

[7] PAIA s 81(1).

[8] PAIA s 81(2).

[9] PAIA s 81(3).

[10] PAIA s 80(1) and (2).

[11] PAIA s 80(3)*(a)*.

[12] PAIA s 80(3)*(b)* and *(c)*.

[13] *President of the Republic of South Africa & Others v M&G Media Ltd* [2011] ZACC 32, 2012 (2) SA 50 (CC)(*M&G CC*).

Constitutional Court, as well as its practical implications for access to information. Our analysis focuses on four decisions made by the Court: (i) that The Presidency had presented sufficient evidence to justify its refusal of access to the Report; (ii) that the High Court should have examined the Report before it could responsibly order its release; (iii) that the matter should be remitted to the High Court for such examination to take place; and (iv) that M&G should not be entitled to recover from The Presidency any of its costs incurred in the High Court, the Supreme Court of Appeal and the Constitutional Court.

II Over hill and under hill: the history of the matter

In the build-up to the contested 2002 presidential election in Zimbabwe, the then President Thabo Mbeki asked two judges – Justice Sisi Khampepe and Justice Dikgang Moseneke – to visit the country and to prepare a report on legal and constitutional dimensions of the election ('Report'). They duly did so and provided the Report to the President. Six years later, in response to rising public interest in Zimbabwe's controversial and violent presidential election in 2008 – which President Mbeki had been mandated to mediate – the publisher of the *Mail & Guardian* weekly newspaper, M&G Media Limited (M&G), lodged a request for access to the Report in terms of s 18 of PAIA.

The request was refused by the Deputy Information Officer in The Presidency, Trevor Fowler. He proferred two grounds for refusal. Firstly, the disclosure of the Report 'would reveal information supplied in confidence by or on behalf of another state or an international organisation'. Secondly, he stated 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 two grounds of refusal relied upon by Fowler are set out in ss 41(1)*(b)*(i) and 44(1)*(a)* of PAIA, respectively.

M&G lodged an internal appeal against the refusal under s 74 of PAIA. This internal appeal was dismissed by the Minister in The Presidency, Manto Tshabalala-Msimang. Her stated grounds for dismissing the appeal were identical to the grounds relied upon by Fowler.

M&G then launched an application in the North Gauteng High Court, Pretoria (as it then was) (before Sapire AJ) in terms of s 78 of PAIA. The application was opposed by The Presidency: it persisted in relying on ss 41(1)*(b)*(i) and 44(1)*(a)* of PAIA. In its opposing papers The Presidency also sought to raise a new ground of refusal. The Report was ostensibly 'a record of the Cabinet' and was, as such, exempt from the application of PAIA.[14] In support of its opposition to the application, The Presidency filed affidavits by Fowler, Tshabalala-Msimang, Frank Chikane, then the Director-General in The Presidency, and Kgalema Motlanthe, the President at the time. The Presidency filed no affidavits by President Mbeki or Justices Khampepe and Moseneke.

[14] PAIA s 12*(a)* of PAIA.

The first issue noted by the High Court was that none of the individuals who had deposed to affidavits on behalf of The Presidency: (i) had any personal knowledge regarding the appointment of the judges to prepare the Report; (ii) was in any position to attest to the reasons for their appointment or the nature of their mandate; or (iii) had any personal knowledge of what transpired during the course of the judges' visit to Zimbabwe or how and from whom the information contained in the Report was obtained. The High Court found that it was not possible to accept the evidence of the individuals who deposed to affidavits in support of The Presidency regarding facts of which they had no personal knowledge. It also noted that the affidavits did little more than recite the wording of the grounds of refusal relied upon under PAIA and provided no factual evidence to support such reliance.[15]

The High Court held that, in the absence of affidavits from the two judges or individuals from whom the judges received information, no evidence existed to support The Presidency's assertion that the information in the Report had been supplied in confidence by or on behalf of another state or international organisation. The High Court's conclusion was bolstered by the fact that The Presidency had admitted in its own affidavits that the information in the Report was *not* obtained exclusively from the Zimbabwean government.[16]

With respect to the second ground of refusal, the High Court noted that on Fowler's own version, the President only decided to use the Report to formulate policy *after* he had received the Report. The Court held that it could not *logically* be said that the Report was obtained for the purpose of formulating policy.[17] The argument that the Report was a record of the Cabinet and thus immune from the application of PAIA, was also dismissed. The President is not the Cabinet and there was no evidence that the Report was ever even placed before the Cabinet.[18] The High Court concluded that The Presidency had failed to adduce any evidence that justified its refusal of M&G's request and that the application ought to be granted.[19]

The Presidency lodged an appeal with the Supreme Court of Appeal, which was dismissed. In dismissing the appeal, the Supreme Court of Appeal (unanimously per Nugent JA, with Van Heerden, Maya and Cachalia JJA and Bertelsmann AJA) emphasised that our new constitutional order is founded on a culture of justification as opposed to the past culture of authority.[20] Public officials must

[15] *M&G HC* (note 6 above) at pages 7–8.

[16] Ibid at pages 9–10.

[17] Ibid at pages 11–12.

[18] Ibid at pages 8–9.

[19] Ibid at pages 12–13.

[20] This leitmotif of the new constitutional order can be traced to Etienne Mureinik's still vibrant ur-text on grounds for determining the constitutionality of public and private action. E Mureinik '"A Bridge to Where": An Introduction to the Interim Constitution' (1994) 10 South African Journal on Human Rights 1.

give adequate reasons for their decisions.[21] Like the High Court, the Supreme Court of Appeal found The Presidency's affidavits to be insufficient to bring the Report within the exemptions relied upon, and held that this was a fatal flaw in The Presidency's case.

The Supreme Court of Appeal 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 scrutinise 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 s 3 of the Law of Evidence Amendment Act 45 of 1988.[22] However, the Court held that the 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 within their terms'.[23]

With respect to Chikane's evidence, the Supreme Court of Appeal found that his assertion that certain facts were in his personal knowledge was insufficient in the absence of evidence as to how that knowledge was acquired.[24] The Court also 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 Moseneke and Justice Khampepe.[25] Given the paucity of meaningful evidence in the affidavits, the Court dismissed each of the grounds of refusal raised by The Presidency and held that The Presidency had not laid a basis for refusing access to the Report.[26]

[21] *President of the Republic of South Africa & Others v M&G Media Ltd* [2010] ZASCA 177, 2011 (2) SA 1 (SCA)(*M&G SCA*) at paras 10–11. Our rule of law jurisprudence and the legality principle have deeply entrenched this FC s 1*(c)*-based provision of our basic law. See *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC); *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Other*s C [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC). See F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) Chapter 11. J Fowkes 'Founding Provisions' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 6, 2014) Chapter 13; M Bishop 'Rationality is Dead! Long Live Rationality! Saving Rational Basis Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench & the Academy* (2012) 1; A Price 'The Content and Justification of Rationality Review' in S Woolman & D Bilchitz (eds) *Is This Seat Taken? Conversations at the Bar, the Bench & the Academy* (2012) 38.

