

Cynicism and the rule of law: A critical analysis of *President of the RSA v M&G Media Limited* 2012 2 SA 50 (CC) and associated judgments

Abstract

In June 2015 the High Court granted an interim order prohibiting Sudanese President Omar al-Bashir from leaving South Africa. Although Al-Bashir is wanted by the International Criminal Court for war crimes and South Africa is a signatory to the Rome Statute and has passed the Implementation Act, the government failed to arrest him as required by an order of court. Short-term political considerations appear to have outweighed the need to respect the rule of law.

Parallels can be drawn between this incident and the decision by the executive to refuse access to the Khampepe Report when requested to do so by the *Mail and Guardian* newspaper. The report was prepared at the request of former President Mbeki by two senior South African judges, after a visit to Zimbabwe shortly before the election held in that country in 2002. In an attempt to prevent disclosure, the executive approached various courts on six different occasions and drew out the process for more than six years.

The main issue in this case is the use of section 80 of the Promotion of Access to Information Act by the courts, a discretionary power that is applied sparingly. In terms of PAIA, the state is prevented from making reference to the content of a record in order to support a claim of exemption. In such instances, section 80 provides courts with the power to inspect the record – a procedure known as a ‘judicial peek’ – in order to make a determination as to whether the exemption is justified. This case provides a clear example of how the state cynically used this provision as a dilatory tactic in refusing access to the report.

The current system that relies solely on the courts to handle access to information matters undermines the main objectives of the Act and is inefficient and costly. It is recommended that PAIA be amended to provide for an information commissioner with powers to mediate and make binding decisions.

1 Introduction

The South African Government was recently confronted with a dilemma that periodically faces democratic governments: whether to advance its political agenda or to respect the rule of law. The North Gauteng High Court granted an

interim order prohibiting Sudanese President Omar Al-Bashir from leaving South Africa. Al-Bashir is wanted by the International Criminal Court for war crimes including crimes against humanity and genocide in respect of the ongoing conflict in Darfur.¹ He has successfully evaded the warrant of arrest that was issued six years ago. As South Africa is a signatory to the 1998 Rome Treaty and as Parliament passed the Implementation of the Rome Statute of the International Criminal Court Act,² it appeared that it was obliged to arrest Al-Bashir when he landed in South Africa. The African Union (AU), of which South Africa is a member, adopted a Resolution at the Thirteenth Ordinary Session of the Assembly held at Sirte, Libya on 3 July 2009 not to co-operate in the arrest of Al-Bashir.³ When Al-Bashir arrived to attend the 25th Summit of the AU held in South Africa in June 2015 after receiving an invitation from the then Chairperson of the AU, President Robert Mugabe, an application compelling the South African government to arrest him was brought in the Pretoria North High Court by an NGO, the Southern African Litigation Centre. Despite having obtained an interim order compelling Al-Bashir to remain in South Africa until the application was decided, he left the country, seemingly with the assistance of government officials. The South African government argued that Al-Bashir was granted immunity⁴ in terms of the Diplomatic Immunities and Privileges Act⁵ as he was attending the AU summit as a head of state. As far as the government was concerned, the territory on which the Summit was taking place was regarded as African Union territory and, as a result, Al-Bashir was immune from the application of the domestic laws of South Africa. Further, the government contended that in terms of customary international law, it was prohibited from arresting a sitting head of state in these circumstances. In essence their contention was that the granting of immunity to him overrode any obligation to arrest him. The government in support of its contention that immunity had been granted to Al-Bashir relied on an agreement between itself and the AU Commission that all visiting heads of state would be granted immunity.

When the merits of the matter were heard, the Court held⁶ unequivocally that the AU agreement could not trump the constitutional and statutory obligations

¹Onishi 'Omar al-Bashir, leaving South Africa, eludes arrest again' available at: <http://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html> (accessed 2015-06-26).

²27 of 2002.

³Assembly of the African Union 13th Ordinary Session, available at: http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf (accessed 2015-06-26).

⁴GN 470 of 2015-06-15.

⁵37 of 2001.

⁶*Southern African Litigation Centre v Minister of Justice* [2015] ZAGPPHC 402 para 37.2.

founded on the Rome Statute and the Implementation Act enacted by parliament. The Court therefore concluded that the failure of the government to take steps to arrest Al-Bashir was inconsistent with the Constitution of the Republic of South Africa, 1996. The South African government has since appealed the full bench decision. As the Implementation Act required South Africa to arrest Al-Bashir, it is difficult to see how an appeal court could find that an AU resolution could override domestic constitutional and statutory obligations.

The fact that the government found themselves between a rock and a hard place in this matter was entirely of their own making. Given that we have independent courts that properly apply the law, they ought to have foreseen that permitting Al-Bashir to enter South Africa could result in an order for his arrest. The executive signed the Rome Statute and the legislature approved it by adopting the Implementation Act. The law imposed clear obligations on the government that included arresting persons in cases where warrants of arrest had been issued. Despite this, they took a deliberate risk by allowing Al-Bashir to enter South Africa and not arrest him.

