ORIGINAL

REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

1/12/2014
DATE

SIGNATURE

CASE NO: 2013/32512

In the matter between:

THE RIGHT2KNOW CAMPAIGN	First Applicant
THE SOUTH AFRICAN HISTORY ARCHIVE	Second Applicant
M & G MEDIA LIMITED	Amicus Curiae

and

THE MINISTER OF POLICE	Respondent
THE NATIONAL DEPUTY INFORMATION OFFICER OF THE SOUTH AFRICAN POLICE SERVICE	Second Respondent

JUDGMENT

SUTHERLAND J:

Introduction

[1] This is a case about whether or not the people of South Africa ought to know what places and areas are national key points, as contemplated by the National Key Points Act 102 of 1980 (NKP Act). In terms of section 11(3) of Promotion of Access to Information Act 2 of 2000 (PAIA) a 'requester' of information, other than compliance with the formal request procedures, need not justify a request for information held by the State. If the information is refused, the refusal must be justified on one or more grounds set out in Chapter 4 of PAIA.

[2] A request by the second applicant, to the Second respondent, within the contemplation of section 18(1) of the PAIA to disclose the national key points, was made on 4 October 2012 and refused on 16 November 2012. The internal appeal, provided for in section 74 of PAIA, to the First Respondent was dismissed on 28 February 2013.

[3] These decisions by the respondents provoked this application in which the relief sought is to declare that the decisions of the respondents refusing the request for information in terms of PAIA are unlawful and unconstitutional, to

review and set aside the refusals and to direct the provision of the requested information, being:

(1) records indicating what places or areas have been declared a "National Key Point" or "National Key Points Complex" under section 2 and 2A of the National Key Points Act 102 of 1980 and

(2) the bank statements from 2010 to 2012 of the Special Account for the Safeguarding of National Key Points provided for in section 38 of the National Key Points Act.

The Parties

[4] The first applicant, the RIGHT2KNOW campaign and the second applicant, the South African History Archive are civil society organisations whose objectives are to serve the public interest. Both have an interest in advancing constitutional values, the first applicant by promoting transparency, accountability, a free media, effective governance of public and private bodies, and a human rights culture; the second applicant by the collection and preservation in accessible mode of materials of importance to the history of and an understanding of South African society. The Amicus, whose admission was granted unopposed, is a publisher of news in South Africa and who has insight into the role of professional journalists in reporting on public affairs and the restrictions that are constructed to inhibit their function in unearthing information for dissemination to the general public. The Amicus associates itself with the relief sought by the applicants.

[5] The second respondent is the designated Information Officer of the South African Police Service as contemplated in the definition thereof in section 1 and in the provisions of section 17 (1) of PAIA and is the deponent to the answering affidavit. The incumbent of such office is required in terms of sections 19 and 25 of PAIA to assist requesters of information and provide the information sought subject to the caveats provided for in various other provisions of PAIA. The first respondent is the political officer bearer in whom the power is vested to make declarations of places as national key points.

The Respondents reasons for refusal.

[6] The answering affidavit of the respondents seeks to justify the refusal. The deponent alleges that beyond disclosing that there are 200 national key points, that most are privately owned by juristic and by natural persons, and that key points can be categorised as banks, munition industries, petro-chemical industries, water supply, electricity, communications, transport, government institutions, data processing, research or 'chemical information'(sic) systems, no more information can appropriately be disclosed.

[7] The rationale is that 'mere mention' of such a place will attract 'unnecessary attention' and what would at present be seen as insignificant would attract such attention. For example, so it is alleged, not everyone knows that OR Tambo airport is a key point, but if that fact was disclosed, interest would be

attracted. How information about a key point is used is unpredictable and 'people who seek to hurt the public' may be encouraged to take an interest in such places. The categories of key points listed are 'pivotal' to the 'security and stability' of the country. It is inappropriate to reveal any of the places because to do so would prejudice the security of the owners and their buildings and the 'defence and safety' of the country. Non-disclosure is 'necessary or expedient for the safety of the Republic'. Apparently, there are 'dark forces' who are out to destabilise peace-loving countries, like our own. By way of illustration, the bombing of the mall in Nairobi shows 'how vulnerable countries and their citizens are.'

