



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG**

CASE NO: 16707/22P

In the matter between:-

NOKUTHULA GLADNESS KHANYILE

APPLICANT

and

**THE DIRECTOR-GENERAL
PROVINCE OF KWAZULU-NATAL**

FIRST RESPONDENT

THE PREMIER OF KWAZULU-NATAL

SECOND RESPONDENT

**THE MEC: KWAZULU-NATAL
DEPARTMENT OF SOCIAL DEVELOPMENT**

THIRD RESPONDENT

**THE MEC: KWAZULU-NATAL
DEPARTMENT OF TRANSPORT**

FOURTH RESPONDENT

THE MEC: KWAZULU-NATAL TREASURY

FIFTH RESPONDENT

JUDGMENT

ANNANDALE AJ:

[1] This application concerns the applicant's right of access to information. It is brought in terms of section 78 of the Promotion of Access to Information Act 2 of

2000 (PAIA) to compel production of records which the respondents have refused to disclose.

[2] PAIA was enacted to give effect to the right of access to information enshrined in section 32 of the Constitution, subject to justifiable limitations including the reasonable protection of privacy, and good governance. Its objects include the promotion of transparency, accountability and the effective governance of all public bodies.¹

[3] As functionaries exercising a public power or performing a public function in terms of any legislation, and departments of state or administration in the provincial sphere of government, the respondents are public bodies as defined in section 1 of PAIA. Requesters are entitled to the records of public bodies regardless of the reasons given for requesting access or the information officer's belief as to what the requester's reasons are for requesting access, provided only that they comply with the procedural requirements of PAIA.² If the requester has complied with the relevant procedure, access can only be refused on grounds contemplated by Chapter 4. Consequently, if the requester has complied with PAIA and the information does not fall within one of the grounds of exclusion, there is no discretion on the part of the public body or the court to refuse access.³

[4] Section 81(3) of PAIA places the burden of establishing that a refusal of a request complies with the provisions of the act on the party invoking the exemption from disclosure. Applications in terms of section 78 are civil proceedings,⁴ so that evidentiary burden must be discharged on a balance of probabilities.⁵

[5] The applicant is the former Head of the KwaZulu Natal Department of Social Development (the Department of Social Development) which is the third respondent. The information at issue comprises: the records of a meeting of the Provincial Executive Committee relating to an agenda item concerning the

¹ Sections 9(a) and (b) of PAIA.

² Section 11 of PAIA.

³ *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 58.

⁴ Section 81(1) of PAIA.

⁵ *President of the RSA and Others v M & G Media Ltd* 2012 (2) BCLR 181 (CC) para 14.

applicant; the reports of two forensic investigations into her alleged misconduct which were conducted by the office of the second respondent (the Premier) and the fifth respondent (the Provincial Treasury); and records relating to her unsuccessful applications for the posts of head of the Department of Social Development, and of the fourth respondent (the Department of Transport).

[6] The present application follows a largely unsuccessful request for access to information made to the first respondent (the Director-General) in her capacity as the Information Officer in the office of the Premier, and the Premier's dismissal of an appeal against the Director-General's refusal to provide most of the information requested.

[7] The Department of Social Development made common cause with the Director-General and the Premier in opposing the application and persisting in refusing access on various grounds. The Department of Transport did not file a notice to oppose. The Provincial Treasury did, but thereafter failed to file an answering affidavit, despite a court order directing the first to third and fifth respondents to file their answering affidavits by a specified date.

[8] This does not however mean that the application insofar as it pertains to the records of the Department of Transport and the Provincial Treasury is uncontested. Although the Department of Transport and the Provincial Treasury did not participate directly in this application, the Director-General and the Premier dealt with all the requests for information, including those relating to the records of the fourth and fifth respondents. The answering affidavit is attested to on behalf of the first to third respondents, but resists disclosure of all the categories of information. I therefore regard the exemptions from disclosure which have been relied on by the first to third respondents as being invoked also on behalf of the fourth and fifth respondents insofar as the latter's records are concerned. I consequently refer to the first to fifth respondents as 'the respondents' unless the context requires differentiation.

[9] Given the scheme of PAIA set out above, it will be apparent that the issue in this application is whether the respondents have discharged the burden of

establishing that their refusal of the requests complies with the provisions of PAIA on which they rely.

[10] A summary of the factual context within which the application arises is necessary properly to frame the issue engaged. The exposition of the relevant facts which follows is common cause unless otherwise indicated.

The facts

[11] The applicant was appointed as Head of the Department of Social Development on 1 November 2014 for a period of five years. All things being equal therefore, her term of office would have come to an end on 31 October 2019. During 2019 however, the Member of the Executive Committee of the Province of KwaZulu-Natal (the MEC) responsible for the Department of Social Development changed. Disputes and difficulties arose between the applicant and the new MEC and allegations were made by unnamed parties that the applicant was guilty of financial and human resources management misconduct.