[22] *M&G SCA* (note 21 above) at paras 15–16.

[23] Ibid at para 20.

[24] Ibid at paras 36–39.

[25] Ibid at para 20.

[26] Ibid at paras 53–55.

III On the doorstep: the proceedings in the Constitutional Court

The Presidency, predictably, applied for leave to appeal to the Constitutional Court. Leave was granted. The Court provided no specific reasons.[27] The Constitutional Court, after hearing initial argument on the merits of the appeal, then requested further argument.

The narrow majority (Ngcobo CJ, with Froneman J, Mogoeng J, Mthiyane AJ and Yacoob J concurring) upheld the appeal. It held that the evidence presented by The Presidency, considered within the statutory constraints of what it was obliged to provide, was sufficient to establish a basis for refusal. As a result, a court could not responsibly order the release of the Report without first examining it under s 80 of PAIA. The majority reversed the orders of the High Court and the Supreme Court of Appeal (including their costs orders in favour of M&G), and remitted the matter back to the High Court so that it might engage in a proper examination of the Report.

The minority (Cameron J, with Jafta J, Nkabinde J and Van der Westhuizen J concurring) would have dismissed the appeal. It opined that The Presidency had failed to justify its refusal under PAIA, and further failed to provide a plausible basis for its plea that PAIA itself precluded it from providing adequate reasons for its refusal. The minority further contended that secret judicial examination – as had occurred in this matter – should be invoked rarely, and only to amplify access to information.

A Riddles in the Dark: The Decision that the Evidence was Sufficient

The first question confronting the Constitutional Court in this matter was whether The Presidency had adduced sufficient evidence to establish valid grounds for refusing to release the Report. In answering this question, Ngcobo CJ began by reiterating that, under our law, 'the disclosure of information is the rule and exemption from disclosure is the exception'.[28]

Ngcobo CJ explained that, in proceedings under PAIA, a court does not conduct a review of the refusal of access to information but 'decides the claim of exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits'.[29] The proper approach to evidence in such proceedings was set out as follows:

> Section 81 provides that proceedings under PAIA are civil proceedings and the rules of evidence applicable in civil proceedings apply. The burden of establishing that the refusal of access to information is justified under the provisions of PAIA rests on the state or any other party refusing access. … The evidentiary burden borne by the state pursuant to section 81(3) must be discharged, as in any civil proceedings, on a balance of probabilities.[30]

Requiring the refuser to prove that the refusal was justified, as PAIA does, is understandable. The alternative, requiring the requester to prove that the refusal

[27] *M&G CC* (note 13 above) at para 3.
[28] Ibid at para 9.
[29] Ibid at para 14.
[30] Ibid at paras 13–14.

was unjustified, 'would be manifestly unfair and contrary to the spirit of PAIA read in the light of section 32 of the Constitution.'[31] The refuser has unrestricted access to the contents of the record. The requester has none.

After undertaking a comparative analysis of the position in the United States of America, Canada and Australia, with 'particular caution', in terms of FC s 39(1) *(c)*,[32] Ngcobo CJ concluded as follows:

> It is apparent from this comparative analysis of the standards applied by 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.[33]

Ngcobo CJ then adumbrated the test as to 'whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed'.[34] In this case, applying that test turned not on a question 'of the admissibility of evidence, but of the sufficiency of evidence'. The Presidency's deponents all asserted personal knowledge of the facts that: (a) the two judges received information from representatives of the Zimbabwean government in confidence and (b) the report was commissioned for the purpose of assisting the President in the formulation of policy relating to the situation in Zimbabwe.[35]

In determining whether such assertions were indeed 'sufficient', an 'indication of how the alleged knowledge was acquired is necessary to determine the weight, if any, to be attached'. In this respect, Ngcobo CJ held, importantly, that:

> 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 alleged.[36]

At this critical juncture, the Court narrowly splits. Ngcobo CJ relied on *Barclays National Bank v Love*[37] as authority for the proposition that it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his personal knowledge. He must simply offer some indication that his office or capacity would give him an opportunity to have acquired such personal knowledge.[38]

[31] Ibid at para 15.
[32] Ibid at paras 16–21.
[33] Ibid at para 22.
[34] Ibid at para 25.
[35] Ibid at para 27.
[36] Ibid at para 28.
[37] 1975 (2) SA 514 (D)(*Love*) at 516A–B.
[38] *M&G CC* (note 13 above) at para 29 (According to Ngcobo CJ: '[T]his approach was affirmed by the Appellate Division in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 424A–D, and is still applied in assessing whether a deponent can reasonably depose to the facts with regard to which he claims to have personal knowledge.')

Ngcobo CJ recognised that this principle should be applied with caution in access to information cases.[39] However, he did not explain how such caution should manifest. Moreover, he offered no guide as to how he had exercised such caution in his treatment of the evidence in this case. Although The Presidency's deponents did not explain how they acquired personal knowledge of the facts allegedly justifying secrecy, Ngcobo CJ appears to have been satisfied that they acquired it in the course of their duties in the Office of The Presidency.

Cameron J, in his minority opinion, applied a stricter standard. Like Ngcobo CJ, Cameron J acknowledged that, in ordinary civil proceedings, a court may sometimes conclude that a witness had personal knowledge of asserted facts even in the absence of an adequate explanation of how she or he acquired them. Cameron J warned, however, 'that these are not ordinary commercial proceedings, but a determination involving the constitutional right of access to government-held information'.[40]

Cameron J found that Fowler and Tshabalala-Msimang, in refusing the request and the appeal against that refusal, did little more than incant 'the provisions of the statute'.[41] Neither of them states that they had any direct personal knowledge about the judges' mission or its terms.[42]

For Cameron J, this last piece of information disposed of The Presidency's reliance on s 41(1)*(b)*(i) of PAIA (which protects information supplied in confidence by or on behalf of a foreign state), because, apart from Fowler's and Tshabalala-Msimang's rote recitations of that section, no evidence existed to indicate, even in general terms, who had supplied information on behalf of the Zimbabwean government, nor even with whom the judges had met in Zimbabwe.[43] Moreover, although The Presidency had conceded that not all of the information in the Report was supplied in confidence by Zimbabwean state officials, neither Fowler nor Tshabalala-Msimang explained why the confidential portions of the Report could not be severed or redacted, and the non-confidential portions released.[44]

Cameron J found Fowler's and Tshabalala-Msimang's incantations equally inadequate as support of The Presidency's reliance on s 44(1)*(a)* of PAIA (which protects records prepared for the purpose of policy formulation). Even the evidence of Chikane gave no indication of how or from whence he gained personal knowledge of the matters in issue.[45]

Significantly, Cameron J contended that Chikane's assertion that he had 'personal knowledge' that the report was commissioned for policy-formulation 'is not evidence that it was'.[46] He explained this strict stance as follows:

> 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

[39] *M&G CC* (note 13 above) at para 30.
[40] Ibid at para 111.
[41] Ibid at paras 83, 86 and 89.
[42] Ibid at para 97.
[43] Ibid at para 103.
[44] Ibid at para 104.
[45] Ibid at para 100.
[46] Ibid at para 106.