When the High Court granted an interim order directing that Al-Bashir not be allowed to leave the country, the government was faced with a quandary. Does it effectively detain Al-Bashir and deal with the significant political fallout that would almost certainly have ensued or does it either directly or indirectly permit him to depart in direct violation of an order of a South African court? The latter option would have a long-term corrosive impact on the rule of law but would not have the direct and immediate political consequences. It appears that the government accepted that erosion of the rule of law would be more palatable than dealing with the political fallout of arresting Al-Bashir. This is probably what prompted Mlambo JP to warn that

[a] democratic State based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.⁷

The Al-Bashir case is an extreme example of disrespect for the rule of law. However it is submitted that cynical compliance with the law in order to convey the impression of compliance while in reality other objectives are being pursued is equally damaging to the rule of law.

It is our submission that this is what occurred in the series of cases involving an application by the *Mail & Guardian* to gain access to a report which was

⁷*Id* para 37.

prepared by two senior South African judges on the fairness of the elections held in Zimbabwe in 2002.⁸ In an attempt to prevent disclosure, the executive approached various courts on six different occasions and drew out the process for more than six years. After much procrastination, the report was finally released in 2014. After the courts took a 'judicial peek' at the contents of the report, it became apparent that the reasons for refusing disclosure were simply untenable and unsustainable in terms of law. The question then is why had President Thabo Mbeki (as he then was) steadfastly refused to disclose the information even though such refusal could not properly be justified in terms of the Promotion of Access to Information Act (PAIA)?⁹ It is our submission that the refusal had less to do with a proper and legal application of PAIA and more to do with former President Mbeki's role as a mediator in the Zimbabwean crisis. Indeed, in opposing the application for disclosure, President Zuma referred to that mediation role that he and his predecessor had played after being appointed as facilitators by the Southern African Development Community (SADC).¹⁰ The judges concluded in their report that the elections were not free and fair and thus the legitimacy of the Mugabe government was directly questioned. Such disclosure would no doubt have impacted adversely on mediation efforts. Ultimately the Zimbabwean parties agreed to what was termed the Global Political Agreement in 2008, which included a government of national unity. The objective was to restore political and economic stability to Zimbabwe. With the benefit of hindsight, the five years of power sharing shored up ZANU-PF rule and decimated the opposition. The Zimbabwean economy is far from being stabilised. This paper will consider the series of *Mail & Guardian* cases and make recommendations as to how to ensure that the 'culture of justification', one of the main objectives of PAIA, can be better achieved.

2 'Culture of justification'

PAIA was enacted to give effect to the constitutional right of access to any information held by the state. Importantly, this right is expressed in peremptory terms as the requester 'must' be given access to the report so long as the request complies with the procedures set out in the Act and the record requested does not fall under one of the exemptions contained in the Act.¹¹ The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. For instance, the right to receive or impart information or ideas is dependent on

⁸*President of RSA v M&G Media Limited* 2011 2 SA 1 (SCA) para 11.

⁹2 of 2000.

¹⁰*President v M&G Media* (n 8) para 19.

¹¹*President v M&G Media* 2012 2 SA 50 (CC) para 9.

it.¹² The exercise of the right to vote also depends on the right of access to information.¹³ Without access to information, the ability of citizens to make considered political decisions and engage meaningfully in public life is compromised.¹⁴ Moreover, in decision after decision constitutional founding principles have been reaffirmed.

The 'culture of justification' referred to by Mureinik pervades the provisions of PAIA. A request for information held by a public body obliges the relevant information officer to produce it unless he or she can justify refusing its release. Any refusal must be accompanied by adequate reasons with reference to the provisions of PAIA relied upon to refuse the request.¹⁵ Mureinik further expressed the essence of the Bill of Rights in the Interim Constitution when he described it as a

bridge ... from a culture of authority ... to a culture of justification ... a culture in which every exercise of power is expected to be justified.

He went on to describe the Bill of Rights as

a compendium of values empowering citizens affected by laws or decisions to demand justification. If it is ineffective in requiring governors to account to people governed by their decisions, the remainder of the Constitution is unlikely to be very successful. The point of the Bill of Rights is consequently to spearhead the effort to bring about a culture of justification. That idea offers both a standard against which to evaluate [the Bill of Rights] and a resource with which to resolve the interpretive questions that it raises.¹⁶

Importantly, in the *Mail and Guardian* case the Constitutional Court (CC) was not concerned with the constitutionality of PAIA or the limitation of the right of access to information. Rather, its focus was on the 'constitutional and statutory framework within which claims for exemption from disclosure must be considered and evaluated'.¹⁷ We now turn to an assessment of the *Mail & Guardian* cases regarding a request in 2008 to gain access to a report prepared in 2002.