[8] The deponent says that PAIA and section 2 of the NKP Act should be read together. Section 2 reads:

> (1) If it appears to the Minister at any time that any place or area is so important that its loss, damage, disruption or immobilization may prejudice the Republic, or whenever he considers it necessary or expedient for the safety of the Republic or in the public interest, he may declare that place or area a National Key Point.
>
> (2) The owner of any place or area so declared a National Key Point shall forthwith be notified by written notice of such declaration. (Emphasis supplied)

By inference, the allegation must be understood to mean that the deleterious occurrences that are listed, ie, a risk of loss, damage, disruption or immobilisation of the key point will result from disclosure.

[9] Lastly, in responding to a criticism in the founding affidavit that no attempt was made by the respondents to 'excise' any of the information and that a blanket refusal was given, the deponent concedes the total refusal but alleges that 'no information could be excised' for the reasons which have been described.

[10] The reasons in the answering affidavit are not the reasons initially invoked by the second respondent. On 16 November 2012 when the second applicant refused the request, she invoked only section 38(a) & (b)(i)(aa) of PAIA. Those provisions read:

> Mandatory protection of safety of individuals, and protection of property
> The information officer of a public body-
>
> (a) must refuse a request for access to a record of the body if its disclosure could reasonably be expected to endanger the life or physical safety of an individual; or
>
> (b) may refuse a request for access to a record of the body if its disclosure would be likely to prejudice or impair-
>
> (i) the security of-
>
> (aa) a building, structure or system, including, but not limited to, a computer or communication system;
> (bb) a means of transport; or
> (cc) any other property; or
>
> (ii) methods, systems, plans or procedures for the protection of-

(aa) an individual in accordance with a witness protection scheme;
(bb) the safety of the public, or any part of the public; or
(cc) the security of property contemplated in subparagraph (i) (aa), (bb) or (cc).

[11] The refusal was amplified by this statement by the second respondent:

> "To provide access to the requested records will impact negatively on and jeopardize the operational strategy and tactics used to ensure security at the relevant property or safety of an individual (eg if a person plans, intends or tries to harm the relevant individual or to prejudice or impair the security of the building, access to this information may prejudice the effectiveness of those methods, techniques or procedures used to ensure the safety of such individuals and/or the building – a person who intends to harm the relevant individual may with ease harm the individual if he or she has access to such information, or he or she may with ease determine the strategies and tactics used for such protection and then use the information to do such harm."

[12] Plainly, the safety of the country was not, at that time, thought to be a consideration; the concern was wholly about unidentified individuals. This focus on individuals does not sit well with the import of Section 2 of the NKP Act (cited above) a theme to which I shall return.

[13] In the dismissal of the internal appeal on 28 February 2013, the First Respondent regurgitated the second respondent's rationale and then added further reasons to justify a refusal. Extrapolating on the theme of individuals' well-being, the first respondent contended that because the majority of key points are privately owned, the name of the place also 'qualified' as a person's address and this constituted 'personal information' as defined. He referred to the definition

and to section 34 which concerns 'mandatory protection of the privacy of a third party' if that person is a natural person. Where disclosure of information that might be personal information, or confidential information of a natural person, section 47 requires notice to them before disclosure to enable *audi alterem partem* on the decision to disclose. The allusion to this aspect was not developed and was alluded to only to justify the idea that giving notice to the owners of the majority of the 200 places that were key points was unduly onerous within the meaning of section 45(b) of PAIA which provides that ' ...a public body may refuse a request for access to a record of the body if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.' (The resistance by the respondents based on Section 45(b) was not persisted with in the answering affidavit nor in argument.)

[14] The first respondent invoked, without express reference, the terminology of section 2 of the NKP Act, alleged these places would be 'soft targets', gave the list of categories of key points already mentioned in the answering affidavit, and emphasised that knowledge that a place was a key point exposed the individuals at the key point to danger as the knowledge was 'highly likely to prejudice or impair the security of such places.'

[15] The first respondent added, gratuitously (because the information was not solicited) certain information about the security arrangements at certain key points; ie 'VIPS' who are 'at the key points' are guarded by the VIP protection

unit. This unsolicited information seems to have been given to justify the non-existence of the special account established by section 3B of the NKP Act and to indicate that the costs of the protection of the VIPS was catered for in the funding of the VIP protection unit. This disclosure was misdirected, more especially, because security relevant to the NKP Act is about places not about people.