> the quality, strength and reliability of his knowledge in determining whether the fact to 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. … 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.[47]

Accordingly, Cameron J concluded that the Supreme Court of Appeal was correct to hold that The Presidency had not substantiated its case and that the witnesses offered not reasons, but 'perfunctory conclusions'.[48]

Ngcobo CJ firmly disagreed. The Presidency's evidence was deemed sufficient evidence. Although neither Fowler nor Tshabalala-Msimang was personally involved in the events preceding the judges' mission, Ngcobo CJ reasoned that their reliance on the statutory grounds for refusal had to be based on their assessment of the contents of the Report itself. Ngcobo CJ explains the logic of his thinking as follows:

> 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 seems 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*.[49]

With respect, Ngcobo CJ has here turned the law on its head. The regime of proof imposed by PAIA is that the *refuser* must prove *on a balance of probabilities* that the refusal was justified. Ngcobo CJ's approach is consistent with the proposition that the *requester* must prove *beyond reasonable doubt* that the refusal was unjustified. (It's a position that the Chief Justice elsewhere denied in his judgment.)

Ngcobo CJ also accepted The Presidency's argument that its hands were tied by ss 25(3)*(b)* and 77(5)*(b)* of PAIA in meeting its statutory burden,[50] as those provisions require the refuser of a request for access to information, when giving reasons for the refusal, to 'exclude, from such reasons, any reference to the content of the record'. Ngcobo CJ held that the allegation by the state that it was 'hamstrung' by these provisions from presenting further evidence 'does not appear to me to be implausible'.[51] But surely a provision that excludes the necessity of providing any reference to content of the record can only have two possible meanings: (A) the reasons need not identify the actual content, word for word, but only need to provide a general sense of what the record contains;

[47] Ibid at paras 107–109.
[48] Ibid at para 112.
[49] Ibid at para 59 (our emphasis).
[50] Ibid at para 57.
[51] Ibid at para 60.

or (B) the reasons need not reflect any factual predicate that would support the refusal, indeed the reasons need not provide any factual grounds for the refusal at all. Position A seems plausible. Position B is utterly Kafkaesque. While the Court clearly adopted Position B, it seems to want to have it both ways. Consistent with Position A, Ngcobo CJ concluded that PAIA does not require the state to adduce 'the best evidence to justify refusal' but only *evidence* that is 'sufficient' for the court to conclude, on the probabilities, that the record falls within the exemption claimed.[52] Position A requires some evidence. Position B requires no evidence. The Chief Justice cannot have it both ways.

Cameron J was far less accommodating. He held that, although circumstances may obtain in which the 'hands tied' plea could be credibly raised, in this case the plea failed 'to meet even a baseline standard to warrant further probing'.[53] Moreover, the plausibility of this plea was diminished by 'the affidavits' most prominent feature – their formulaic incantation of the statute's provisions'.[54]

Cameron J also noted the apparent availability of better evidence, and the absence of any explanation of why it was not adduced. He wondered why President Mbeki and the judges had not testified, whether they were asked to do so and, if not, why not.[55] For Cameron J, The Presidency's failure to answer these questions undermined the plausibility of the 'hands-tied' argument. He thus concluded that the state's hands had not been tied because it could have obtained the evidence from Mbeki, Khampepe or Moseneke.[56] Cameron J explained that his approach was not based on requiring the state to produce the 'best' evidence. To the contrary: it required very little. However, the holes in the state's argument were such that they rendered the 'hands tied' argument utterly implausible.[57]

Cameron J's approach is clearly correct. The sufficiency of evidence in PAIA proceedings cannot be regarded as a binary question of whether or not the deponent has asserted personal knowledge of facts justifying refusal, or has claimed that its hands are tied. The sufficiency of evidence reflects a graded assessment of how reliably the refuser has proved that the refusal was justified. Under PAIA, *the burden of proof rests on the refuser*, and the standard of proof is a balance of probabilities. Accordingly, the refuser must adduce evidence that can be considered reliable enough to satisfy a court that the refusal to grant access to information is justified.

Where such evidence exists (either in the requested record itself or in other documentary or testamentary evidence), and yet the refuser is unable to provide it, the refuser must explain why it is unable to do so. So although the 'best evidence' is not necessarily required to discharge the statutory burden of proof, the failure to adduce the 'best evidence' is inevitably a factor in considering whether the evidence that has been adduced is 'sufficient'. A factual assertion may be found to amount to evidence, but that does not automatically mean

[52] Ibid at paras 25 and 32.
[53] Ibid at para 113.
[54] Ibid at para 114.
[55] Ibid at paras 116–117.
[56] Ibid at para 118.
[57] Ibid at para 120.

that it is reliable, let alone 'sufficient' for the purposes of PAIA. Even if the assertions in The Presidency's affidavits amounted to evidence, as Ngcobo CJ (erroneously) found, the sufficiency of that evidence is necessarily diminished by the fact that The Presidency did not explain how the deponents' knowledge was acquired, and why the deponents were unable to adduce better documentary or testamentary evidence, not least from President Mbeki and the judges he had sent to Zimbabwe.

In our culture of justification – of which PAIA is a pillar – The Presidency's case simply cannot be considered sufficient when it offers recitations rather than reasons and more mystery than certainty. Indeed, if one were to conceive of an objective spectrum of sufficiency (or probative reliability), it is hard to imagine how a refuser could be closer to absolute insufficiency than The Presidency in *M&G*.

B Inside Information: The Decision That the Court Should Have Examined the Report

After hearing argument on the merits of this matter, the Constitutional Court issued directions to the parties. Citing the Supreme Court of Appeal's comment that '[i]t might be that the Report contains information that was received in confidence, and it might be that it was prepared for a purpose contemplated by section 44, but that has not been established by acceptable evidence', the Court directed the parties to lodge argument addressing, among other questions, the following:

(a) the proper approach, in the light of s 80, when a court is faced with uncertainty as to whether a record falls within the exemptions claimed;
(b) the standard that a court should apply in deciding whether to invoke s 80;
(c) the relevance of a dispute of fact as to the severability of the record in applying such standard; and
(d) whether this Court should remit the matter to the High Court for reconsideration in the light of the legal principles that this Court may announce for the first time in this judgment.[58]

The requested arguments would not be the first occasion that the prospect of judicial examination of the Report was raised in these proceedings. In its founding affidavit before the High Court, M&G submitted that the Report ought to be disclosed so that the court could assess for itself whether the state's grounds of refusal had any merit.[59] In its answering affidavit, The Presidency resisted M&G's submission that s 80 should be invoked.[60] In reply, M&G noted that:

> [E]ven though the Respondents are alive to the possibility of a court perusing the report to verify their allegations and to test the Applicants' competing allegations…, it is not without significance that they have not tendered the report to this court for such purposes.