¹²Section 16(1)(b) of the Constitution.

¹³*Id* s 19(3)(a).

¹⁴*President v M&G Media* (n 8) para 10.

¹⁵*President v M&G Media* (n 8) para 11.

¹⁶Mureinik 'A bridge to where? Introducing the interim bill of rights' (1994) *SAJHR* 31 at 32.

¹⁷*President v M&G Media* (n 8) para 12.

3 President of the Republic of South Africa v M&G Media Limited

In September 2014, the Supreme Court of Appeal (SCA) handed down a judgment in *President of the Republic of South Africa v M&G Media Limited*¹⁸ that dealt with access to information held by the state. The case is significant within the context of access to information because it is the final case in a sequence of judgments dealing with the ways in which access to information decisions were made by the state. The judgments raise a number of legal issues and have already had far-reaching effects on how courts deal with similar cases.

The issue concerned a report in the possession of former President Mbeki, which was compiled by two high court judges, Sisi Khampepe and Dikgang Moseneke, after a visit to Zimbabwe shortly before the election held in that country in 2002. They did so at the request of former President Mbeki and the report was never released to the public. The *Mail & Guardian* made a request to view the report in June 2008 but this was declined by the presidency. This was followed by an internal appeal, which was refused in November of that year. The *Mail & Guardian* then made an application to the North Gauteng High Court compelling the president to release the report. This was granted by Sapire AJ but the presidency chose to take this decision on appeal. The SCA upheld this decision but on appeal to the CC, the matter was remitted to the High Court for examination of the report in terms of section 80 of PAIA. Following a further unsuccessful appeal to the SCA, the CC refused leave to appeal and the report was released to the public on 8 November 2014. Thus, after this matter was considered in six instances by different courts in the hierarchy of the South African judicial system, we learned that there was no basis to refuse the disclosure of the information.

3.1 *The Supreme Court of Appeal (1)*

As outlined above, Sapire AJ in the North Gauteng High Court ordered the state to release the report. The state then appealed to the SCA. From the perspective of the court, the most striking feature of the case was that affidavits were not filed by the three people who had direct knowledge of the mandate that was given to the judges: former President Mbeki and the two judges themselves. As a consequence, the state's case amounted to

little more than rote recitation of the relevant sections and bald assertions that the report [fell] within their terms. That is not the 'stark and dramatic contrast' with the past that was referred to by Mahomed DP. Nor does it reflect the 'culture of justification' that was referred to by Mureinik and which is embedded in the Act.¹⁹

¹⁸*Ibid.*

¹⁹*President v M&G Media* (n 8) para 20.

In the SCA, the presidency raised three defences. The first was that the report was excluded under section 12(a) of PAIA which excludes from the reach of PAIA a 'record of the Cabinet and its committees'.²⁰ The court held that this was factually incorrect as the judges reported directly to the president and not to the cabinet. Furthermore there was no evidence that the report was ever presented before the cabinet.²¹

The second defence was that the report contained information 'supplied in confidence by or on behalf of another state or international organisation' and, as a consequence, was excluded by section 41(1)(b)(i). The court questioned how the report could have contained information given by an 'international organisation' as this was not suggested in the affidavits.²²

The third defence relied on was section 44(1)(a) which allows for refusal of access to a record obtained or prepared for the purpose of assisting to formulate policy. The court did not accept this, as the evidence indicated that it was only once he had sight of the report that the president thought the record could assist him in the making of policy. The court stated that the section does not render a report subject to secrecy if it is 'reasonably conceivable' that it would assist in the formulation of policy or 'when it would be of assistance'.²³ To fall under PAIA's policy formulation exemption, that must have been the object of the report from the outset. The state further submitted that the judges acted as diplomats. The court dismissed this argument on the basis that diplomacy is an executive function and not a judicial function.²⁴

The court commented that the reasons submitted by the state were 'perfunctory conclusions'.²⁵ It was clear that no discretion had been exercised and that the refusal to release the report was oblivious to the dictates of the Act.²⁶ The court further commented that it is not bound to accept the *ipse dixit* of a witness that his or her evidence is admissible; proper grounds need to be demonstrated for the admissibility of the evidence. Mere allegations that the information is within the 'personal knowledge' of an official are inadequate.²⁷

In sum, the SCA emphasised that a mere recitation of relevant statutory provisions did not discharge the state's evidentiary burden. The Court found the state's evidence to be inadequate in justifying the refusal to release the report and accordingly upheld the decision of the High Court. The state then appealed

²⁰ *Id* para 21.

²¹ *Ibid.*

²² *Id* para 25.

²³ *Id* para 34.

²⁴ *Id* para 49.

²⁵ *Id* para 30.