[16] The respondents' articulations of their reasons fail the test set by Ngcobo CJ in President, RSA v M & G Media Ltd 2012 (2) SA 50 (CC) at [23] – [25]:

> [23] In order to discharge its burden under PAIA, the State must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the State has discharged its burden under s 81(3) of PAIA 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.
> [24] The recitation of the statutory language of the exemptions claimed is not sufficient for the State to show that the record in question falls within the exemptions claimed. Nor are mere ipse dixit affidavits proffered by the State. The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.
> [25] Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it does, then the State has discharged its burden under s 81(3). If it does not, and the State has not given any

> indication that it is unable to discharge its burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the State has only itself to blame. (Footnotes omitted)

The criteria for a judicial peek

[17] In argument, counsel for the respondents, quite properly, was driven to concede that there was no *evidential material* disclosed in the papers to support the refusal. He contended that the predicament of the respondents was illustrated by the experiences of that well known gentleman adventurer and upholder of noble causes, James Bond, who, albeit it must be supposed, with his customary charm and grace, declined to disclose a fact to a questioner, because were he to do so, he would have to kill him. This is an interesting submission, which, alas, is spoilt by the absence of such an allegation under oath.

[18] A solution to a predicament of such a sort is addressed in Section 80 of PAIA which provides that:

> (1) Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds.
>
> (2) Any court contemplated in subsection (1) may not disclose to any person, including the parties to the proceedings concerned, other than the public or private body referred to in subsection (1)-

(a) any record of a public or private body which, on a request for access, may or must be refused in terms of this Act; or

(b) if the information officer of a public body, or the relevant authority of that body on internal appeal, in refusing to grant access to a record in terms of section 39 (3) or 41 (4), refuses to confirm or deny the existence or non-existence of the record, any information as to whether the record exists.

(3) Any court contemplated in subsection (1) may-

(a) receive representations ex parte;

(b) conduct hearings in camera; and

(c) prohibit the publication of such information in relation to the proceedings as the court determines, including information in relation to the parties to the proceedings and the contents of orders made by the court in the proceedings.

[19] However, as already said, the contention of counsel is not foreshadowed in the answering affidavit, notwithstanding an invitation therein from the respondents to peek at the information. Indeed, no attempt is made even to justify the invitation to peek; the most that is said in the affidavit is that a court may do so and the respondents are not adverse thereto. There is no allegation by the respondents of being hamstrung in presenting their case, not to mention a plausible basis being laid for such an allegation. This distinguishes these circumstances from those addressed in the majority judgment in President of the RSA v M&G Media Ltd 2012 (2) SA 50 (CC) in which Ngcobo CJ, at [37], [39], [45], [46], [50] and esp [60] dealt comprehensively with the approach of a court to examining the material which is the subject matter of a disclosure dispute. In that matter a peek was ordered and the matter referred back the High court to do so.

That was done, and the material, a report on the 2002 Zimbabwe Election was examined by the judge who ordered its disclosure. That decision was appealed against, and the SCA in President, RSA v M & G Media Ltd ZASCA 124 (19/09/2014) addressed the decision to do so, yet again. The gravamen of the judgment delivered by Ngcobo CJ was the court's response to a plausible allegation that the State's 'hands were tied' or 'hamstrung' in meeting the threshold requirements of PAIA to justify the non-disclosure. Where such a predicament was claimed and shown to be plausible, the interests of justice had to prevail and a peek becomes appropriate. Brand JA summarised the approach approved by the Constitutional Court at [12] - [14]:

> [12] In writing for the majority in the Constitutional Court Ngcobo CJ also concluded that the evidence put forward by the Presidency in its answering papers was insufficient to discharge the onus resting on it in terms of s 81(3), to establish that the report fell within the scope of the exemptions claimed. But, so he held, that was not the end of the matter, because proceedings under PAIA differ from ordinary civil proceedings in several respects (see paras 33-35). One of these differences most pertinent for present purposes, so the Chief Justice said, is that parties to disputes under PAIA may be constrained by factors beyond their control in presenting and challenging evidence. From the requestors' perspective, the facts upon which the exemption is justified, will be exclusively within the knowledge of the holder of the information. In consequence they may have to resort to bare denials of facts relied upon by the holder as justifying refusal of access. On the other hand, holders of information may be compelled to rely on the contents of the record itself to justify the exemption. But they will be precluded from doing so by the provisions of ss 25(3)(b) and 77(5)(b) of PAIA. The second feature distinguishing PAIA disputes from ordinary civil proceedings, which is pertinent in this case, so the Chief Justice continued, is that courts are afforded the discretion to call for additional evidence in the form of the contested record itself and have, what is referred to in the parlance of American jurisprudence, 'a judicial peek' at its contents.