[58] Ibid at para 58, fn 62.
[59] Founding affidavit at para 44.3.
[60] Answering affidavit at para 69.

> This does not leave the Applicants with much confidence in the Respondents' allegations regarding the prospects of redacting the report.[61]

The High Court, however, declined to exercise its power to examine the Report. Furthermore, it did not provide reasons for this decision. One can infer that the Court believed that the need to review the report did not arise, as The Presidency had failed to prove its case. The Supreme Court of Appeal's basis for refusing to exercise such power was far more clear:

> 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.[62]

Ngcobo CJ disagreed with the Supreme Court of Appeal. He observed that, despite the fact that applications under s 78 of PAIA are civil proceedings,[63] and are subject to the rules of evidence applicable in civil proceedings,[64] 'proceedings under PAIA differ from ordinary civil proceedings in certain key respects'.[65] By invoking these differences, Ngcobo CJ gave judicial examination of the requested record a central place in the adjudication of access to information disputes:

> Courts should therefore approach these disputes mindful of both the disadvantage at which requesters are placed in challenging evidence put forward by the holder of the record, and the restraints placed on the party holding the information in terms of how it may refer to the contents of the record in justifying refusal of access. In the light of these challenges in producing and refuting evidence, courts have been empowered by s 80 to call for additional evidence in the form of the contested record so that they may test the validity of the exemptions claimed.[66]

Ngcobo CJ warned, however, that s 80 of PAIA 'should be used sparingly'.[67] He compared s 80 of PAIA to a similar provision in the United States. In the US, courts have held that it should be applied only 'as a last resort' or 'where absolutely necessary', 'when the affidavits are insufficient for a responsible *de novo* decision'.[68] Crucially, Ngcobo CJ went on to hold as follows:

> As a discretionary power afforded to the courts to prevent injustice, the standard for assessing whether a court should properly invoke s 80 in a given case is whether it would be in the interests of justice for it to do so.
>
> It is neither necessary nor desirable to detail all of the circumstances under which a court may conclude that it would be in the interests of justice for it to exercise its discretion and invoke the provisions of s 80. It will generally be in the interests of justice to invoke s 80 where doubt emerges, from the unique limitations parties in access to information

[61] Replying affidavit at para 29.2.
[62] *M&G SCA* (note 21 above) at para 52.
[63] Section 81(1) of PAIA.
[64] Section 81(2) of PAIA.
[65] *M&G CC* (note 13 above) at para 33.
[66] Ibid at para 36.
[67] Ibid at para 39.
[68] Ibid at para 40.

disputes face in presenting and refuting evidence, as to whether an exemption is rightly claimed.[69]

In addressing the reservations expressed by the Supreme Court of Appeal,[70] Ngcobo CJ remarked that, by applying s 80, 'the court is neither supplementing the state's case nor making out a case for the requester'. Rather, the purpose of s 80 of PAIA is 'to prevent courts from being forced into the role of mere spectators in an adversarial process that, because of the nature of access to information claims, may not produce the factual record necessary for courts to execute their judicial function responsibly'.[71]

Ngcobo CJ explained that the main purpose of s 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.[72] For these reasons Ngcobo CJ saw s 80 as 'vital to the vindication of the right of access to information'.[73]

Seizing on the Supreme Court of Appeal's comment that 'it might be' that valid grounds of refusal are applicable to the Report,[74] Ngcobo CJ held that, in light of this uncertainty, it was in the interests of justice for s 80 to be invoked.[75] This finding drew further support from the prior finding that The Presidency's evidence was sufficient to discharge its burden of proof. Somewhat ironically, Ngcobo CJ found that the interests of justice favoured a judicial peek also because of 'the constraints M&G faced in challenging the affidavit evidence put forth by the state, both in relation to state officials' reading of the report to which M&G did not have access, and in relation to the personal knowledge state officials asserted as to the judges' mandate'.[76] 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'.[77]

Yacoob J, who concurred in the judgment of Ngcobo CJ, construed the purpose of the power in s 80 more widely. In his view, courts should always examine the contested document.[78] On the other hand, Froneman J, also concurring in Ngcobo CJ's judgment, read s 80 more narrowly. He contends that the interests of justice only require judicial examination where (a) either party is constrained in presenting evidence or (b) the issue of severability is in dispute.[79]

On this question, the *M&G* Court split still further. Cameron J (and those who concurred in his judgment) firmly dissented. Cameron J accepted that s 80 of PAIA could be useful to test claims for secrecy but held that it 'should be invoked with care'.[80] He did not share Ngcobo CJ's view that s 80 imports an

[69] Ibid at paras 45–47.
[70] *M&G SCA* (note 21 above) at para 52.
[71] *M&G CC* (note 13 above) at para 50.
[72] Ibid at para 52.
[73] Ibid at para 53.
[74] *M&G SCA* (note 21 above) at para 53.
[75] *M&G CC* (note 13 above) at para 55.
[76] Ibid at para 64.
[77] Ibid at para 66.
[78] Ibid at para 74.
[79] Ibid at para 77.
[80] Ibid at para 124.

inquisitorial character to applications under PAIA. Instead, he reasoned that '[i]f the object of the statute were to create a novel form of proceeding in access disputes, and invest courts with inquisitorial powers for ready use in disputes, its provisions would not have included so plain an imposition of the burden on the holder of information.'[81] 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.[82] Cameron J posited that s 80 should only be employed 'when government plausibly asserts the hands-tied argument or a ground of exemption, but doubt exists whether the exemption is rightly claimed'.[83]

The rationale for Cameron J's approach is not only that both the burden of proof and resort to judicial examination should be given effect 'within their appropriate fields of application', but also that the judicial peek upends 'two fundamental principles of the administration of justice'.[84] It suspends 'the adversary[ial] nature of the parties' dispute, in which the court is a disinterested arbiter', and shrouds the court's operation in secrecy.[85] Star Chambers have no place in a modern constitutional democracy. Section 80 should thus be of 'rare recourse'. It presents the 'blunt risk … that the parties' dispute will be decided on the basis of a court's secret conclusions from a secret process'.[86]

We again are in agreement with Cameron J's two-fold argument. We would add a third. Secret judicial examination introduces the practical problem of entangling the parties in a stunted, complicated and costly exercise. It operates to the prejudice of the requester. The requester is explicitly excluded from meaningful participation in the proceedings. Yet he, she or it is required to be available for them at its own expense. This procedural morass is well illustrated by the post-remittal progress of *M&G* in the High Court.

A harmonious reading of ss 80 and 81 of PAIA requires that the exceptional resort to secret judicial examination need not, and must not, disturb or displace the statutory burden and standard of proof. Section 81 places the burden squarely on the refuser to prove that the refusal is justified, and to do so on a balance of probabilities. To hold, as the majority did, that s 80 can apply when that burden has not been discharged, but where there remains some residual doubt about whether the refusal is justified, renders the application of s 81 at best inefficient and often ineffective, and destroys much of its intended purpose.