²⁶ *Ibid.*

²⁷ *Id* para 38.

to the CC. The reasoning of the SCA, particularly that which referred to the need for proper reasons as opposed to perfunctory conclusions, directly advanced the objective 'of actively promoting 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'.²⁸

3.2 *Constitutional Court: Majority judgment*

On appeal to the CC the state contended that both the SCA and the High Court had erred in finding that it had not discharged its statutory burden, imposed by section 81(3) of PAIA, of establishing that its refusal to grant access to the report was justified by either of the exemptions it claimed under sections 41(1)(b)(i) and 44(1)(a).²⁹

Ngcobo CJ, writing for the majority, primarily considered two issues: first, how the state discharges the burden, under section 81(3), of establishing that its refusal to grant access to a record is justified; and second, the circumstances under which a court may call for additional evidence in the form of the contested record under section 80.³⁰ He noted that court proceedings under PAIA are covered by sections 78 to 82. Section 81 provides that proceedings under PAIA are civil proceedings and the evidentiary burden rests on the state and must be discharged on a balance of probabilities.³¹

Accordingly, Ngcobo CJ set out the test for determining whether the state has discharged its burden by asking whether the state had put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld fell within the exemption claimed.³² The question to be asked is not whether the best evidence to justify refusal has been tendered but whether it is sufficient for a court to rule that the record falls within the exemption relied on.³³

The Court emphasised that proceedings under PAIA differ from ordinary civil proceedings in a number of respects. First, such disputes involve a constitutional right of access to information and that since access to information disputes are not exclusively private in nature, requesters often act in the public interest and court judgments impact the 'general health of our democratic polity'.³⁴ Second, parties to such disputes are often constrained by factors beyond their control in presenting and challenging evidence and courts are able to call for additional evidence in the form of the contested record.³⁵

²⁸The preamble to PAIA.

²⁹*President v M&G Media* (n 8) para 4.

³⁰*Id* para 5.

³¹*Id* paras 12-13.

³²*Id* para 23.

³³*Id* para 25.

³⁴*Id* para 33.

³⁵*Ibid*.

Should the state wish to rely on the contents of the record itself in order to justify the exemption claimed, it is prevented from doing so by the provisions of sections 25(3)(b) and 77(5)(b), which preclude 'any reference to the content of the record' in order to support a claim of exemption.³⁶ On the other hand, the requester is constrained by lack of access to the record sought when attempting to challenge claims that the record is exempt from disclosure. Both of these factors could result in the court having insufficient information when deciding whether the exemption is rightly claimed. Section 80 provides courts with the power to use the record in question in such instances as evidence to decide whether the exemption is justified.³⁷

Section 80(1) was drafted as an override provision and should be applied sparingly. In the United States, courts have emphasised that a so-called judicial peek only be undertaken 'as a last resort' or only 'where absolutely necessary'.³⁸ Courts resort to using the procedure when the evidence provided by the State is insufficient to enable them to decide whether an exemption is valid.³⁹ Further section 80 sets out the circumstances under which courts are empowered to examine a particular record. It is therefore a discretionary power that must be exercised in accordance with the constitutional right of access to information and PAIA.⁴⁰

The main issue in this case was whether the court believed that the state's hands were tied by the provisions of sections 25(3)(b) and 77(5)(b). The majority held that this claim by the state was not implausible. To the extent that the state was unable to divulge the contents of the report, its potential prejudice was that it could not provide more specific evidence to justify the exemptions it claimed. The majority ruled that this was sufficient to trigger the provisions of section 80.⁴¹ The court referred the matter back to the High Court with the instruction that it should invoke section 80. Yacoob J, in a concurring judgment, agreed with Ngcobo CJ that the appropriate standard to be used by the courts in exercising a discretionary power whether to invoke section 80 is whether it is in the interests of justice.⁴²

3.3 *Minority judgment*

Cameron J, writing for the minority, held that the judgments of the High Court and the SCA were correct but that the majority's decision to remit the matter for re-

³⁶ *Id* para 35.

³⁷ *Id* para 43.

³⁸ *Id* para 39.

³⁹ *Ibid.*

⁴⁰ *Id* para 42.

⁴¹ *Id* para 60.

⁴² *Id* para 73.

adjudication to the High Court was incorrect. In his view, the state had failed to justify its refusal to release the report under PAIA and also failed to provide a plausible plea that section 25(3)(b) of PAIA made it impossible for it to provide acceptable reasons for its refusal. More widely, he felt that section 80 should only be invoked where the state has laid a plausible foundation for a plea that its hands are tied, or where government has laid a basis for claiming an exemption, but a court considers that doubt exists about its validity. In sum, secret judicial examination should be used to 'amplify access'.⁴³

Cameron J noted the state's submission that former President Mbeki had been requested by the contesting parties in Zimbabwe to assist in finding a solution to their political issues and had been appointed as a facilitator by the SADC and the AU. As a consequence, the state argued that the former president was seen to be impartial and disclosure of the report would be 'detrimental to peace in Zimbabwe'.⁴⁴ The state did not explain, however, how a report by two judges about an election six years earlier could be seen to impact on the President's impartiality in 2008, or be detrimental to peace in Zimbabwe.⁴⁵

