

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

CASE NO: 23554/2002

In the matter between -

MGP LEKOTA NO

APPLICANT

and

CCI SYSTEMS (PTY) LIMITED

RESPONDENT

In to -

CCI SYSTEMS (PTY) LIMITED

APPLICANT

and

MGP LEKOTA NO

RESPONDENT

**APPLICANT'S HEADS OF ARGUMENT IN THE APPLICATION FOR
LEAVE TO APPEAL**

A. INTRODUCTION

- 1 On 15 April 2005, the Court ordered the applicant for leave to appeal to produce to the respondent all of the documents set out in the order.¹

- 2 The applicant now applies for leave to appeal against the judgment and order. The application for leave was filed and served on the respondent on 20 July

¹ Bundle B p 21

2005.²

3 The grounds set out in the notice of application for leave to appeal are, in summary:

3.1 The applicant had adduced enough evidence of facts to bring all the requested items of information within the ambit of the particular sections which protect such information from disclosure.³

3.2 Even if the applicant had not adduced adequate evidence of facts, the Court ought not have ordered the applicant to disclose the whole record. Instead, it should have referred the request back to the applicant to consider which parts of each document warranted protection. The principle of severability would then apply in each instance where the applicant was of the view that it should disclose only part of a particular document. Such a ruling would apply to all of the requested items.⁴

4. The applicant will first deal with two general points upon which this application is founded.

² Bundle B pp 1-12

³ See paragraphs 1, 3, 5, 6, 7, 8 – in respect of items 10, 11, 48, 62, 12 and 13.

⁴ See paragraphs 2.3, 3.4, 5.4, 6.4, 7.3, 8.2, 9, 10 and 11.

5. The applicant will then deal with a number of individual points under the head of some items or category of items under which disclosure was sought by the respondent.
6. At the outset it should be stated that, in argument, the applicant will not take issue with the findings of the court to the effect that insufficient information was placed before it to enable the court to find that one or more of the sections relied upon by the applicant were of application and would serve to protect certain documents or certain categories of documents from disclosure. The point is not however abandoned.

B. FIRST GENERAL POINT

7. The Court did consider referring the request back to the committee⁵. However the court declined to refer the matter back to the applicant so that consideration could be given to applying the provisions of the Act relating to severance.
8. It is submitted that a court on appeal might well adopt a different approach for the reasons that follow.
9. This court reasoned in essence that because the applicant had had an opportunity to apply severance and had neglected to utilise that opportunity there was no reasonable basis for a referral back to correct the situation. Two

⁵ Judgment p 111 paragraph 107

added considerations applied by the court were first, that the Act⁶ was easy to follow and in any event the applicant had the resources to gain an understanding of its provisions and second, the issue of the delay that would be occasioned by a referral back.

10. But the result of this analysis is that protected information might yet slip through the net and this because the executive (the applicant), simply put, did not do its job properly.
11. Another court might reason that the primary function of this court in terms of the Act is to ensure that the principal objects of the Act are achieved. This court has been visited with a supervisory function and been given wide powers to carry it out. Seen in this light it is the primary duty of this court to ensure that access is given where the Act, properly interpreted and applied, so permits and that information is protected where, properly interpreted and applied, the Act demands.
12. The wide powers given to this court enable it to carry out this function
13. Put another way, the fact that an executive organ errs should not have the result that protected information, that would otherwise have been protected had the provisions of the Act been properly interpreted and applied, is released into the public domain. Of course, the corollary applies with equal force. This, it is submitted, is an overriding consideration.
14. There is of course the added consideration that this Act has come into operation only relatively recently, that there are policy considerations underlying the manner of its application by our courts and that a higher court should, as a matter of public policy, have the opportunity to determine the manner in which it should be implemented.

⁶ The Promotion of Access to Information Act, 2 of 2000 ("the Act")

C. SECOND GENERAL POINT

15. The remedy that the court was empowered to give is one provided for in s 82 of the Act. Section 82 provides as follows:

" 82. Decision on application

The court hearing an application may grant any order that is just and equitable, including orders —

- (b) confirming, amending or setting aside the decision which is the subject of the application concerned;
- (c) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the Court considers necessary within a period mentioned in the order;
- (d) granting an interdict, interim or specific relief, a declaratory order or compensation; or
- (e) as to costs."