To lighten the burden and standard of proof imposed strikes at the very essence of the right of access to information. PAIA was enacted in order to 'foster a culture of transparency and accountability' and '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'.[87] For this reason, in our constitutional order, transparency is the rule and secrecy the exception. Section

[81] Ibid at para 125.
[82] Ibid at para 126.
[83] Ibid at para 127.
[84] Ibid at para 126.
[85] Ibid at para 128.
[86] Ibid at para 129.
[87] Preamble of PAIA.

81's imposition of the burden of proof on the refuser gives practical expression to the fundamental presumption of disclosure. Any disturbance of that burden undercuts the underlying essence of the right. Thus, to alleviate the state's burden to justify its claims to secrecy, as Ngcobo CJ did, even if only by providing a safety net of judicial examination when the state has failed to discharge its burden, does violence to the plain meaning of section 81.

In order to give equal functional life to both s 80 and s 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 s 80 is not to complete the refuser's case. It serves to compare it to the record in question in order to test its probity. The record should not be examined 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 s 81. Judicial examination would remain a discretionary measure. A court could still satisfy itself that a refuser's evidence is reliable by more conventional methods: namely, an assessment of contradictory documents or of witnesses' credibility under cross-examination. The exceptional power to examine the record would only require application where the court cannot otherwise satisfy itself of the reliability of the refuser's evidence.

This position is buttressed by the constitutional imperative of interpreting any legislation to 'promote the spirit, purport and objects of the Bill of Rights'.[88] This imperative informed the reasoning of the Supreme Court of Appeal in *Minister for Provincial and Local Government of the Republic of South Africa v Unrecognised Traditional Leaders of the Limpopo Province.*[89] The Court held that 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 a provision be restricted only to an extent which is reasonable and justifiable'.[90] We submit that the same set of reasons should apply with equal force to the interpretation of the interplay between s 80 and s 81.

[88] FC s 39(2). The Constitutional Court has always been clear about the fact that courts must prefer an interpretation of legislation that falls within the remit of constitutional norms over those that do not. See, eg, *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and Others* [2000] ZACC 12, 2001 (1) SA 545 (CC) at para 23. Soon after *M&G CC,* the Court went even further and stated that where there are two interpretations of a provision that are 'constitutionally compliant, one would then have to prefer the interpretation that conforms better with the spirit, purport and objects of the Bill of Rights.' *South African Transport and Allied Workers Union (SATAWU) and Others v Moloto and Another NNO* [2012] ZACC 19, 2012 (6) SA 249 (CC) at para 72.

[89] *Minister for Provincial and Local Government of the Republic of South Africa v Unrecognised Traditional Leaders of the Limpopo Province (Sekhukhuneland)* [2004] ZASCA 93, 2005 (2) SA 110 (SCA), [2005] 1 All SA 559 (SCA).

[90] Ibid at para 16.

It is important to emphasise that the standard of proof imposed by PAIA is a balance of probabilities, not the presence of 'doubt', as intimated by Ngcobo CJ.[91] This dubious 'doubt standard' led Ngcobo CJ to hold that the Supreme Court of Appeal had failed to act 'responsibly' when it ordered the release of the Report without first examining it.[92]

The finding that s 80 should be applied whenever a court cannot 'responsibly' decide on disclosure, without first examining the requested record, raises questions that promise to be extremely difficult to resolve in practice. Although Ngcobo CJ narrowed the notion of responsibility to the familiar standard of 'the interests of justice', this standard hardly offers an objective compass for the application of s 80. The Chief Justice held that it 'will generally be in the interests of justice to invoke s 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'[93] – this does, however, remain a value judgment . It is to be determined according to the circumstances of each case, with little guidance as to how much 'doubt' justifies a judicial peek. This approach threatens to reduce the standard of proof required of the refuser from a balance of probabilities to the presence of doubt. Moreover, it is inevitable in opposed proceedings (and perhaps even in unopposed proceedings) that some degree of doubt will seep in when a party fails to discharge its burden of proof. Indeed, the pragmatic standard of proof applies in civil proceedings for that very reason.

While Ngcobo CJ held that it 'is neither necessary nor desirable to detail all of the circumstances under which a court may conclude that it would be in the interests of justice' to apply s 80,[94] we would respectfully beg to differ. The case currently under discussion amply demonstrates the importance of certainty about when a court should apply s 80. A court's decision not to do so, on its own assessment of the interests of justice, is vulnerable to reversal on appeal and remittal to the lowest court should an appellate court construe the interests of justice the slightest bit more conservatively. As we explain below, the delay and the cost occasioned by such a turn of events, for all practical purposes risk extinguishing the right of access to information.

As the majority in *M&G* were obliged to require judicial examination of the record when the refuser failed to prove its case, it is, for future cases, both necessary and desirable to set out the circumstances in which judicial examination is in the interests of justice. In this sense, even the extreme approach of Yacoob J (that it is always in the interests of justice to apply s 80) would be far preferable as a practice, than the opaque approach of Ngcobo CJ. The extreme approach would eliminate the lengthy and costly consequences of an appealable decision by a lower court that a judicial peek is unnecessary.

It was, therefore, hardly irresponsible for the Supreme Court of Appeal to dispose of this matter in the way that it did. It is inimical to the presumptions underpinning PAIA to treat the state with the kind of patience and leniency

[91] *M&G CC* (note 13 above) at para 46.
[92] Ibid at para 55.
[93] Ibid at para 46.
[94] Ibid at para 46.

that a court would typically reserve for an indigent or illiterate litigant. Quite the contrary, the state is surely among the most informed, seasoned and well-resourced litigants in the country. It must be presumed to be in a position to acquire and to adduce the best available evidence to justify its claims to secrecy or, at the very least, to explain why it is unable to adduce such evidence. In this light, it cannot be considered irresponsible for a court to hold the state to the evidence it has tendered in support of a refusal. A court cannot be expected either to lower the level of evidence required or to add to the evidence tendered, when the state has failed to discharge its statutory burden of proof.

It is worth recounting, at this point, the remarkable coincidence that, on the very same day as the Constitutional Court delivered judgment in *M&G*, the Western Cape High Court, Cape Town (per Griesel J) delivered a judgment invoking its power under s 80 of PAIA in *Independent Newspapers v African National Congress*.[95] (The first time a High Court has done so.) It deployed s 80 on the grounds that the refuser's evidence established that the requested record was broader in its contents than the information that the requester was entitled to access, and that it was impossible for the Court to determine appropriate severability without examining the record.[96] The record was duly provided to the Court for secret examination. After reviewing the record in camera, the High Court issued a final order that the record be released. (The order was rendered utterly final by the fact that the full unredacted record was attached to the order itself!).[97] In making this order, the Court remarked that, in light of the Constitutional Court's statement in *M&G* that s 80 should be used 'sparingly', it 'may have been unduly lenient in favour of the respondents by invoking the provisions of section 80'.[98]

While Ngcobo CJ observed that the very existence of s 80 'should, in itself, deter frivolous claims of exemptions',[99] its potentially deleterious consequences – as reflected in *M&G* – cannot be overstated. As we have seen, s 80 should certainly not be available as an avoidance mechanism. While s 80 may serve to discourage the unjustified refusal of requests for access to information, s 89 of PAIA immunises officials from criminal and civil liability 'for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty' under PAIA. Section 89, coupled with the pressure that may realistically be brought to bear on public or private officials by their superiors, diminishes the deterrent potency of s 80.

