



CONSTITUTIONAL COURT OF SOUTH AFRICA

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

**Case No.: CCT 03/11
[2011] ZACC 32**

**Date of Hearing: 17 May 2011
Date of Judgment: 29 November 2011**

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Tuesday 29 November 2011 the Constitutional Court gave judgment about the right of access to information and how courts should consider requests for access to records held by the state.

The matter stems from a request by the publisher of the *Mail and Guardian* newspaper, brought under the Promotion of Access to Information Act, that the President make public a report drafted by two South African judges on the 2002 presidential elections in Zimbabwe. The judges observed the elections at the request of President Thabo Mbeki.

The publisher of the *Mail & Guardian* newspaper requested the report in June 2008, but the office of the President declined to release it on the grounds that it would reveal information supplied in confidence by Zimbabwean government officials and that the report was obtained to help the President formulate executive policy. The North Gauteng High Court, Pretoria and the Supreme Court of Appeal concluded that the record should be disclosed because the state had not discharged the burden placed upon it by the Information Act. The state applied for leave to appeal to the Constitutional Court.

In a majority judgment written by Ngcobo CJ, the Court considers: first, how the state discharges its burden, under the Information Act, to show that its refusal to grant access to a record is justified; and second, the circumstances under which it is proper for a court to exercise its powers, under the Information Act, to examine the contested record in order to determine whether it should be released.

The majority judgment emphasised that the constitutional guarantee of the right of access to information held by the state gives effect to accountability, responsiveness and openness as founding values of our constitutional democracy. It stressed that it is impossible to hold

accountable a government that operates in secret. The judgment recognised, however, that the Information Act provides for reasonable and justifiable limitations on the right of access to information, and sought to give guidance to courts considering whether exemptions from disclosure claimed by the state are lawful.

The majority held that a court considering whether the state has discharged its burden of showing that it has properly claimed that a record is exempt from disclosure, must determine whether the state has put forward sufficient evidence to show, on the probabilities, that the withheld information falls within the exemptions claimed. This does not mean that the court must consider whether the state has provided the best evidence to justify refusal.

The judgment recognised that, given the nature of proceedings under the Information Act, courts may, at times, have insufficient evidence to responsibly decide whether an exemption from disclosure is rightly claimed. This can happen because the requester, not having access to the record, faces difficulties raising genuine disputes of fact as to the exemptions claimed by the state. It can also occur when the state is limited, under the Information Act, in its ability to refer to the contents of the record in justifying the exemptions it claims.

For these reasons, the majority concluded that courts are empowered to examine the contested record to determine whether exemptions claimed by the state are proper. The majority held that this power should be invoked when it is in the interests of justice to do so.

In a separate concurrence, Yacoob J held that courts must always examine the contested record in order to reach a just and equitable outcome. In a further separate concurrence, Froneman J held that it will be in the interests of justice for courts to examine the record where either of the parties is constrained in presenting evidence in relation to the dispute, or where there are questions as to whether the exemption applies to the whole record or only to a part of it which can be severed so that the rest of the record may be disclosed.

In the result, the majority concluded that the High Court should have invoked its power to examine the report to decide the state's claims that it was exempt from disclosure.

In a dissenting judgment, written by Cameron J, four members of the Constitutional Court found that the Presidency failed to justify its refusal to release the report, or to put up a plausible basis for a plea that the statute made it impossible for it to provide adequate reasons for its refusal. It also held that a court should exercise its powers to examine the record only under exceptional circumstances. The dissent concluded that the report should therefore be released without further consideration of the matter by the High Court.

The Constitutional Court accordingly remitted the matter to the High Court for that Court to examine the record and determine the case in the light of its judgment.