[13] As to when courts should exercise their discretion in favour of resorting to a judicial peek into the contested record, Ngcobo CJ held (in para 44) that it should be reserved for the situation where an injustice may result from the unique constraints placed upon the parties in PAIA disputes: where, for instance, the holder of the information had failed to discharge its burden under s 81(3), but indicated that it was prevented from doing so by the provisions of PAIA, the courts should generally invoke s 80 (para 46). Or where the probabilities are evenly balanced and the doubt as to the validity of the exemptions claimed can be explained in terms of the limitations placed on the parties to adduce evidence (para 47).

[14] In concluding that the provisions of s 80 should have been invoked by the high court in the circumstances of this case, Ngcobo CJ was primarily swayed by three considerations (paras 54-66). First, the conclusion of the SCA that the refusal of access to the report might have been justified, but since this had not been established by acceptable evidence, disclosure of the report was inevitable. Secondly, that the Presidency had alleged in its answering papers that its hands were tied by sections 25(3)(b) and 77(5)(b) of PAIA in presenting evidence in support of its claim to exemptions. Thirdly, that even if refusal of access to the report as a whole was justified, s 28 of PAIA provides for disclosure of information that is not protected and that can reasonably be severed from the protected part. Although the Presidency asserted that the report was not severable, M & G was placed at a disadvantage in challenging this assertion as it did not have access to the report. In consequence, the assertion of non-severability could not be decided without having regard to the content of the report.

[20] However, ultimately, in argument before me, the suggestion in support of a peek veered towards the peek being used to merely perform the very exercise which the respondents were obliged to undertake; ie to sift through the declarations and decide if there were any key points whose identity, upon good grounds recognised by PAIA, might not be appropriate to disclose. That expectation is inappropriate. Cameron J, dissenting from the order made in President, RSA v M & G (CC) supra, cautioned as follows about the implications of a peek:

[123] It is nevertheless necessary to consider the course proposed in the judgment of Ngcobo CJ. The judgment affirms the ambit and importance of the right of access to information; notes that disclosure is the rule and exemption is the exception; observes that in comparable foreign jurisdictions, the state must show that the record is covered by the exemption claimed; requires government to produce evidence to show that, on the probabilities, the information falls within the exemption; and disclaims recitation of statutory language and ipse dixit formulaism — but nevertheless decides on remittal so that the High Court can invoke s 80 of the statute. In my respectful view this is wrong.

[124] Section 80 permits a court in all circumstances to examine the disputed record itself, but the examination must be secret and the parties excluded. This provision can indeed, as Ngcobo CJ states, be employed to test claims of secrecy and to facilitate, rather than obstruct, access to information. But its provisions should be invoked with care. M & G urged that judicial examination of the disputed record (a 'judicial peek') should be resorted to only in exceptional circumstances. I agree. There are two reasons for this conclusion.

[125] First, a cautious approach to s 80 accords with the structure of the statute. The Constitution creates an entitlement to information held by government, which the statute has limited under the Bill of Rights. The structure of PAIA is to stipulate the process required to claim access, and to enumerate the instances where it may be refused. The statute creates an overriding judicial power to examine the record, but goes on to provide explicitly that the burden of establishing that an exemption is properly invoked lies on the party claiming it. If the object of the statute were to create a novel form of proceeding in access disputes, and invest courts with inquisitorial powers for ready use in disputes, its provisions would not have included so plain an imposition of the burden on the holder of information.

[126] Both the onus and the judicial examination provisions must be given effect, but within their appropriate fields of application. Judicial examination should not be a substitute for requiring government to discharge its burden of showing that the statute's exemptions applied. Still less should it be invoked to avoid an order of disclosure when government has failed to establish its case under the statute.

[127] The provision should in my view be invoked only when government plausibly asserts the hands-tied argument or a ground of exemption, but doubt exists whether the exemption is rightly claimed. The provision

should, in other words, be used to amplify access, and not to occlude it. It should only be a last resort. It should not be used to help government make its case when it has failed to discharge the burden the statute rightly places on it.

[128] Second, the very provisions of s 80 make it plain that the power it confers should be of rare recourse. The provision makes the court a party to the secrecy claimed, and prohibits it from disclosing the disputed record to any person, 'including the parties to the proceedings concerned'. In effect, two fundamental principles of the administration of justice are here upended: first, the adversary nature of the parties' dispute, in which the court is a disinterested arbiter, is suspended; and, second, the indispensable attribute of the administration of justice, its openness, is shrouded. These are consequences that we should be reluctant to countenance too readily.