[12] As a result of these allegations, the Premier decided to extend the applicant's contract beyond 31 October 2019 and temporarily redeploy her to his office to allow for a pre-investigation screening to take place.

[13] On 13 November 2019 there was a meeting of the Provincial Executive Committee (the PEC meeting). It is not in dispute that a resolution was taken at the PEC meeting to extend the applicant's contract of employment beyond 31 October 2019. Whether other decisions were taken at that meeting entitling the applicant to reinstatement as Head of the Department of Social Development as well as contractual damages is hotly contested.

[14] Two full-blown forensic investigations were conducted into the allegations of misconduct, which culminated in written reports (the investigation reports). The investigation into alleged financial misconduct was undertaken by the Provincial Treasury, while the human resources related investigation was conducted by the

office of the Premier. No disciplinary or other charges were ever proffered against the applicant as a result of the reports.

[15] It is unclear from the papers exactly when the pre-investigation screening and the investigations themselves commenced, or when the investigation reports were finalised, save that the results of the investigations were apparently known by 25 March 2020 when the applicant states the former Premier advised her that she had been exonerated by both investigations.

[16] The applicant was therefore disappointed when she was not re-appointed as Head of the Department of Social Development despite having been shortlisted for that position and interviewed on 30 April 2020. She was dismayed when she was not even shortlisted for the post of Head of the Department of Transport for which she applied at some point in 2020.

[17] Believing these career setbacks to be the result of the investigation reports or the dissemination of false information regarding what the investigations had found, on 10 December 2021 the applicant made four applications in terms of PAIA to the Director-General. She sought access to the following four categories of information:-

- [a] both investigation reports;
- [b] the records of the PEC meeting insofar as it related to the agenda item pertaining to the applicant, including the memorandum sent to the PEC, any presentations, discussions and decisions taken at the meeting relating to the applicant, the minutes and the audio recordings of the deliberations;
- [c] the scoresheets populated by each panel member in respect of the applicant's application for the post of Head of the Department of Social Development, the minutes and voice recording of the applicant's interview and the assessment discussions relating to the applicant;

[d] the list of applicants for the post of Head of the Department of Transport and the minutes of the shortlisting meeting insofar as they pertain to the applicant, together with reasons why she was not shortlisted.

[18] On 15 December 2021 the Director-General wrote to the applicant explaining that the office of the Premier would not be able to deal with the request within 30 days as envisaged by section 25(1) of PAIA, because there was a need to provide notification to third parties as contemplated by Chapter 5. By 9 May 2022 there was still no response. The applicant consequently demanded the records by 18 May 2022, failing which she indicated she would pursue legal avenues.

[19] This galvanised a response the day before the applicant's deadline. The response dealt with all the categories of documents requested, there being no suggestion that the applicant should have directed any of her requests elsewhere. The Director-General provided only the minutes of the interviews for the position of Head of the Department of Social Development, a summary reflecting the totals of the scoresheets for the applicant (but not the audio recordings or the scoresheets of each panel member) and the minutes of the meeting of the shortlisting committee for the position of Head of the Department of Transport with the names of the other candidates redacted because that constituted personal information protected in terms of the Protection of Personal Information Act, 4 of 2013. An appeal to the Premier for access to the balance of the information followed, albeit out of time.

[20] By then, the applicant had instituted proceedings against the Premier and the Department of Social Development out of the Pietermaritzburg High Court under case number 1536/22P for reinstatement or contractual damages (the reinstatement application). In her appeal submission, the applicant made no secret of the fact that she wanted to use at least some of the requested information in the reinstatement application and to clear her name. The exact date on which the reinstatement application was launched was not canvassed on the papers. It is therefore not apparent whether it had already been instituted when the initial request for information was substantially refused in May of 2022. It was however dismissed after all the affidavits had been filed in the present proceedings.

[21] The Premier considered the appeal on its merits and dismissed it in October 2022. The applicant having complied with the necessary procedural requirements, the present proceedings were then launched on 30 November 2022, well within the 180-day period for their institution prescribed by section 70(2)(e) of PAIA.

[22] The respondents oppose the application relying on the following provisions in Chapter 4 of PAIA: section 7 which provides that the act does not apply to records requested for criminal or civil proceedings after their commencement; section 44 which pertains to the records of public bodies containing opinions, advice, reports, or recommendations; section 23 which relates to records which cannot be found, and section 12 which exempts the records of Cabinet and its committees from disclosure under the act.

Interpretation of exemptions and sufficiency of evidence

[23] Before dealing with each of the grounds of exemption upon which the respondents rely, it is necessary to consider how the exemption provisions must be construed and what is required for the respondents to discharge the burden resting on them.