Cameron J proceeded to deal with the 'hands-tied' plea of the state. He argued that the state had failed to explain why crucial evidence that was readily available was not produced. Mbeki mandated the judges to go to Zimbabwe but failed to tender an affidavit. This was surprising given the fact that former President Motlanthe, who held office when the *Mail & Guardian* went to court in 2009, and President Zuma, who held office when the matter was heard before the CC, both supplied affidavits. There were evidently no prohibitions against presidential depositions so the question of why Mbeki failed to testify remains unanswered.⁴⁶ Equally concerning was the absence of evidence from the two judges. Cameron J pointed out that an affidavit from either of them may have been sufficient to bring the matter to a conclusion.⁴⁷ Cameron J therefore concluded that the state's hands were not tied as it could have obtained direct evidence from any one of the three people most closely involved in the operation, yet it failed to do so.⁴⁸ The 'hands-tied' argument must have been plausibly raised before the Court could consider a course of action. In Cameron J's view this was not done.⁴⁹

Cameron J further commented on the course proposed by Ngcobo CJ, namely the remittal of the case to the High Court with an instruction to invoke the

⁴³*Id* para 79.

⁴⁴*Id* para 94.

⁴⁵*Ibid.*

⁴⁶*Id* para 116.

⁴⁷*Id* para 117.

⁴⁸*Id* para 118.

⁴⁹*Id* 121.

provisions of section 80. He advocated a cautious approach to section 80 stating that judicial examination should not be seen as a substitute for requiring the state to discharge its burden. It should also not be used to assist the state when it has failed to discharge the burden PAIA places on it.⁵⁰ Cameron J advocated a cautious approach when resorting to a judicial peek in terms of section 80. The structure of PAIA does not vest the court with inquisitorial powers but rather imposes a burden on any party relying on the exemptions to justify non-disclosure in terms of the Act. PAIA allows for a judicial peek, but not where the party refusing disclosure has failed to discharge the onus justifying its decision.⁵¹ We respectfully agree with the approach of Cameron J because resorting to a judicial peek in instances where the parties have not justified their decision to refuse access will materially undermine the provisions of PAIA.

3.4 High Court judgment (2)

The majority ruling in the CC instructed the High Court to view the contested record. The evidence of contents of the record was then used by Raulinga J to test the validity of the exemptions claimed by the state. Surprisingly, the state proceeded to make an application in terms of Rule 6(5) of the Uniform Rules of Court to have affidavits by former President Mbeki and President Zuma admitted as further evidence.⁵² The Court ruled that the state had failed to give sufficient explanation as to why the affidavits were not tendered at an earlier stage.⁵³ The Court described the matter as a 'vicious circle' having started in the High Court six years previously and thus questioned why Mbeki's affidavit was not tendered earlier.⁵⁴ As regards Zuma's affidavit, the court commented that this affidavit could not be said to reflect a *prima facie* statement of the veracity of the evidence, since he had no personal knowledge of the events attested to.⁵⁵

Echoing Cameron J's minority judgment, Raulinga J stated that although section 80 does not specify the circumstances under which the power to examine the record may be exercised, it is a discretionary power that must be used with caution. Due regard must be given to the constitutional right of access to information and the challenges of the parties in a particular case. Importantly – with reference to the state's attempts to introduce new evidence – it 'does not "open the floodgates" for one party to snick new evidence through the back door'.⁵⁶

⁵⁰ *Id* paras 126-127.

⁵¹ *Id* para 125.

⁵² *President v M&G Media* 2013 3 SA 591 (GNP) para 25.

⁵³ *Id* para 15.

⁵⁴ *Id* para 16.

⁵⁵ *Id* para 34.

⁵⁶ *Id* para 35.

The outcome of the judicial peek was that the contents of the report did not support the state's first ground that the disclosure of the report would reveal information supplied in confidence by or on behalf of another state or international organisation, contrary to section 41(1)(b)(i). There was also no indication that the report was prepared for the purpose of assisting the President to formulate executive policy on Zimbabwe, as contemplated in section 44(1)(a).⁵⁷ The judge commented that in his view most of the information contained in the report was public knowledge and the report itself did not reveal that it was intended to be kept secret.⁵⁸

The Court also dealt with the override provisions set out in section 46. It was of the view that the report potentially disclosed evidence of a substantial contravention of, or failure to comply with, the law. Accordingly, the Court was of the view that the public interest superseded the harm that may have ensued should the report have been released.⁵⁹

Regarding section 28 of PAIA, it was the state's contention that the report could not be severed or redacted. The Court disagreed with this contention because it was divided into sections and paragraphs, thus facilitating severance and/or redaction. In any event, however, this issue had become moot as the other grounds for non-disclosure had already been dismissed.⁶⁰