[129] Secret in camera examination of disputed records requires courts to lay aside the foundations of their precious-won authority. As the United States Circuit Court of Appeals for the District of Columbia has stated, a 'denial of confrontation creates suspicion of unfairness and is inconsistent with our traditions'. The blunt risk is that the parties' dispute will be decided on the basis of a court's secret conclusions from a secret process. That may sometimes be necessary. The power the statute creates is for cases of necessity. But the risks inherent in resorting to secret judicial examination are so grave that it should be avoided if at all possible. The Supreme Court of Appeal rightly said of this:

'Courts earn the trust of the public by conducting their business openly and with reasons for their decisions. I think a court should be hesitant to become a party to secrecy with its potential to dissipate that accumulated store of trust. There will no doubt be cases where a court might properly make use of those powers but they are no substitute for the public body laying a proper basis for its refusal.'

[130] Nor should the public ever fear that courts may assist in suppressing information to which the Constitution says they are entitled. To give secret judicial examination of disputed records a central place in deciding claims to exemption, instead of enforcing the burden government rightly bears to justify withholding information, is in my view a grave error.

(Footnotes omitted)

[21] Accordingly, to sum up, in my view, the idea of a peek in this particular case is inapposite because no case is attempted to justify its need, and it is plain

that because of the grave policy considerations that attend upon its use, it is never available for the asking, but must be seriously motivated as the only appropriate mechanism to avert a failure of justice.

The National Key Points Act: an examination

[22] At the heart of this controversy in the NKP Act. What is a national key point? It is a place that the designated Minister [at present the Minister of Police, formerly the Minister of Defence] declares to be one. The Minister is empowered to do so in section 2 of the NKP Act (Cited Above). It confers a wide discretion for it requires merely that 'it appears' to the minister that the prescribed circumstances exist or he 'considers' it necessary or expedient or he 'considers' it to be in the public interest. More specifically, the Minister may declare a place a key point if 'it appears' 'so important' that its loss, disruption or immobilisation may prejudice the Republic. A common sense view might think of airports, sea ports and the like. The second thought that can occur to him is that he 'considers it necessary or expedient' for the 'safety of the Republic to declare a place a key point. What that might encompass is obscure. A third thought is that he 'considers' it in the 'public interest' to declare a place a key point. This notion, curiously distinguishing the safety of the state from the public interests, perhaps a prescient piece of drafting in the era of 1980, leaves open a field of concerns without clear limits.

[23] What is the effect of a declaration? The object is to ensure that key points are appropriately secured against the threats mentioned in section 2. This is achieved by imposing an obligation on the owner of a key point, at the owner's own expense to put security measures in place to the satisfaction of the Minister (Section 3). If the owner fails to do so, the owner commits an offence. If the owner fails to comply the Minister could order the measures he deems appropriate to be put in place at state expense. When that is done, the Minister is empowered to recover the costs for which the owner was liable. (Section 5(b))

[24] Thus, in my view, it is plain that the purpose of the NKP Act is to ensure that certain places ought to are secured and their owners can be forced to put in place security measures through the use of criminal sanctions and by the recovery of money spent by the state to effect the measures as deemed necessary. A point of importance is that the gravamen of the NKP Act is the securing of areas, places and infrastructure, not the personal security of individuals who might frequent them.

[25] Is the identity of the key points to be kept secret? Nothing in the NKP Act provides for that idea. If that had been the purpose of the NKP Act, it would be startling that no mention was made, especially when express provisions exist to inhibit dissemination of information *about* the security measures in place. Disclosure of information about security is conduct criminalised by section 10 which provides:

10 Offences and penalties

(1) Any person who at, on, in connection with or in respect of any National Key Point performs any act which, if such act would have constituted an offence in terms of the Official Secrets Act, 1956 (Act 16 of 1956), if performed or executed at, on, in connection with or in respect of any prohibited place, as defined in section 1 of that Act, shall be guilty of an offence and liable to the penalties prescribed for that act in that Act.