[24] In *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Limited* 2013(1) BCLR 55 (CC) (*PFE International*) para 18, the Constitutional Court held that a restrictive interpretation of the ambit of section 7 was required so as to limit the exclusion to the circumstances contemplated in that section and thereby ensure greater protection of the right of access to information to which PAIA seeks to give effect.

[25] The same approach should in my view apply to the construction of all exemption provisions by parity of reasoning, whether they exclude the application of PAIA, constitute mandatory refusal provisions or confer a discretion on state actors to refuse access. Such an approach would also be congruent with the objects of PAIA as set out in section 9 which include the promotion of transparency and accountability, and the injunction in section 2(1) of PAIA that a court must prefer any reasonable interpretation of the provision that is consistent with the objects of the

act over any alternative interpretation that is inconsistent with those objects. Other courts have adopted this approach in relation to section 36 of PAIA relating to the mandatory protection of commercial information⁶ and section 44⁷ upon which the respondents rely.

[26] I turn then to the manner in which public bodies are required to discharge the evidentiary burden. The Supreme Court of Appeal and the Constitutional Court had occasion to deal with the requirements in this regard on three occasions in connection with attempts by the Mail & Guardian newspaper to obtain access to a report prepared by two senior judges on their visit to Zimbabwe shortly before the 2002 presidential elections in that country. In the Constitutional Court judgment, *President of the RSA and Others v M & G Media Ltd* 2012 (2) BCLR 181 (CC) (*Mail & Guardian CC*) para 23 the Court explained:-

‘The proper approach to the question whether the state has discharged its burden under section 81(3) is therefore to ask whether the state has put forward *sufficient evidence* for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.’

(emphasis added).

[27] As evidence is required, reciting the language of the statute, *ipse dixit* affidavits and affidavits that merely assert the conclusion that a particular exemption applies are insufficient, the public body is required to lay a factual basis for its reliance on specific provisions.⁸

[28] If the public body is unable to discharge its burden, and does not give any indication that its inability to do so arises from other provisions of the act,⁹ then the state actor has only itself to blame.¹⁰ The respondents here invoke no such inability.

⁶ *Van der Merwe v National Lotteries Board* 2014 JDR 0844 (GP); (38293/2012) [2014] ZAGPPHC 240 (11 April 2014) para 21.

⁷ *AVUSA Publishing Eastern Cape (Pty) Ltd v Qoboshiyane NO and Others* 2012 (1) SA 158 (ECP) para 17.

⁸ *Mail & Guardian CC* paras 24 – 25.

⁹ Which claims would permit the court to utilise the ‘judicial peek provisions’ in section 80: of PAIA, see *Mail & Guardian CC* paras 33 and 113.

¹⁰ *Mail & Guardian CC* para 25.

[29] Section 81(2) of PAIA makes the rules of evidence in civil proceedings applicable to applications in terms of section 78. The evidence must therefore be put before the court on affidavit and by a person who has knowledge of the facts to which they speak.¹¹ Those fundamental requirements assume importance in this case for two reasons.

[30] First, presumably in an attempt to deal with the challenges created by the fact that the respondents' affidavit is terse in the extreme, the heads of argument filed on behalf of the respondents contained a number of factual averments which do not appear on the affidavits. They are not evidence and fall to be ignored.

[31] Second, the deponent to the respondents' affidavit is a principal state law advisor and deputy information officer in the office of the Premier. She states, in boilerplate fashion, that she has personal knowledge of the contents of her affidavit because she dealt with the application for access to information, but that fact on its own does not give the deponent personal knowledge of everything canvassed in her affidavit. The deponent does not state that she dealt with both the initial request for access and the appeal and to what extent she dealt with the request for information. She did not sign either the original decision letter or the appeal decision. If she did deal with both the initial request and the appeal, despite her name not appearing on the decision letter, that would seem to render the appeal right somewhat illusory. The deponent does not state that she has seen all the information requested and evaluated it to come to the conclusion that the outstanding records fell within the exemptions upon which respondents rely, much less disclose a factual foundation for such a conclusion.

[32] I return to this later in the judgment. For present purposes suffice it to state that her affidavit calls to mind what Nugent JA said of the affidavits filed by the state respondents in the first decision of the Supreme Court of Appeal in the *Mail & Guardian* saga:¹²

¹¹ *Mail & Guardian CC* paras 28 – 30.

¹² *President of the RSA and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) (*Mail & Guardian SCA* 1).

[18]....At another time courts were regularly confronted with laws that precluded them from going behind conclusions and opinions formed by public officials

[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 conclusion 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.'