To return finally to *M&G*: for the same reasons advanced above, the proper application of s 81 results in The Presidency having failed to prove the sufficiency of the evidence presented. It cannot possibly be in the interests of justice to require recourse to s 80 in this matter or any similar dispute.

[95] *Independent Newspapers (Pty) Ltd & Others v African National Congress & Another (1)* [2011] ZAWCHC 436.

[96] Ibid at para 27.

[97] *Independent Newspapers (Pty) Ltd & Others v African National Congress & Another (2)* [2012] ZAWCHC 4.

[98] Ibid at paras 13–14.

[99] *M&G CC* (note 13 above) at para 52.

C Not At Home: The Decision to Remit the Matter to the High Court

The issue of remittal was raised by the Constitutional Court. The Court requested submissions from the parties on whether the matter should be remitted to the High Court if it was found that the courts below ought to have invoked s 80. Everyone demurred.

The Presidency was not in favour of remittal. It argued that the evidence before the Court was sufficient for the case to be decided. The Presidency's Cassius Lubisi had previously also stated under oath, in his affidavit before the Constitutional Court, that there was no need to remit the matter for further evidence.[100] M&G argued that such a remittal was not necessary. The matter, it contended, would result in wasted costs and, in all probability, end up back before the Constitutional Court (this prediction transpired to be true).

In support of its decision to remit the matter to the High Court, Ngcobo CJ invoked s 80(3) of PAIA. Section 80(3) empowers a court that decides to exercise its discretion under s 80 to receive ex parte submissions, conduct a hearing in camera and prohibit the publication of information regarding the proceedings. Ngcobo CJ reasoned that various options are available to a court under s 80(3) and that 'further issues may arise during the course of the hearing that may require further attention'.[101] Ngcobo CJ does not state why the High Court would have been better placed to deal with these issues or what harm would arise if the Constitutional Court acted as court of first instance in relation to those issues. All that s 80(3) does is to empower the court with various options when it decides to take a judicial peek. The court is not required to exercise any of the options available to it. It could simply review the disputed record and issue a decision without having recourse to any of the options under s 80(3).

Moreover, the Constitutional Court apparently ignored s 80(1) of PAIA, which provides that 'any court hearing an application, *or an appeal against a decision on that application*, may examine any record'. (PAIA's explicit provision for an appellate court to examine the record itself (ie without remitting the matter to the court a quo) implies that there is nothing inherently objectionable about such an exercise being conducted on appeal. At the very least, the Court ought to have provided compelling reasons for its decision to remit the matter to the High Court for judicial examination.

Given that full argument and *all* the available evidence from both parties had been placed before the Constitutional Court, it is difficult to comprehend why the High Court was deemed to be in a better position to read a copy of the Report and decide if it wanted to receive further submissions from one or both parties. Any submissions made by the parties, including ex parte submissions by the state, would presumably have had to be legal in nature; to permit additional affidavits in light of the history of the matter would amount to giving the state an opportunity to start its case from scratch and would be unjust in the circumstances.

The Court's decision to remit the matter comes across as yet another deft move to avoid disposing of a matter. That might be undesirable given the underlying

[100] Affidavit of Cassius Lubisi at para 33.
[101] Ibid at para 68.

constitutional imperatives at stake.[102] Or it could be viewed as an institutional necessity in a highly charged political matter.[103] However, against the backdrop of the inevitable delay in finalising the matter, as well as the additional costs that have been occasioned by the remittal, it remains hard to justify.

Ngcobo CJ did not seriously consider the submission from M&G that remitting the matter to the High Court would entail wasted costs, but curtly dismissed it as 'speculation'. This is particularly worrying in light of the Court's eventual decision on costs, discussed below.

PAIA places an explicit premium on expediting access to information. Among its stated purposes is to enable people 'to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible',[104] and 'generally, to promote transparency, accountability and effective governance of all public and private bodies'.[105]

In *Brümmer v Minister for Social Development (Brümmer)*,[106] the Constitutional Court held in relation to the right of access to information that:

> The importance of this right too, 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'.[107]

In *Avusa v Qoboshiyane*,[108] one of the first judgments to apply the Constitutional Court's judgment in *Brümmer*, the Eastern Cape High Court found that a 'disturbing factor' in the refuser's case was 'the apparent lack of appreciation of the essence of *time*'.[109] Applying the above passage of *Brümmer*, the High Court considered FC s 195(1)*(g)*, which provides that '[t]ransparency must be fostered by providing the public with *timely,* accessible and accurate information' (the Court's emphasis), and held that 'this section makes time to be of essence in matters of this nature'.[110] The *Avusa* High Court found that the delays occasioned by the refuser, whose attitude 'seem[ed] rather paternalistic and appear[ed] to reflect a distrust of the public', were decisive in determining that the public interest outweighed the prospective harm justifying refusal. It required the release of the record in terms of s 46 of PAIA.[111]

[102] See S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Review* 762; G Penfold & D Milo 'Media Freedom and the Law of Privacy: *NM v Smith (Freedom of Expression Institute as Amicus Curiae*) 2007 (5) SA 250 (CC)' (2008) 1 *Constitutional Court Review* 311.

[103] T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013).

[104] S 9*(d)* of PAIA.

[105] S 9*(e)* of PAIA.

[106] [2009] ZACC 21, 2009 (6) SA 323 (CC).

[107] Ibid at para 62 (our emphasis).

[108] *Avusa Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO & Others* [2011] ZAECPEHC, 2012 (1) SA 158 (ECP).

[109] Ibid at para 39 (our emphasis).

[110] Ibid at para 44.

[111] Ibid at paras 46–47.

The speed with which a request for access to information is brought to finality should not be viewed as an inconsequential side issue or a minor irritation – it goes to the core of the public's ability to hold the state accountable. If information is only provided several years after it was requested, then there's an obvious risk that the information will no longer be relevant or useful for achieving the purpose for which it was initially requested. A concomitant risk exists that state officials will be inclined to evade accountability simply by refusing access to a record and then dragging the matter through court *ad infinitum* until the issue becomes moot. The judgment does not address the prejudice suffered by M&G as a result of the delay in finalising this case. Its initial request for the Report was submitted in mid-2008. By the time the case was *first* heard in the Constitutional Court three years had elapsed. Under the circumstances, the decision to remit the case did not give effect to the principle that information should be provided in a timely manner. It could, therefore, not be 'in the interests of justice' to do so.