(2) Any person who-

(a) hinders, obstructs or thwarts any owner in taking any steps required or ordered in terms of this Act in relation to the efficient security of any National Key Point;

(b) hinders, obstructs or thwarts any person in doing anything required to be done in terms of this Act;

(c) furnishes in any manner whatsoever *any information relating to the security measures, applicable at or in respect of any National Key Point or in respect of any incident that occurred there,* without being legally obliged or entitled to do so, or without the disclosure or publication of the said information being empowered by or on the authority of the Minister, or except as may be strictly necessary for the performance of his functions in regard to his employment in connection with, or his ownership of, or as may be necessary to protect, the place concerned, shall be guilty of an offence and on conviction liable to a fine not exceeding R10 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment. (Emphasis supplied)

[26] The section deals expressly with confidentiality of the security measures *per se,* not the secrecy of the status of the place as a key point. No offence is created to penalise the disclosure of the identity of a place as having been declared a national key point. Regulations made under section 11 of the NKP Act, despite creating more offences, also, do not address the idea that the status of the key points be a secret. (see: R1731, GG 8338, 13 August 1982)

[27] The reference to the Official Secrets Act is obsolete because that statute was repealed by the Protection of Information Act 84 of 1982 (as amended up to Act 11 of 2003). It too has a definition of 'prohibited place' which is confined to military establishments: ie:

> '(a) any work of defence belonging to or occupied or used by or on behalf of the Government, including-
>
> (i) any arsenal, military establishment or station, factory, dockyard, camp, ship, vessel or aircraft;
> (ii) any telegraph, telephone, radio or signal station or office; and
> (iii) any place used for building, repairing, making, keeping or obtaining armaments or any model or document relating thereto;
>
> (b) any place where armaments or any model or document relating thereto is being built, repaired, made, kept or obtained under contract with or on behalf of the Government of the Government or of any foreign State;'

[28] If the Protection of Information Act is accepted as the successor statute, section 14(a) requires all 'prohibited places' to be gazetted, and accordingly, their identity to be published. The only offences relating to such a prohibited place is trespass (Section 2) and obstructing a guard (Section 6). Nothing in this Statute obliquely points to secrecy about the status of 'prohibited place' still less a key point. Might an argument be made about an inference to be drawn from the absence in section 2 of the NKP Act of a need to gazette the declarations? No contention to that effect was advanced. In my view the purely administrative procedure of a declaration and notice to the sole affected parties, ie the owners who had to expend money for security, illustrates the narrow focus and purpose

of the statute: to make lawful the compulsory expenditure of private funds on security when demands by the Minister are made and to recover state expenditure if such owners fail to comply.

The Applicants Rebuttal of the respondents' rationale

[29] The applicants' case is, first, that it is demonstrable that the case presented by the respondents is bereft of evidence to support it; secondly, even if there was a plausible basis to refuse disclosure, on the factual material and the related contentions presented to the court, section 46 trumps the respondents' refusal, and disclosure must follow.

Harm to individuals

[30] Other than the respondents' contentions *per se,* there is no foundation laid for the idea that individuals will or even may be harmed.

[31] The applicants are at pains to say that they are uninterested in the addresses of the places declared to be key points. In my view, the alleged anxiety about disclosure of addresses is misplaced. It may be correct that the only way to describe a particular key point is by reference to its address per se. The applicants have no interest in addresses per se, and where the key point can be identified without such reference, no obligation exists to do so. However, it is correctly surmised by the respondents that even without an address it is possible

for an inquisitive person to find out where a place is located. Sensitivity about personal information of individuals as contemplated in section 34 of PAIA is utterly unmotivated. Moreover, it is highly problematic that the fact of the status of a place as a national key point is capable of being understood to be personal information of a natural person, as contemplated in section 34 of the definition of 'personal information' in section 1 of PAIA.

[32] The answering affidavit hardly mentions the supposed plight of individuals, but is mentioned, baldly, in the initial refusal and the appeal decision.

The Defence and security of the Republic

[33] The remarks made about this aspect, might on a generous interpretation be encompassed by Section 41 of PAIA,(which deals with the defence, security and international relations interests) albeit not expressly referred to, and this theme dominates the answering affidavit.

[34] Again, no evidence is adduced to support the bald allegations.

What can be made of what the respondents do allege?

[35] The only 'fact' alluded to in the answering affidavit is the bombing of the mall in Nairobi, ostensibly by Somali Extremists irked by Kenya's involvement in

security operations in the Horn of Africa. This is, self- evidently, an ill chosen example; ie, to compare a shopping centre being exposed to politically inspired violence, where the public congregate *en masse*, with a key point, is inapposite. However, it may be supposed that, upon a generous interpretation of the remark, it was intended simply to illustrate the generic exposure to unexpected violence that everyone experiences. Nevertheless, to give voice to a bland truism contributes nothing to a justification under PAIA.