3.5 *SCA judgment (2)*

In the SCA for the second time, Brand JA focused on the attempt by the state to introduce affidavits deposed to by former President Mbeki and President Zuma in the High Court. He believed the attempt to admit former President Mbeki's affidavit was a 'clear attempt to plug the holes in the Presidency's case' that was identified in the previous judgments, in particular Cameron J's minority judgment.⁶¹ The affidavit demonstrated that Cameron J rightly suspected that the state's case had nothing to do with being hamstrung at all. It was the Court's view that when the state filed the affidavit, it knew what was in the report and must have realised that the contents of the report did not support the two grounds of refusal. Therefore, the state tried to avoid the consequences of a judicial peek by tendering an affidavit that should have been submitted during the initial stages of litigation. This was in the hope that the Court would refuse the *Mail & Guardian's* application on a basis that was not connected to the contents of the report. It used the referral by the CC for an ulterior purpose and this amounted to an abuse of process.⁶²

⁵⁷ *Id* para 59.

⁵⁸ *Id* para 62.

⁵⁹ *Id* para 67.

⁶⁰ *Id* para 68.

⁶¹ *President v M&G Media* (n 8) para 25.

⁶² *Ibid*.

The Court also took a judicial peek into the report and agreed with the High Court that there was nothing in the report that supported the grounds of refusal relied on by the state.⁶³ Furthermore, even if the affidavit of Mbeki was accepted as evidence, it would not have been sufficient to support the grounds of refusal.⁶⁴

In both *President v M&G Media* and the recent Al-Bashir incident, the government acted in a cynical way by placing its political agenda above the rule of law. As evidenced by the state's conduct in this case, PAIA requires amendment as its current provisions are open to abuse. Former President Mbeki in a reply to an editorial in the *Mail & Guardian* contended that the Courts erred in ordering the release of the report as this would compromise the frankness with which advice is given to government. He went on to conclude further that 'we owe and will make no apology whatsoever'.⁶⁵ We are of the view that the former president is wrong in both these conclusions.

This series of judgments demonstrates that despite the obvious intent of PAIA, stratagems including interminable appeals could be used effectively to frustrate the objective of timeous access to information. It appears to us that formal court processes to compel disclosure may not be best suited to achieving the objectives of the Act. We now turn to consider alternative bodies that may be better suited to the task.

4 Alternative bodies handling access to information disputes

Approximately 90 countries have passed access to information laws, the objectives of which are to increase transparency, accountability and trust in government.⁶⁶ Significant problems, however, arise when implementing access to information legislation such as governments' resistance to disclosing information and insufficient resources, both resulting in information being unjustly withheld and to delays in dealing with requests. A number of different kinds of enforcement mechanisms exist. In some jurisdictions requesters only have recourse to the courts but in the majority of countries, enforcement is overseen by quasi-judicial organisations, often referred to as oversight bodies.⁶⁷

Of the approximately 90 countries that had passed access to information legislation by 2011, around one-third had given enforcement oversight to a

⁶³*Id* para 27.

⁶⁴*Id* para 28.

⁶⁵Mbeki 'We owe no one an apology' *Mail & Guardian* (2014-11-28), available at: <http://mg.co.za/article/2014-11-27-mbeki-we-owe-no-one-an-apology> (accessed 2015-07-08).

⁶⁶Holsen and Pasquier 'Insight on oversight: The role of information commissioners in the implementation of access to information policies' (2012) 2 *J of Information Policy* 214-241 at 214.

⁶⁷*Id* 215.

commissioner; less than one-third to an ombudsman; and the remainder to a tribunal, the courts or an administrative office.⁶⁸ In all access to information laws a number of routes are open to requesters who have been refused access by the state. These include internal review, external review – review by an information commissioner – and recourse to the courts.⁶⁹

Effective enforcement is essential to the legitimacy of access to information legislation. If there is widespread belief that the legislation will not be enforced, it becomes easier for the state to deny access to requested information.⁷⁰

In 1983, Canada became the first country to name its information oversight officer as the Information Commissioner. Prior to this date, most access to information matters were handled by an already established ombudsman.⁷¹

Before the office was established, requesters had to approach the Federal Court of Canada, which was described as an 'onerous ... frustrating and expensive process'.⁷² Canada's Access to Information Act has been described as being carefully structured and has incorporated most of the key points necessary for effective access to information legislation.⁷³ The information commissioner is an ombudsman appointed by parliament to investigate complaints alleging that the government has denied rights under the Act. The Act gives Canadians the broad legal right to information held by most federal government institutions. Requesters who have been denied information have recourse to the commissioner who has the power to investigate complaints. The commissioner has wide investigative powers but may not order a matter to be resolved in a specific way. He or she relies on persuasion to solve disputes and requests a Federal Court to review a matter only if it is believed that a requester has been improperly denied access and a negotiated solution could not be achieved.⁷⁴ Their remit often extends to providing support to the state, offering advice to both parties and monitoring implementation.⁷⁵

In the South African context, a Task Group on Open Democracy was appointed by Deputy President Mbeki in 1994 that produced a number of policy proposals in the form of the draft Open Democracy Bill. One of the main proposals pertained to the drafting of freedom of information legislation relating to information held by state institutions. The Task Group envisaged that

⁶⁸*Id* 222.