16. Section 82 therefore confers upon the Court the powers of review⁷. Having reviewed and set aside the decisions of the information committee, the Court had to decide whether to substitute its own decision for that of the committee, or to refer the matter back for reconsideration, in accordance with the judgement of the Court.

⁷ See Judgment: para 45

17. The general principle in review matters is that a matter should be remitted unless there are special circumstances for not doing so.⁸ What constitutes "special circumstances" is, *inter alia*, the fear that the body to which a matter is referred back will not apply its mind fairly and properly as directed by the Court, or when the outcome appears to be a foregone conclusion.
18. There is no evidence or reasonable apprehension that the applicant's information committee will not act in accordance with the judgment or directives of the Court if the matter is referred back to it.
19. The reviewing court's power, is described by Baxter⁹ as follows:

"The mere fact that a court considers itself as qualified to take the decision, as the administrator does not of itself justify usurping that administrator's powers ...; sometimes, however, fairness to the applicant may demand that the court should take such a view."

20. In this matter, although the court considered itself as qualified to take the decision and to substitute its own decision, the court usurped the powers of the information committee against the general principle to be applied when reviewing administrative actions.
21. Secondly, the court, in certain instances, was compelled to make assumptions as to the likely, or probable, content of the documents without having had an opportunity to examine those documents. It follows that this court was not in as good a position as the administrative functionary to complete the task at hand.

⁸ *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council* 1999 (1) SA 104 at 109C-J; *Competition Commission v General Council of the Bar of South Africa* 2002 (6) SA 606 (SCA) at 618A

⁹ *Administrative Law*, 1964 at 684

22 It is submitted further that in circumstances pertaining to the defence and security of the country, the courts should show a measure of judicial deference to the bodies or functionaries that are charged with complex decision-making on specialist matters. Having given an extensive interpretation of the provisions of the Act, the Court ought to have referred the matter back to experts in matters of defence and security to re-adjudicate the respondent's request for access to information. As Cameron JA put it, in *Logbro Properties CC v Bedderson NO and others*¹⁰:

"A judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies; to admit the expertise of those agencies in policy laden or polycentric issues; to accord their interpretation of fact and law due respect"

23 In the premises, it is submitted that another court may find that the decision to substitute its own decision was not the correct decision and that the matter should be referred back to the Information Committee.

D. AD ITEM 9

24. This court found that the request under item 9 bore the meaning contended for by the respondent and not the meaning contended for by the applicant.¹¹

¹⁰ 2003 (2) SA 480 (SCA) at 471A-B

¹¹ Judgment para 51

25. Another court might reasonably find that, in the circumstances, the applicant should have been granted an opportunity to apply the severance provisions of the Act to the request, based on the correct interpretation of that request.
26. Otherwise the effect of this court's order may be to bypass the provisions of the Act on account of a wrong interpretation of the request relied upon by the respondent.
27. Again, it bears emphasis that another court may find that the primary duty of a court in terms of this Act is to exercise a supervisory function to ensure that the main provisions of the Act are properly applied.

E. AD ITEM 10

28. This court found¹²

"The failure of the respondents to adduce facts to bring the umbrella agreement within the ambit of sections 56(1), 37(1), 41(1) or 42(2) makes it impossible to find that the whole agreement or any parts of it are indeed covered by the subsection."

¹² Judgment at para 67

29. The resultant order is based therefore on a failure by the applicant to adduce the necessary facts and by virtue of the operation of the onus provisions of the Act. Some protected information might be disclosed as a result.
30. This danger can be averted by recourse to the severance provisions (or to the provisions of section 80 of the Act).
31. In respect of the application of section 36(1)(e), it is submitted that on a proper interpretation of clause 18 of the relevant contract, information in the contract itself is confidential.

F. AD ITEMS 12 AND 13

32. In respect of Items 12 and 13,¹³ the Court made the point that the applicant had not considered the question of severability and that the reasons given for the refusal were not adequate. The Court concluded that because the respondent's managing director, Dr Young, enjoyed the Department of Defence's highest security clearance and that because Young stated that he had never done anything to prejudice the defence or security of the Republic, the applicant had failed to show that the disclosure of the Items to the respondent would cause the harm referred to in the relevant section.