[33] Applications in terms of section 78 of PAIA are not review proceedings. They entail a reconsideration of the merits *de novo* on the evidence put before the court, which may well go beyond what served before the information officer or the appeal authority.¹³ They are therefore in the nature of a wide appeal.¹⁴ As such, the principle applicable in reviews that a decision maker is bound by the reasons given for their decision at the time it was made,¹⁵ does not apply in the same way. The public body must justify its refusal on the evidence in the application. Whether a public body's refusal to grant access passes muster therefore falls to be determined with reference to the grounds upon which it relies in that affidavit, not the grounds upon which it may have relied at an earlier stage in proceedings. However, where the grounds for refusing access advanced in the affidavit differ from those relied on at an earlier stage, that change may be relevant to assessing whether the grounds relied on in the answering affidavit should be approached with reserve.¹⁶

[34] It is convenient to consider whether the respondents have discharged the burden resting on them with reference first to each of the exemption provisions on which they rely, rather than by category of document, as in various instances, a single section is relied on to resist disclosure in respect of more than one category.

¹³ *Mail & Guardian CC* para 14

¹⁴ *Cf Pahad Shipping CC v Commissioner, SARS* [2010] 2 All SA 246 (SCA) para 14.

¹⁵ *National Lotteries Board and others v SA Education and Environment Project and another* (2012) 4 SA 504 (SCA) paras 24- 8.

¹⁶ See for example the approach of Cameron J in para 114 of *Mail & Guardian CC*

Thereafter, I deal with additional considerations which apply in respect of the records relating to the interviews and shortlisting .

Section 7: records for purposes of legal proceedings after commencement

[35] It is appropriate to start by evaluating the validity of the respondents' reliance on section 7 of PAIA, as it is invoked as a justification for the refusal of access to all the information sought. The purpose of section 7 is to prevent a dual system of access to documents and information that would be disruptive to court proceedings.¹⁷

[36] Section 7(1) reads:

7. Act not applying to records requested for criminal or civil proceedings after commencement of proceedings.—

- (1) This Act does not apply to a record of a public body or a private body if—
- (a) that record is requested for the purpose of criminal or civil proceedings;
 - (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
 - (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law'.

[37] The Director-General did not rely on section 7 as a ground for refusing access in May 2022, but the Premier did so when dismissing the appeal in October 2022 and the respondents persist in such reliance in their answering affidavit.

[38] The respondents submit that as the applicant stated repeatedly in her appeal that the documents were essential or required for purposes of the reinstatement application, she clearly requested the documents for the purposes of those proceedings and access was correctly refused in terms of section 7.

¹⁷ *Industrial Development Corporation of South Africa Limited v PFE International Inc (BVI) and Others* 2012 (2) SA 269 (SCA) para 31

[39] That submission cannot be sustained for two reasons, both of which stem from the conjunctive nature of the requirements of section 7.¹⁸ The provision 'lays down three conditions',¹⁹ all of which must be established by the party seeking to invoke the exemption. The respondents' difficulty relates to the first two requirements which are interlinked: that the record must be requested for the purpose of civil or criminal proceedings and that the request be made after the commencement of those proceedings.

For the purpose of civil or criminal proceedings

[40] Insofar as the first requirement relating to the purpose for which the information is requested, the respondents are not entirely accurate in their reference to the reasons cited by the applicant in her appeal submission. Dealing with the documents generally, the applicant did state that they were 'intertwined with' the reinstatement application and that it was therefore critical that she pursue her request for the information. She however went on to say:

'Furthermore, I want to use the requested information, particularly the forensic reports, to clear my name that was grossly muddled during the well-orchestrated smear campaign through the social and mainstream media that occurred in 2019.'

[41] The applicant then went on to motivate her requests for each category of document. In so doing, she did not state that the records relating to her unsuccessful applications for the posts of head of the Departments of Social Development and Transport are related to the reinstatement application. The PEC meeting records were however said to be central to that application, while the investigation reports were requested to clear the applicant's name, especially as the Director-General had apparently referred to them in her affidavit but annexed a preliminary report which she represented was the forensic report.

[42] Precious little is said in the affidavits in these proceedings about the reinstatement application. The applicant asserts that it relates to 'the political

¹⁸ *MEC for Roads and Public Works Eastern Cape v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) para 12.

¹⁹ *PFE International* para 20

machinations of the province of KZN' and was a claim for reinstatement to the position of Head of the Department of Social Development and/or a contractual claim. It is also apparent from her appeal submission that the Department of Transport and the Provincial Treasury are not parties to it, which is hardly surprising given the nature of the claim. The respondents state only that the applicant alleged in the litigation that her contract of employment was extended at the PEC meeting. In that context, the only documents which could be seen as being requested for the purposes of the reinstatement application are those relating to the PEC meeting.

[43] In her affidavit in the present proceedings, the applicant states that she requires the information to 'clear her name of spurious and hurtful allegations'. She explains that the documents might lead to a press release or a claim for declaratory relief but she cannot make a decision on whether further court proceedings might be warranted until she has seen the documents.