⁶⁹*Id* 217.

⁷⁰*Id* 222.

⁷¹*Id* 224.

⁷²Government of Canada *The Access to Information Act: 10 years On* (1994) 223.

⁷³Holsen 'Freedom of information in the UK, US and Canada' (2007) *The Information Management J* 50 at 50.

⁷⁴Office of the Information Commissioner of Canada 'Annual Report 2005-2006' (2006) available at: www.infocom.gc.ca/reports/2005-2006-e.asp (accessed 2015-07-23).

⁷⁵Holsen and Pasquier (n 63) 223.

enforcement of that aspect of the Bill would be given to an independent body invested with the power of making authoritative and binding decisions.⁷⁶ This proposed body was described by the Task Group as an 'Information Court'. Should an internal appeal be unsuccessful, requesters would be entitled to appeal to this court. It was envisaged as a superior court, established in each division of the High Court. Although High Court judges would staff these courts, they would apply rules that were designed to 'ensure that they were accessible, cheap, simple, informal and expeditious'.⁷⁷ Ultimately, the cabinet chose not to adopt the Task Group's recommendations and the Bill simply provided for disputes relating to access to information requests to be dealt with by the High Courts.⁷⁸

In 2007 the Asmal Committee, an *ad hoc* parliamentary committee chaired by Kader Asmal, reviewed the efficacy of Chapter 9 institutions established by the Constitution.⁷⁹ The Committee stated that for the extensive rights set out in PAIA to be realised, it was essential that some form of independent tribunal be established. The tribunal should be easily accessible and able to decide disputes 'authoritatively, cheaply, quickly and effectively'.⁸⁰ The report further stated that as a consequence of the expense and inefficiency often associated with High Court litigation, most jurisdictions had chosen to set up information commissions or specialised administrative tribunals to hear disputes relating to access to information.⁸¹ The Asmal Committee's recommendation was to create a 'dedicated information commissioner' invested with power to 'receive appeals from persons lodging requests for information and make binding orders on access and disclosure'.⁸² In order to save costs, the Committee did not agree with the South African Human Rights Commission's (SAHRC) suggestion that a new institution be set up, but recommended the appointment of an information commissioner within the SAHRC with a separate budget and staff complement.⁸³

In South Africa, where requesters' only option is to approach the courts, Allan and Currie have concluded that 'litigation is self-evidently too inaccessible and cumbersome to be an effective means to enforce the freedom of information

⁷⁶Allan and Currie 'Enforcing access to information and privacy rights: Evaluating proposals for an information protection regulator for South Africa' (2007) *SAJHR* 570 at 572-573.

⁷⁷Task Team on Open Democracy 'Open Democracy Act for South Africa: Policy proposals' (1995) 8-9 in Allan and Currie (n 76) 574.

⁷⁸*Id* 574.

⁷⁹Parliament of the Republic of South Africa 'Report of the ad hoc committee on the review of Chapter 9 and associated institutions'(2007), available at: www.parliament.gov.za/live/chapter_9_report.pdf (accessed 2015-07-24).

⁸⁰Allan and Currie (n 76), 578.

⁸¹*Ibid*.

⁸²Report of the *ad hoc* Committee (n 79) 174.

⁸³*d* 174-175.

rights in the Act and the Constitution'.⁸⁴ Accordingly, they identified a key defect in PAIA: the absence of an independent mechanism for access to information disputes, other than the courts.⁸⁵ In order to appeal a refusal to provide access to information, action must be taken in the High Court. Calland criticises this by invoking the analogy of using a 'hammer to smash an acorn'.⁸⁶ Asmal noted that '[t]he complex and potentially expensive appeals mechanism provided for in the legislation places further obstacles in the way of ordinary individuals wishing to access information ... it is significant that only a handful of cases reach the courts'.⁸⁷

Institutionally, the establishment of a functioning access to information system remains incomplete. For instance, the designation of all Magistrates' Courts as having jurisdiction over matters relating to PAIA has been delayed by the initial drafters of the legislation; even though these are more accessible than the High Courts they have not yet been made available to PAIA requesters.⁸⁸ Part 4 of PAIA deals with appeals against decisions made by public and private bodies.⁸⁹ Requesters may only apply to a court for appropriate relief after that requester or third party has been unsuccessful in an internal appeal. Although courts are defined in PAIA as being both High Courts and Magistrates' Courts, the Minister has yet to authorise access to information matters to be heard by magistrates.⁹⁰ Significantly, the South African History Archive (SAHA) has commented on amendments proposed by the Rules Board for Courts of Law in 2014, which sought to achieve uniformity of court rules in all courts regarding PAIA litigation, including Magistrates' Courts. Because litigation in the High Court is the only mechanism for appeal and there has been a substantial increase in refusals by public bodies, the ability of Magistrates' Courts to hear PAIA cases should be encouraged.⁹¹

5 Conclusion

The current enforcement provisions do not meet the aims set out in PAIA. This

⁸⁴Allan and Currie (n 76) 577.