¹³ See Judgment p 76 paragraphs 80 to 84.

33. Another court might well find that the fact that Mr Young possesses a security clearance certificate, *per se*, is no good reason to release protected information. This appears to be going beyond the provisions of the Act.

34. Further, this category of documents is pre-eminently a category of information warranting the application of the severance provisions of the Act (alternatively, the provisions of section 80 of the Act).

G. AD ITEM 14

35. This category of documents is an extremely wide category encompassing a substantial volume of documentation.¹⁴

36. Accepting that the applicant erred in dealing with this category of documents as it did (by recourse to section 45(b) of the Act), the issue is whether that error should have as its consequence the disclosure of all the documents within that category, without more.

37. It is submitted that another court may reasonably find that before this category of documents is disclosed in its entirety, the applicant should have an opportunity to apply the severance provisions of the Act.

¹⁴ Judgment para 85

H. AD ITEMS 15, 17, 18 AND 19¹⁵

38. It is submitted that the same considerations as have been raised in respect of item 14 apply in respect of this category of documents.

L. AD ITEMS 22 AND 23

39. We are instructed that items 22 and 23 were not dealt with in the notice of appeal in error¹⁶. Leave of this honourable court is sought to enable the applicant to deal with this category of documents.

40. In respect of this category of documents the respondent alleged that "*they also contained details of the equipment on board the Corvette, including performance capabilities, weapon numbers and Navy Value Systems of such weapons.*" To the extent that this allegation is correct the wide order granted by the court in respect of disclosure could have as its result the fact that protected information is disclosed.

41. In respect of Item 22,¹⁷ the Court stated that it was not clear why a costs and risks audit would contain the detailed specifications alleged and ordered the

¹⁵ Judgment para 88

¹⁶ The error arises from the inclusion of items 20 and 21 in para 9 of the notice of application for leave to appeal instead of items 22 and 23. Items 20 and 21 are no longer contentious.

disclosure, this because audits would simply reflect estimated costs at various times. The court made the assumption that Item 23 did not contain detailed technical specifications. It declined the Information Committee an opportunity to sever such information.

42. In order for this result to be avoided it is submitted that another court might reasonably find that it is appropriate in these circumstances to afford the applicant's an opportunity to apply the severance provisions of the Act.

J. AD ITEMS 26, 33 - 38 AND 44

43. Once again, in respect of this category of documents the allegation has been made by the applicant that *"they also contained details of the equipment on board the Corvette including performance capabilities, weapon numbers and Navy Value Systems of such weapons."*

44. In respect of Items 26, 33 to 38 and 44,¹⁷ the Court concluded that spreadsheets summarising quotations would not disclose pricing methods but only prices, and that it is unlikely that the spreadsheets would contain detailed technical specifications. The Court went further to state that even if they did contain detailed technical specifications this would not *per se* be sufficient to avoid disclosure. The court did not afford the Information Committee an

¹⁷ See Judgment, paragraphs 90-94

¹⁸ See Judgment p 100 paragraphs 98 to 100.

opportunity to explain further why the information is protectable or to excise such information from documents to be disclosed. First, the Court made the assumption that it is unlikely that the spreadsheets would contain detailed technical specifications. Second, the Court stated that even if it were so, the applicant must run the risk of disclosing potentially harmful information to the respondent.

45. It is submitted that another court might reasonably find that in all the circumstances, (including the fact that a vast number of documents is concerned) the applicant should have the opportunity of applying the severance provisions of the Act.

K. AD ITEM 40¹⁹

46. It has been alleged by the applicant that the Systems Specification document details the functional applications of the performance of the Corvette System. *Prima facie* this would appear to be protected information in terms of the Act.

47. Once again it is submitted that another court might reasonably find that in respect of this document, at least, the applicant should be given an opportunity to apply the severance provisions of the Act.

¹⁹ Judgment para 105

L. CONCLUSION

48. Accordingly an order is sought granting leave to appeal against the whole of the order granted by this court. It is submitted that, if leave is granted, the matter should be referred to the Supreme Court of Appeal.

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Leave to appeal