[44] The respondents do not engage with these assertions meaningfully. They merely dispute them 'on the basis that the Applicant has already been furnished with the records she seeks in relation to the recruitment process.' Apart from not being entirely correct on the facts, that statement takes no account of the balance of the information the applicant requested, save that the respondents state that the applicant had 'rule 35 to seek documents in relation to her litigation with some of the respondents.' Given the nature of the applicant's claim in the reinstatement application, and the fact that the Department of Transport and the Provincial Treasury were not parties to it, the respondents proffer no answer at all to the applicant's reasons for requesting the documents which are unconnected with the reinstatement application.

[45] The respondents have therefore failed to discharge the burden on them to establish the first requirement in section 7. Nor can they establish the second.

After the commencement of such proceedings

[46] The second requirement in section 7(1)(b) is that the request is made *after* the commencement of the proceedings. In the present instance the request for information was made on 10 December 2021 and the reinstatement application was only instituted at some point in 2022. The respondents' case ignores this and treats the appeal as a self-standing request, rather than the pursuit of the mandatory domestic remedy for the refusal of the initial request which had been made before legal proceedings were instituted.

[47] Counsel for the respondents sought to meet this difficulty by submitting that the phrase 'commencement of ... proceedings' should be interpreted to include an intention to commence proceedings in the future. On the basis of that construction, so the argument ran, the applicant's request for information was an impermissible attempt at early discovery in the proceedings she intended to launch at the time the request was made. As support for this contention, counsel relied on the judgment of Sutherland J in *Mahaene and another v Anglogold Ashanti* [2016] 1 All SA592 (GJ) (*Anglogold Ashanti*)²⁰ which held that 'commencement of proceedings' was not limited to the service of summons or a notice of motion but could include earlier steps in the litigation process.²¹

[48] *Anglogold Ashanti* concerned an application for access to information of a private body, to which a requester is not entitled as of right. That distinction however matters not, as counsel relies on the judgment insofar as it dealt with what is contemplated by the phrase 'commencement of such proceedings' in section 7, which applies to all requests whether made to public or private bodies as the text of the provision makes plain.

[49] *Anglogold Ashanti* is not authority for construing 'commencement of proceedings' in the manner contended for by the respondents. Whilst there is a

²⁰ An appeal to the Supreme Court of Appeal reported at [2017] 3 All SA 458 (SCA) was dismissed by the majority but on different grounds. The majority therefore did not engage with the high court's findings on section 7: para 27. The minority appears to have accepted the principle that proceedings could commence as envisaged in section 7 before the service of a summons or application: para 46.

²¹ Paras 27 – 29.

‘degree of generality intrinsic in the phrase “commencement of such ...proceedings,”’²² it is not infinitely elastic.

[50] In accordance with the principles that a restrictive interpretation of section 7 is required and that its purpose is to ensure that PAIA is not used to interfere with litigation or to obtain early discovery, save in exceptional circumstances,²³ *Anglogold Ashanti* made it clear that the earlier steps prior to the institution of litigation which might constitute the commencement of proceedings are ‘litigious steps in pursuit of particular relief’.²⁴ Those litigious steps must be evinced by ‘an outward and visible act’²⁵ that marks the beginning of the proceedings. An outward manifestation is necessary as the determination of whether section 7 applies is objective.²⁶

[51] In *Anglogold Ashanti*, at the time the request for information was made, an application for the certification of a class was pending. The request was made with a view to enabling the requesters’ attorney who had been instructed to pursue the prospects of a damages action against the holder of the information, to advise on whether the applicants should bring an action or not and if so, whether to join in the class action which would ensue if the certification application were successful or to opt out. Here, by contrast, at the time of the request in December 2021, there was no outward or visible act in the form of a litigious step in pursuit of the proceedings the applicant instituted the following year. Consequently, no objective determination that section 7 applied could have been made at the time of the applicant’s initial request.

[52] There is an additional difficulty for the respondents in this regard. *Anglogold Ashanti* stressed that the word ‘such’ in the phrase ‘commencement of such... proceedings’, should not be overlooked as it performed the important function of linking the proceedings in question with the purpose for which the request was

²² *Anglogold Ashanti* para 29.

²³ *Unitas Hospital v Van Wyk and another* 2006 (4) SA 436 (SCA) paras 19 – 23.

²⁴ Para 42.3.

²⁵ Para 28.

²⁶ Para 42.2.

made.²⁷ The court held that what was required was an objective determination of whether the information procured was to be used in relation to the participation of a person in *such* proceedings. The respondents cannot demonstrate that link given their failure to refute the applicant's case that she required the documents for purposes other than the reinstatement application and still wishes to obtain them to clear her name.