[36] A serious flaw in the efforts to justify non-disclosure is the absence of an argument to support the conclusion that the NKP Act objectives include keeping secret the status of places as key points. Moreover, as that prop is absent, it was incumbent upon the respondents to adduce evidence that, notwithstanding the absence of such an objective, to use the language of section 38, disclosure 'could reasonably be expected to endanger' anyone, or was 'likely to prejudice or impair' any security measure of a building or a person, or to use the language of section 41, disclosure 'could reasonably be expected to cause prejudice' to the state's security. All the respondents offer are platitudes and a recitation of the provisions of the statutes.

[37] The rationale offered by the respondents is spoilt by the conduct of the Government itself, because evidence was adduced of ministers having furnished details of key points to Parliament for the whole world to know, including, presumably, those dark forces that lurk in wait to disturb our tranquillity. A further

example of public disclosure of a key point adduced by the applicants includes the very public announcement that Nkandla, the private home of President Zuma, has been declared a key point. (The legitimacy of such declaration is not a question that needs to be decided in this matter.) Other examples given are a report on 5 August 2008 of a Government Official who explained the arrest of homeless people who deigned to sleep outside a Department of Justice Building in Cape Town on the grounds that it was a key point; a report on 15 November 2012 that a Police Brigadier had publically justified the arrest of protesters outside the Rustenburg Magistrates' Courts on the grounds that the court was a national key point; and a report on 30 August 2012 that the Chairman of the Parliamentary Portfolio Committee for Correctional Services justified the forcible destruction of photographs taken by journalists of a fatal thrashing administered by warders to a prisoner on the grounds that Groenpunt prison was a key point. These factual examples were adduced to rebut the rationale offered in the answering affidavit and have gone unanswered.

[38] The conclusion is inescapable that the rationale offered for the refusal fails to meet the threshold set by PAIA.

The Public Interest overide

[39] Relying on section 46 of PAIA the applicants address several issues to warrant its invocation. The Section provides:

> Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if-
>
> (a) the disclosure of the record would reveal evidence of-
>
> (i) a substantial contravention of, or failure to comply with, the law; or
>
> (ii) an imminent and serious public safety or environmental risk; and
>
> (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

[40] The unrebutted allegations of the applicant are addressed in turn.

[41] The question arises whether there has been an abuse of the power to make declarations of a places as key points, whether by the present incumbent, the first respondent, or any of his predecessors since 1980. Do all the places so declared measure up to the prescribed criteria in section 2 of the NKP Act?

[42] More specifically, the question is posed about what has been the public expenditure on security at key points, if any? The revelation that no special account was opened in terms of section 3B of the NKP Act gives rise to several troubling public concerns. First, why has a statutory injunction not been complied with; the NKP Act *per se* establishes the account? This failure looks very much like it might be the sort of failure described in section 46(a)(i) – a failure to comply with a law. Secondly, without the account, how has public expenditure being

managed, if at all? Have the provisions of the Public Finance Management Act 1 of 1999 (PFMA) been breached? Does the absence of an account mean that the Minister of Police, and his predecessors, have culpably failed to recover money due from owners of key points who, by law, were required to bear the cost of the security of key points? Are key points, in truth, not being properly secured? Does a lack of security threaten the public interest?

[43] Reference is made to the considerable media attention given to the issue of national key points, eg the widespread public debate about the immense expenditure on Nkandla, said to be a key point, and the disquiet about criminal sanctions and the like being applied for what are alleged to be transgressions peculiar to places said to be key points. The Citizenry would like to know.

[44] On a different tack, have the actions taken by organs of state to suppress reporting by the media, of which an example was the Groenpunt Prison photographing affair, described elsewhere in this judgment, been validly taken; ie were the places really declared key points? (I address this and the related issue of the clash with the principle of legality that arises from non-disclosure, discretely and more fully when I deal with the case advanced by the Amicus.)

[45] In my view, these considerations, all rooted in unrebutted fact, serve eminently to trigger the provisions of section 46. It is wholly unsatisfactory that political office bearers and senior civil servants should have to perform their

duties under a cloud of suspicion of incompetence or dishonesty. Transparency about all the facts is necessary to either repair the rot, if any exists, or dispel the lack of confidence which the citizenry will continue to nurse if the facts are concealed.