⁸⁵*Id* 571.

⁸⁶Calland 'Illuminating the politics and the practice of access to information in South Africa' in Allan (ed) *Paper wars: Access to information in South Africa* (2009) 13.

⁸⁷*Ibid*.

⁸⁸Klaaren 'Three waves of administrative justice in South Africa' in Corder (ed) *Comparing administrative justice across the Commonwealth* (2008) 381.

⁸⁹Sections 74-82 of PAIA.

⁹⁰South African History Archive 'Will new rules open Magistrates Courts up to PAIA?' available at: www.saha.org.za/news/2014/May/will_new_rules_open_magistrates_courts_up_to_paia.htm (accessed 2015-07-05).

⁹¹*Ibid*.

is because litigation is 'self-evidently too inaccessible and cumbersome to be an effective means to enforce the freedom of information rights in the Act and in the Constitution'.⁹² Arguably, PAIA's greatest failing is its enforcement mechanism and, despite this, the recommendations of the Asmal Committee have yet to be incorporated into the Act. In jurisdictions such as Canada, information commissioners have made a great impact in promoting access to information by handling a large caseload that provides a developing jurisprudence as well as guidance to government on how to handle requests and interpret exemption clauses.⁹³

It is apparent from the judgments in *President v M&G Media* that there was no merit in either of the state's two main defences: Nugent JA made it clear in the first SCA judgment that the state's reasons for refusing the release of the report were without basis. Notwithstanding this, leave to appeal to the CC was granted. In our view, Ngcobo CJ's decision, on behalf of the majority, to remit the matter to the High Court was incorrect. Apart from the fact that it delayed the release of the report by more than three years, this decision was based on his acceptance that the state's claim that its hands were tied was 'not implausible'.⁹⁴ It appears to us that the state's hands were not tied as it had chosen (for reasons that remain unclear) not to provide affidavits by the three people who had direct knowledge of the events surrounding the production of the report: the two judges and former President Mbeki. As a consequence – this was clearly set out by Cameron J in the minority judgment – there was no need for a 'judicial peek'. The state chose not to place relevant information within its possession before the Court and this must be considered in deciding whether it has discharged the statutory onus placed on it by PAIA. Be that as it may, after taking a judicial peek, Raulinga J in the High Court came to precisely the same conclusion as that reached by Sapire AJ in the same court three years earlier: that the state's reasons for refusing the release of the report did not fall within the exemptions claimed in terms of PAIA.

With regard to alternative bodies handling access to information matters, it is clear from other jurisdictions and our own that a system relying solely on the courts is inefficient and costly. In this case, had South Africa set up an information commissioner's office along the lines of that currently existing in Canada, the commissioner would have been able to view the Khampepe report from the onset. In the event of the commissioner finding against the state, the decision could have been appealed and heard by the High Court but it would have been apparent to the court that its claims were baseless. Based on the report itself, the

⁹²Allan and Currie (n 76) 577.

⁹³Calland (n 86) 13-14.

⁹⁴*President v M&G Media* (n 8) para 60.

High Court would have been able to make a definitive ruling. The case provides an excellent example of how an information commissioner would have expedited the release of the report. Instead, the state was able to use the provisions of PAIA, in particular section 80, to its advantage. The only reason this entire sorry saga was laid bare was that the *Mail & Guardian* engaged in a personal crusade to ensure access to this report and had deep enough pockets to fund this cycle of litigation. Most South Africans would have been effectively fobbed off by government's obfuscation and interminable appeals. The objectives of PAIA would, as a consequence, have been frustrated. Information that should have been disclosed in terms of the law would have remained secret and unlawfully so.

We are of the opinion that the findings of the Asmal Committee be urgently implemented and that an information commissioner be appointed with the power to make binding decisions. This commissioner can be located within the SAHCR but will have to be vested with the capacity and budget to carry out its mandate. Enforcing access through the courts has proven to be technical, time consuming, and expensive, and simply fails to facilitate timeous and effective access to information as required by PAIA. It is entirely cynical, knowing of this defect, to claim that PAIA in its present format gives effect to the right of access to information as contained in section 32 of the Constitution. It is necessary for an inexpensive, flexible, quick and informal means of resolving access to information disputes to be implemented. Amending PAIA and providing for an information commissioner with powers to mediate and if necessary make binding decisions on access to information matters will equip the Act with an effective enforcement mechanism. It will also be congruent with the broader constitutional objective of accountable, responsive and open governance.

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