[53] The respondents rightly did not argue that the language of section 7 could be disregarded so as to eliminate the requirement that the request be made before the commencement of proceedings in circumstances where proceedings are instituted subsequent to the request, merely because the purpose of section 7 is to prevent a dual system of access to documents and information that would be disruptive to court proceedings.²⁸ Not only would such a construction do unjustifiable violence to the language of the provision, in a hearing *de novo* after the dismissal of those proceedings, it would not serve the purpose to which section 7 is directed.

[54] It follows that the respondents' reliance on section 7 to resist disclosure is misplaced.

Section 44: reports for purposes of making decisions

[55] In their answering affidavit, the respondents rely on section 44(1)(a)(i) and (ii) of PAIA to justify their refuse to grant access to the investigation reports and the PEC meeting records. In dealing with the initial request for information and the appeal, neither the Director-General nor the Premier relied on section 44(1) to justify withholding the records relating to the PEC meeting, they relied only on section 12. The Director-General also relied on section 44(2)(b) as grounds for refusing access to the investigation reports.

²⁷ Para 30.

²⁸ *Industrial Development Corporation of South Africa Limited v PFE International Inc (BVI) and Others* 2012 (2) SA 269 (SCA) para 31.

[56] Section 44 reads in relevant part as follows:-

‘44. Operations of public bodies.—(1) ... the information officer of a public body may refuse a request for access to a record of the body—

(a) if the record contains—

- (i) an opinion, advice, report or recommendation obtained or prepared; or
- (ii) an account of a consultation, discussion or deliberation that has occurred, including, but not limited to, minutes of a meeting,

for the purpose of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law; or

(2) ... the information officer of a public body may refuse a request for access to a record of the body if—.....

(b) the record contains evaluative material, whether or not the person who supplied it is identified in the record, and the disclosure of the material would breach an express or implied promise which was-

- (i) made to the person who supplied the material; and
- (ii) to the effect that the material or the identity of the person who supplied it, or both, would be held in confidence; ...’

[57] A simple reading of section 44(1) reveals that there is a rider to the option to refuse disclosure, which applies even where the records contain material as specified in sub-sections (a)(i) and (ii). It is not sufficient for the material to be of the nature therein described, in addition, the material must have been 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.’ That purpose must exist at the time the material was obtained, it is insufficient if the information was subsequently utilised for such purpose.²⁹

[58] The reports were commissioned to investigate allegations of various forms of misconduct. They may have been obtained for any number of purposes and with the view to taking decisions about a variety of matters if they revealed misconduct, such as whether to take disciplinary steps against anyone implicated, or to lay

²⁹ *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (SekhukhuneLand)* 2005 (2) SA 110 (SCA) paras 15 – 17.

criminal charges against those complicit, or revising control systems and reporting lines in the relevant department, or perhaps even whether to extend the applicant's contract of employment. It will be apparent from this speculative list that many of the possible decisions would not be taken 'in the exercise of a power or the performance of a duty imposed by law as required for the information to fall within the purview of section 44(1)(a)(i).

[59] While there are any number of purposes for which the reports might have been obtained or the PEC meeting held, it is not for the court to guess.³⁰ It is for the respondents to articulate and establish through acceptable evidence the purposes for which the investigation reports were obtained and the PEC meeting held, the nature of the decisions they were to inform and the law which imposed the duty or conferred the power to make those decisions. Only if all these matters were canvassed might the respondents show that the information fell within the rider to which the section 44 exemption from disclosure is subject. The respondents come nowhere near to meeting this threshold. Much less do they explain the basis upon which they purported to exercise the discretion accorded by section 44 by refusing disclosure rather than granting access.³¹

[60] The deponent does not disclose the mandates of the investigators, the purpose for which either report was obtained, the decision to be taken or the duty to be exercised, or the law in terms of which the power to take the decision was conferred or the duty was imposed. Instead, the respondents' reliance on section 44 is contained in the following short paragraph:

'The investigation reports are protected from being provided to the Applicant in terms of section 44(1)(a)(i) of the Act. This section entitles me to refuse to grant access if the information requested is a report and/or contains opinions, recommendations and advice. The investigation reports are opinions of the investigation panel and contain recommendations opinions and advice.'

³⁰ *Mail & Guardian SCA 1* para 33.

³¹ *Cf Mail & Guardian SCA 1*, paras 27 – 30.

[61] Those three sentences do not even amount to a recitation of section 44(1)(a)(i) as they ignore the rider. It appears from the second sentence that the deponent appreciates she has a discretion and is not obliged to refuse access, but she provides no explanation of how and why she exercised that discretion in the manner she did.

[62] The respondents have plainly not adduced sufficient evidence upon which I can be satisfied that the investigation reports or the records of the PEC meeting fall within the ambit of the exemption in section 44(1)(a).