The case advanced by the Amicus: disclosure is essential to preserve adherence to the principle of legality.

[46] The amicus associates itself with the arguments advanced by the applicants and supports the relief sought by the applicant.

[47] In addition, in support of the contention that disclosure of all key points is necessary, it points to what is alleged to be a wholly unconstitutional practice committed by the respondents; ie despite the NKP Act prescribing criminal sanctions in section 10, and the regulations prescribing more criminal sanctions for various acts related to national key points, if the citizenry cannot know what places are key points how can they avoid transgressions? No counter argument was advanced save to suggest that as no crimes of strict liability were imposed by the NKP Act, the concern was misplaced. This is not an appropriate perspective. Indeed, if regard is had to the regulations it may not even be correct. In regulation 1(2)(a)(ii) which defines an 'act prejudicially affecting the security of a key point' it is provided that it such an act includes any act ' which otherwise, whether it is an offence in terms of any law, or is committed culpably, or not,

causes the loss, damage, disruption or immobilisation of a key point....' (Emphasis supplied). (The validity per se of the regulations is not a question before me)

[48] A grundnorm of our law is the principle of legality. No public power can be exercised without clear authority in law to do so. (Pharmaceutical Manufacturers of SA in re Ex Parte President, RSA 2000 (2) SA 674 (CC) at [20]). When a law imposes criminal liability it cannot do so retrospectively. A law imposing any liability on a person must be known; there can be no secret laws. If people are at risk of prosecution for a criminal offence they must have had the opportunity to know, beforehand, that the questioned conduct was unlawful. Ergo, the disclosure of national key points is necessary to fulfil the requirements of legality.

[49] In President, RSA v Hugo 1997 (4) SA 1 (CC) at [99], Mokgoro J expressed approval of a passage from the judgement by the European Court of Human Rights in Sunday Times v United Kingdom (1979) 2 EHRR 245 at [49]:

> 'In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law". First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'

[50] Nkabinde J, in Masiya v DPP, Pretoria 2007 (5) SA 30 (CC) at [52] held, in similar vein that:

> One of the central tenets underlying the common-law understanding of legality is that of foreseeability - that the rules of criminal law are clear and precise so that an individual may easily behave in a manner that avoids committing crimes.

[51] The unfortunate examples of the actions taken the somnambulant homeless folk, the protesters and the photo-journalists, alluded to elsewhere in the judgment, illustrate the practical and deleterious effects of the non-disclosure of key points. The implications of an allegation *ex post facto* that a crime was committed because the place where certain conduct occurred, which conduct may not be per se unlawful, is a crime because the place where it happened to occur enjoys a special status, despite the patent inability of the ignorant populace to know how to avoid committing such an offence, is problematic for our Constitutional values. Disclosure cannot be avoided; to have it any other way, is to embrace the ethos of the Star Chamber.

[52] In consequence it is contended by the amicus that to save the constitutionality of section 10 of the NKP Act, at very least, the key points must be publically known and no lawful reason compatible with the principle of legality can excuse a full disclosure. I agree.

Costs

[53] In the circumstances, the respondents will bear the costs of the applicants and of the amicus curiae.

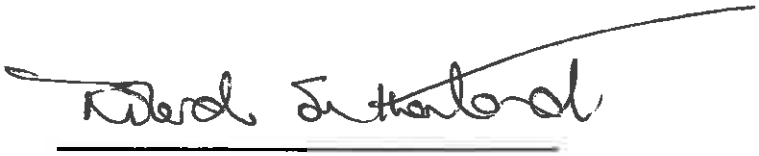
The Order

[54] It is declared that the decision of the First and Second Respondents to refuse the Applicants' request for the information in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") is unlawful and unconstitutional.

[55] The decision by the First and Second Respondents to refuse the request is set aside.

[56] The First and Second Respondents shall supply to the Applicants, within 30 (thirty) days of the granting of this order, the records indicating what places or areas have been declared a "National Key Point" or "National Key Points Complex" under section 2 and 2A of the National Key Points Act 102 of 1980.

[57] The First and Second Respondents shall pay the costs of this application, including the costs of two counsel.



ROLAND SUTHERLAND

Judge of the High Court of South Africa,
Gauteng Local Division.

Hearing: 24 November 2014
Judgment Delivered: 3 December 2014.

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