Serious concerns have been expressed by the South African Human Rights Commission, the institution charged with overseeing the implementation of PAIA, as well as civil society organisations who utilise PAIA on a regular basis, that the current enforcement mechanism under PAIA is inadequate.[112] The basic complaint raised by these organisations is that litigation is costly and time-consuming and thus acts as a barrier to access to information. Proposals have been made that instead of directing unsuccessful requesters to the courts an information regulator should be created to deal with appeals against refusal of access to information under PAIA.

Against the backdrop of the frustration experienced by the public in attempting to enforce compliance with PAIA though the courts, the decision of the Constitutional Court to remit the case to the High Court with seemingly no regard for the delays that this would cause sets a worrying precedent. The Constitutional Court's approach with regard to remittal may well stymie and undermine the constitutional right of access to information.

D A Thief in the Night: The Decision to Revoke M&G's Costs Awards

As a starting point it must be noted that access to the Report is self-evidently in the public interest. The South African government has been at the forefront of the international community's attempts to resolve the political and economic problems that have plagued Zimbabwe since the late 1990s. Zimbabwe's woes have had a direct impact on South Africa with an influx of Zimbabwean

[112] K Allan and I Currie 'Enforcing Access to Information and Privacy Rights: Evaluating the Proposals for an information protection regulator for South Africa' (2007) 23 *South African Law Journal* 570; C Kisoon 'Ten Years of Access to Information in South Africa: Some Challenges to the Effective Implementation of PAIA', available on the Open Democracy Advice Centre's website (http://www.opendemocracy.org.za/wp-content/uploads/2010/10/Ten-Years-of-Access-to-Information-in-South-Africa-Some-challenges-to-the-effective-implementation-of-PAIA-by-Chantal-Kisoon.pdf, accessed on 23 January 2014); J Klaaren 'PAIA through the Courts: Case Law and Important Developments in PAIA Litigation', available on the Open Democracy Advice Centre's website (http://www.opendemocracy.org.za/wp-content/uploads/2010/10/PAIA-Through-the-Courts-Case-Law-and-Important-Developments-in-PAIA-Litigation-by-Jonathan-Klaaren1.pdf, accessed on 23 January 2014).

nationals seeking economic opportunities or political asylum. The 2002 elections were mired in allegations of violence, intimidation and vote rigging. Yet South Africa's Parliamentary Observer Mission was one of the few oversight entities to declare that the election was legitimate. Against this backdrop, it is clear that the proceedings launched by M&G relate to a matter that is manifestly in the public interest. The proceedings also raised important constitutional issues. As noted by the Supreme Court of Appeal: '[o]pen and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy'.[113]

In both the High Court and the Supreme Court of Appeal, the courts gave costs awards in favour of M&G. These costs orders were reversed by the Constitutional Court and replaced with an order that each party should bear its own costs in the High Court, the Supreme Court of Appeal and the Constitutional Court. Save to state that the order was 'just and equitable', the court provided no reasons for its decision.[114] We are of the view that the Constitutional Court's decision in this regard was incorrect.[115]

It is useful, here, to recount the basic principles applicable to costs orders in constitutional matters. In *Ferreira v Levin*,[116] the Constitutional Court restated the generally acceptable approach to costs awards. The first principle is that a court has a broad discretion with respect to what constitutes an appropriate costs order in a particular case.[117] The second principle, which is subsidiary to the first, is that the successful party should ordinarily be awarded its costs.[118] The Constitutional Court has, on occasion, deviated from the general rule: but it has hardly done away with the rule entirely.[119]

In *Biowatch Trust v Registrar, Genetic Resources, & Others*,[120] the Court set out a comprehensive exposition of the principles applicable to an award of costs in a matter where constitutional issues are raised. Biowatch, an NGO dealing with environmental issues, had lodged a request for access to information from the Registrar of Genetic Resources regarding genetically modified organisms. The request was refused. After the refusal, Biowatch launched a court application which was largely successful. However, the High Court declined to make a costs award in Biowatch's favour on the basis that Biowatch's request for information had been framed in an unnecessarily broad and vague manner. A third party, Monsanto (Pty) Ltd, who joined the proceedings on the basis that it opposed the disclosure of its confidential information to Biowatch, was granted a costs order against Biowatch. The High Court reasoned that if Biowatch had framed its request more clearly, Monsanto would not have had to enter the fray and thereby incur unnecessary costs. Biowatch appealed against the costs orders. It argued

[113] *M&G SCA* (note 21 above) at para 1.

[114] *M&G CC* (note 13 above) at para 71.

[115] On this point, and other cost related matters, see M Bishop 'Costs' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, RS 1, 2011) Chapter 5.

[116] [1995] ZACC 13, 1996 (2) SA 621 (CC).

[117] Ibid at para 3.

[118] Ibid.

[119] See *Ferreira* (note 116 above) at para 3 (Court held that the general principles were sufficiently flexible to be adapted to deal with constitutional litigation.)

[120] [2009] ZACC 14, 2009 (6) SA 232 (CC).

that a litigant who raises constitutional issues in the public interest should not be denied its costs or mulcted in costs. The Constitutional Court articulated the following principles in relation to litigation between a private party and the state:

- It is not the identity of the parties that it important, ie whether one party is an NGO or is impecunious, but rather the nature of the issues raised;[121]
- 'The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice';
- The general rule is that 'if the government loses it should pay the costs of the other side, and if the government wins, each party should bear its own costs.'[122]

The foundational principle of the general rules adopted in *Biowatch* is the Court's statement that the primary consideration is how a costs order will hinder or promote the advancement of constitutional justice. In the case at hand, the costs order made by the court, in our view, obstructs instead of promotes the advancement of justice.

M&G was faced with responses to its initial request and its internal appeal that both the High Court and the Supreme Court of Appeal deemed to be no more than a recitation of the applicable statutory language. No detailed reasons were provided in support of the refusal – reasons that might have led the newspaper to conclude that litigation was not warranted.[123] The award of costs in the High Court was just and equitable not only because M&G was successful. Costs were justified because The Presidency fell short of the standard to be expected of the state when responding to requests for access to information and left the newspaper with little option but to litigate.

The reason why the matter proceeded to the Supreme Court of Appeal was that The Presidency decided to lodge an appeal. Accordingly, the newspaper was effectively dragged further through the courts by the state. The basis of The Presidency's appeal did not rest on an allegation that the High Court had failed to exercise its discretion to conduct a judicial peek under s 80 of the Act. On the contrary, when the issue of the judicial peek was raised by the courts in oral argument in both the High Court and the Supreme Court of Appeal, counsel for The Presidency apparently urged the court not to exercise its discretion under s 80 in order to call for a copy of the Report.[124] Instead, the state based its appeal on an attempt to defend the wholly inadequate evidence placed before the High Court. The fact that the state urged the courts below to make a decision without taking a judicial peek was conveyed to the Constitutional Court by M&G in its submissions regarding s 80. Unfortunately, the Constitutional Court appears to have placed no weight on this fact (which was not denied by The Presidency). It features nowhere

[121] Ibid at para 16.

[122] Ibid at para 22.