[63] To the extent they are relevant, the Director-General and the Premier's earlier invocations of section 44 as a basis to withhold access to the investigation reports, suffer from the same malaise. The Director-General refused access to the investigation reports 'in terms of section 44(1) of the Act as the information relates to reports in which recommendations were made'. In dismissing the appeal the Premier simply stated that the investigation reports 'fall within the ambit of section 44(1) of PAIA' without any further particularity.

[64] The Director-General also relied on section 44(2)(b) to justify her initial refusal of access to the investigation reports:

'on the basis that officials employed with in the Department of Social Development provided information to the relevant task teams and provided such information on the basis of their identities and the information which they provided would be held in confidence'

[65] The respondents no longer rely on this sub-section and in any event provide no factual basis for its application.

[66] I therefore find that the respondents have not demonstrated that access to the investigation reports and the records relating to the PEC meeting can be withheld on the basis of section 44.

Section 23: records that cannot be found

[67] The respondents advance an alternative ground for refusing access to the Treasury investigation report in the event that their reliance on section 44 is not upheld. They assert that the report cannot be found and so invoke section 23 of PAIA and submit that they cannot be compelled to produce it.

[68] Section 23 of the PAIA sets the bar high in respect of records which cannot be found or do not exist. It provides as follows:

'23. Records that cannot be found or do not exist.—

(1) If—

- (a) all reasonable steps have been taken to find a record requested; and
- (b) there are reasonable grounds for believing that the record—
 - (i) is in the public body's possession but cannot be found; or
 - (ii) does not exist,

the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.

(2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.'

[69] The assertion that the Treasury Report could not be found was not a ground upon which the respondents relied to refuse access either in response to the initial request or in the appeal. It was raised for the first time in the answering affidavit. The deponent states that it was only whilst preparing that affidavit that it was discovered that the Treasury report could not be found.

[70] The applicant contends that this precludes the respondents from seeking to rely on the provision now because the affidavits envisaged by section 23 should be deposed to in response to the request for access. There is force to that argument, as section 23(3) of PAIA provides that the notice in terms of section 23(1) is to be regarded as a decision to refuse a request for access to the record. This signifies that the affidavit envisaged by that sub-section is deposed to in response to the application for access, not only once an application to compel production is brought. It is not however necessary for me to decide this issue by virtue of the view I take on the manner in which the respondents have sought to rely on section 23.

[71] The deponent to the answering affidavit states only:-

‘To the extent that this Honourable Court may find that I did not exercise the powers conferred on me by section 44(1)(a)(i) of the Act properly, I respectfully submit that the Treasury Investigation report cannot be found after all reasonable steps have been taken to find the report.’

[72] No information whatsoever is given regarding what steps were taken to find the report, when or by whom any steps were taken or what each of those steps revealed. Nor is any communication with any person who conducted the search disclosed. The answering affidavit therefore goes nowhere near satisfying the conjunctive requirements of sections 23(1)(a) and (b) and section 23(2).

[73] That lack of detail, in the face of the express requirements of section 23, is egregious in and of itself. The fact that the Treasury report relates to allegations of financial misconduct by the head of a provincial government department makes the bald allegation even less credible. In addition, it is inconceivable there was only one copy of the report or that a duplicate could not be obtained from its author. Unsurprisingly, the respondents do not suggest this to be case.

[74] The respondents’ difficulties in attempting to rely on section 23 are compounded by the fact that in reply, the applicant stated:

'I know for a fact that the Fifth Respondent keeps copies of all its forensic investigations in various places. The person to whom the deponent should speak is one Jessantha Naidoo, the Head of Forensic Investigations at the Fifth Respondent.'

[75] Despite having been given details of the person who would likely be in possession of the Treasury report or be able to assist the respondents in locating it, the respondents did not seek to file any further affidavits dealing with the extent of the enquiries they had made in consequence of the applicant's disclosure, or what was revealed when they spoke to the person named by the applicant as being in a position to assist them in their search. One would have expected such investigations to be conducted and an affidavit filed in that regard.³²

[76] The respondents' bald allegations are entirely inadequate to discharge the burden resting on them to demonstrate that the Treasury Report cannot be found.

Section 12: records of cabinet and its committees

[77] The respondents have throughout relied on section 12(1)(a) to justify their refusal of access to the records relating to the PEC meeting.³³

[78] Section 12 of PAIA reads in relevant part: –

'12. Act not applying to certain public bodies or officials thereof.— This Act does not apply to a record—

- (a) of the Cabinet and its committees;
- (b)
- (c) of an individual member of Parliament or of a provincial legislature in that capacity.'

³² *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) at 38J - 39A.

³³ In dismissing the applicant's appeal, the Premier also contended that these documents were classified as contemplated in the Minimum Information Security Standards compiled by the State Security Agency as a result of which access had to be refused in terms of section 5(a) but this ground was not referred to in the answering affidavit.