[123] The Constitutional Court accepted that the state cannot discharge its burden to prove that a piece of information falls within the ambit of a particular exemption by merely reciting the words of the exemption. See *M&G CC* (note 13 above).

[124] This attitude was also reflected in The Presidency's answering affidavit in the High Court.

in the judgment. This factor should have weighed heavily in favour of maintaining the extant costs orders. The most immediate effect of the Constitutional Court's decision to strip M&G of its costs in these circumstances is that the state was allowed to benefit from the obstructive stance that it adopted in the courts below.

The sole basis on which the Constitutional Court decided to reverse the judgments of the High Court and the Supreme Court of Appeal, and to remit the matter to the High Court, was that those courts should have exercised their power under s 80 but had failed to do so. This failure, however, cannot be attributed to M&G. It can only be attributable to the state – indeed, all three of its co-ordinate branches. As Ngcobo CJ acknowledged, Parliament did not specify the circumstances in which s 80 of PAIA should be invoked. The Presidency, forming the apex of the Executive, actually resisted the invocation of s 80 in both the High Court and the Supreme Court of Appeal. Finally, the Judiciary, both the High Court and the Supreme Court of Appeal, failed to invoke s 80 despite M&G's formal invitations for them to do so. Accordingly, there can be no justification for the decision to deprive M&G of the costs it was awarded in proceedings where it never set a foot wrong, whether procedurally or substantively, and where the only misstep made, on the Constitutional Court's own assessment, was attributable to the Legislature, the Executive and the Judiciary.

What should be borne in mind is that, as impliedly acknowledged in *Biowatch*, a decision that each party should bear its own costs does not have a neutral impact. Given the prohibitively high costs of litigation, requiring a private party, which litigates a public matter against the state, to bear its own costs may not advance constitutionally implicated interests of justice. The relevant circumstances with regard to costs – which the *M&G CC* Court ignored – in this case were as follows:

(i) the outcome was at best for the state a neutral one because the court upheld the majority of the underlying principles stated by the courts below regarding the state's affidavits – effectively the main respect in which the Constitutional Court differed from the courts below was that it took the view that in light of the insufficient evidence tendered by the state, s 80 should have been invoked;

(ii) the basis upon which the High Court and Supreme Court of Appeal decisions were set aside was not because the state had vindicated its position but because the *M&G* Court decided the case on the basis of an entirely new issue; and

(iii) the state argued against the judicial peek in the courts below and then changed its tune in the Constitutional Court.

Again: what is most disturbing about the Constitutional Court's decision on the issue of costs is that no reasons are provided for its decision to overturn the previous costs orders. This prospect was not raised by the Court at the hearing of the matter. Moreover,the parties were not invited to make submissions on costs when the Court subsequently invited specific argument on s 80 and the possibility of remittal. It is, accordingly, impossible to assess what, if any, factors were taken into account in reaching the decision on costs. Another issue left unanswered is why the Court, in

light of the decision to remit the case to the High Court, opted to set aside the costs orders of the courts below instead of ordering that these be costs in the cause.

A court faced with litigation in terms of PAIA ought to adopt an approach that enhances access to information rather than an attitude that impedes it. We would argue that the costs orders in the High Court and the Supreme Court of Appeal advanced constitutional justice having regard to the public interest in the subject matter of the record requested, the important constitutional issue raised and the manner in which the state conducted itself. By contrast, the Constitutional Court's decision was a backward step for litigants who seek to hold the state accountable.

IV The Return Journey: The Presidency's New Evidence

Pursuant to the remittal some six months later, the matter came before Raulinga J in the High Court.[125] Astonishingly, on the very evening before the matter was to be heard, The Presidency submitted a new affidavit by former President Thabo Mbeki in which he alleged that the judges had been dispatched as special envoys and that the purpose of the Report was to assist him with taking decisions regarding events unfolding in Zimbabwe. Brazenly, when the matter was called, The Presidency actually argued that Mbeki's affidavit rendered the judicial peek unnecessary and warranted the dismissal of the M&G application on the papers. M&G strenuously objected. Raulinga J considered himself bound by the Constitutional Court's order to take a judicial peek at the Report and decide the application on that basis, and insisted that the Report be produced. The Presidency thus abandoned their application to adduce Mbeki's affidavit and handed the Report to Raulinga J.

The Presidency, however, subsequently submitted Mbeki's affidavit again and urged that it should influence the Court's reading of the Report. Raulinga J rejected this effort, holding that s 80 did not permit a party 'to sneak new evidence through the back door'.[126] Raulinga J ruled that the new affidavits had to be assessed in terms of the rules applicable to accepting new evidence on appeal. On this basis, the affidavit was deemed inadmissible. The Presidency had offered no convincing reason to justify why it was not tendered in the court a quo.

Having read the report, Raulinga J ordered its release. He rather blisteringly stated that: 'In my view the contents of the report now in my possession resonates with the reasoning in the original High Court case, the SCA decision and the *minority* judgment in the Constitutional Court case.'[127] His ruling makes plain that the state has sought to deprive the public of access to the Report without legitimate grounds. Undeterred by the ruling, The Presidency lodged an application for leave to appeal to the full bench of the High Court. Raulinga J granted leave to appeal but ordered that the matter must proceed directly to the Supreme Court of Appeal. The Supreme Court of Appeal (unanimously per Brand JA, with Navsa, Ponnan and Mbha JJA and Mathopo AJA concurring) dismissed The Presidency's appeal,

[125] *M&G Media Ltd v President of the Republic of South Africa & Others* [2013] ZAGPPHC 35, 2013 (3) SA 591 (GNP).

[126] Ibid at para 35.

[127] Ibid at para 36 (our empahsis).

for a second time.[128] Significantly, the Court held that The Presidency's effort to introduce Mbeki's affidavit, and thereby obviate the judicial peek for which the matter had been remitted, was an 'abuse of process which cannot be tolerated'.[129]

While the Constitutional Court had accepted The Presidency's excuse that it was 'hamstrung' in its defence, and invoked s 80 to relieve that restriction, the Mbeki affidavit showed that The Presidency had been faking the hamstring all along. The Supreme Court of Appeal held that The Presidency had 'attempted to use the referral back to the High Court for a purpose which was the exact opposite of what the Constitutional Court had in mind',[130] and the Mbeki affidavit was 'a clear attempt to plug the holes in the Presidency's case that were underscored in the previous judgments, particularly the minority judgment of Cameron J'.[131]

At the time of writing, over six years after M&G had requested the Report, and almost three years after Ngcobo CJ had delivered his judgment, The Presidency had applied again for leave to appeal to the Constitutional Court. The journey continues.

> 'Victory after all I suppose!' he said, feeling his aching head.
> 'Well it seems a very gloomy business.'
>
> Bilbo Baggins[132]

[128] *President of the Republic of South Africa and Others v M&G Media Limited* [2014] ZASCA 124.
[129] Ibid at para 25.
[130] Ibid.
[131] Ibid at para 30.
[132] J R R Tolkien *The Hobbit: There and Back Again* (1937) Chapter 18.