[79] The respondents contend that ‘the Cabinet’ in section 12 must be interpreted to include a provincial executive committee as that is the cabinet at provincial level.

[80] The constitutionality of section 12 has been the subject of some academic debate,³⁴ but there is no challenge to its validity in these proceedings. Counsel did not refer to me to any reported cases dealing directly with the ambit of section 12 and I could not find any. It is therefore necessary to interpret the provision in the usual way, considering purpose, language, and context in a unitary exercise, bearing in mind the additional injunction in section 2 of PAIA that the act must be interpreted to accord with the purposes of the legislation set out in section 9 and the jurisprudence of our apex courts that exemptions in PAIA must be restrictively interpreted.

[81] The purpose of section 12 appears to be to incorporate the convention of cabinet secrecy which originated under the Westminster tradition,³⁵ was transplanted to South Africa and formed part of our constitutional dispensation prior to 1994. Cabinet secrecy ensures ‘that the efficiency of the executive is not impeded, and that a robust and open discussion takes place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed’,³⁶ but it has even deeper roots.

[82] Cabinet secrecy is rooted, in part, in the principle of collective cabinet accountability. The inner workings of cabinet remain secret so the whole of cabinet can be held accountable and individual members cannot distance themselves from cabinet decisions. The concept of collective cabinet accountability in the land of its birth is currently defined in the United Kingdom’s 2022 Ministerial Code³⁷ as follows:-

³⁴ See for example Iain Currie & Jonathan Klaaren *The Promotion of Access to Information Act Commentary* (2002) para 4.7 and K Malan *To what extent should the Convention of Cabinet Secrecy still be recognised in South African constitutional law?* *De Jure Law Journal*, vol 49, n1, Pretoria 2016.

³⁵ Woolman et al *Constitutional Law of South Africa*, Second Edition, Volume 4, Chapter 62, para 62.5(b)

³⁶ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) para 243.

³⁷ <https://www.gov.uk/government/publications/ministerial-code/ministerial-code#ministers-and-the-government>

- ‘2.1 The principle of collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained.....
- 2.3 The internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed. Neither should the individual views of Ministers or advice provided by civil servants as part of that internal process be disclosed. Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned. On occasion, it may be desirable to emphasise the importance of a decision by stating specifically that it is the decision of His Majesty’s Government. This, however, is the exception rather than the rule..’

[83] Collective cabinet accountability remains part of our law and is enshrined in section 92(2) of the Constitution.³⁸ Section 133(2) of the Constitution also imposes collective accountability on the members of an executive council of a province. Whilst this might suggest that ‘the Cabinet’ ought to be interpreted in the broad manner suggested by the respondents, the more limited ambit of responsibility of provincial executives³⁹ and the fact that other federal systems which incorporate cabinet secrecy provisions do so only at national level,⁴⁰ militate against such a construction.

[84] More importantly, such an expansive construction of ‘the Cabinet’ would be inconsistent with the language of section 12. In this the regard the use of the definite article in relation to the Cabinet appears to be significant, as does the fact

³⁸ Which reads: ‘Members of the cabinet are accountable, collectively, and individually to Parliament for the exercise of the powers and performance of the functions.’

³⁹ By virtue of section 125(2)(b) of the Constitution.

⁴⁰ Section 34 of Australia’s Freedom of Information Act 3 of 1982 is one such example.

that 'the Cabinet' has a clear Constitutional meaning. There is only one Cabinet in the country. The Constitution thus consistently refers to 'the Cabinet' in the singular to denote the national executive.⁴¹ By contrast, section 125(2) of the Constitution provides that the executive authority of a province is exercised by the Premier and the other members of the 'Executive Council', and that there will be such a council for each province.

[85] The difference in constitutional nomenclature in respect of national and provincial bodies and functionaries is recognised in PAIA, as is apparent from section 12(c) which refers a member of 'Parliament or of a provincial legislature'. That difference in terminology and the use of the indefinite article in relation to the provincial structures is striking.

[86] A reading of 'the Cabinet' in section 12 as being confined to that body which comprises the national executive is consistent with the language of section 12, its apparent origins, the requirement for a restrictive interpretation of exemptions in PAIA already discussed, and the purposes of the act.

[87] I consequently find that section 12 of PAIA does not exempt the records of a provincial executive committee from disclosure and that the respondents' reliance on the provision is misplaced.

[88] That leaves the respondents' refusal to produce the records relating to the applicant's unsuccessful applications for the positions of Head of the Departments of Social Development and Transport.

Records relating to the interviews for Head of Department Social Development

[89] The records requested by the applicant in relation to the interviews for the post of Head of the Department of Social Development included the scoresheets populated by each panel member in respect of the applicant, the minutes and voice

⁴¹ For example in sections 85,91 and 92.