

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

NOT REPORTABLE

Judgment Reserved: 02/12/05
Judgment handed down: 31/1/06

In the matter between:

Case no. 27876/04

HARRIS A B
and
OFFICE OF THE PRESIDENCY

Applicant

Respondent

Case no. 27878/04

HARRIS A B
and
MPUMALANGA PARKS BOARD

Applicant

Respondent

Case no. 27879/04

HARRIS A B
and
ESTERHUIZEN A, S

Applicant

Respondent

Case no. 27880/04

HARRIS A B
and
DU TOIT-SMUTS & MATHEWS PHOSA

Applicant

Respondent

Case no. 27881/04

HARRIS A B
and
ABSA BANK

Applicant

Respondent

JUDGMENT

LEGODI J

A. INTRODUCTION

1. The applicant, Mr Anthony Bernard Harris instituted five applications against the respondents being The Office of the Presidency, Mpumalanga Parks Board, Andries Steffanus Esterhuizen NO, Attorneys Du Toit-Smuts and Mathews Phosa and ABSA Bank under case numbers 27876/04, 27878/04, 27879/04, 27879/04, 27880/04 and 27881/04 respectively.
2. All the five applications were instituted on the 21 October 2004. The applicant sought an order in the following respects:

2.1 IN RESPECT OF THE OFFICE OF THE PRESIDENCY:

- 2.1.1 That the respondent be ordered to provide the applicant with forensic report allegedly prepared by Gebodo on the instructions of the President of the Republic of South Africa.
- 2.1.2 That the respondent be ordered to pay for the costs of the application.

2.2 IN RESPECT OF MPUMALANGA PARKS BOARD:

- 2.2.1 That the respondent be ordered to provide the applicant with the record and documentation set out in annexure "X". This relates to:

- 2.2.1.1 All information and documentation as to why the respondent paid for the wall, built around the property occupied by the then Premier of Mpumalanga, Mathews Phosa during 1994 and 1996,
- 2.2.1.2 The particulars of the bank account from which the payments referred to were made,
- 2.2.1.3 Records of all discussions or correspondence between the Premier, Mr Phosa and Allan Gray CEO of the respondent,
- 2.2.1.4 Any bank statements reflecting the payments referred to,
- 2.2.1.5 Any correspondence between ABSA Bank and the respondent relating to,
- 2.2.1.6 Minutes of the Board meetings as to any discussions or decisions relating to the decision of the respondent to pay for the wall..

2.3 IN RESPECT OF ESTERHUIZEN NO.:

- 2.3.1 That the respondent be ordered to provide the applicant with information and documentation as set out in annexure X attached to the notice of motion. This relates to a whole sort of information regarding enquiries into the insolvency proceedings of Green Peace Park (PTY) Ltd and other related matters or financial transactions thereto.

2.4 IN RESPECT OF ATTORNEYS DU TOIT-SMUTS & MATHEWS PHOSA

2.4.1 That the respondent be ordered to provide the applicant with the information and documentation as set out in annexure X attached to the notice of motion.

2.4.1.1 This information relates to the original of Mr Du Toit's diary showing his meeting with Mr A Esterhuizen to take instructions, Mr Du Toit's notices and records of the meeting with Mr Esterhuizen, the original account sent to Mr Esterhuizen for the consultation relating to and representation of Mr Esterhuizen at the insolvency inquiry regarding Green Peace Park (PTY) Ltd before the relevant magistrate, and records of the payments received from Mr Esterhuizen in respect of account, including the particulars of the deposits into the respondent's bank account.

2.5 IN RESPECT OF ABSA BANK

2.5.1 That the respondent be ordered to provide the applicant with information and documentation as set out in Annexure X.

This relates to a whole host of information, including but not restricted to banking accounts, payment and deposits into the account of Green Peace Park (PTY) Ltd, Path Construction (PTY) Ltd and minutes of the credit meetings relating to Path Projects (PTY) Ltd, KO-raalpark Properties (PTY) Ltd, and copies of the bank accounts of one Mr Wikus Lighthelm .

B. BACKGROUND

3. The applicant is a businessman operating or was operating in the area of Nelspruit, Mpumalanga.
4. His applications against all the respondents are based on his entitlement to information in terms of the provisions of Promotion of Access to Information Act 2 of 2000 which came into operation on the 9 March 2001 (hereinafter referred to as the Act).
5. As regard The Office of the Presidency, on the 3 May 1999 the applicant wrote a letter to the respondent regarding alleged certain activities of ABSA Bank. Subsequently, on the 29 July 1999 one Mr Malofo on behalf of the respondent is alleged to have indicated that the State President was in support of either Health Commission or Scorpion to launch an investigation into the activities of ABSA Bank which was apparently seen by the applicant as being corruptly involved, with the then Premier of Mpumalanga and other senior politicians in that province. The respondent is alleged to have ultimately instituted a forensic audit investigation through the auditors Gebodo Incorporated. It was on this basis that the applicant launched a request in terms of Section 11 of the Act.
6. In the Mpumalanga Parks Board matter, the applicant's company known as Path Construction (PTY) Ltd was commissioned during 1994 to build a wall around the property occupied by the then Premier of Mpumalanga, Mr Mathews Phosa. When his company started to construct the wall, his first interim payment is alleged to have come from

the account of the Chief Minister KaNgwane Government and all subsequent payments from the respondent, Mpumalanga Parks Board. There were also extensions made on the house allegedly financed by ABSA Bank. The money which was paid from the KaNgwane Government was alleged to have initially destined for housing. The applicant wanted all details in terms of the Act to ascertain the exact circumstances involving government funds, ABSA bank, Mathews Phosa and the Mpumalanga Parks Board. (See **letter dated the 14 October 2003 from the respondent**). The information required is said to be in possession of the respondent.

7. The respondent Andries Steffanus Esterhuize NO is said to be sued in his capacity as a trustee of Esterhuizen Family Trust, Elina Trust and Verre Oos Trust. All of these trusts had more than one trustees. The applicant requested information from the respondent and in his own words "*I need in terms of the above Act, you to provide me with certain information to prove that I was the victim of a conspiracy*". In his letter of request, the applicant for example, asked for proof of certain travelling expenses in the amount of R420-00 said to be for Path Projects, proof of the respondent triple heart surgery operation and all medical and hospital expenses and other further information concerning the respondent and whether or not the applicant was unreliable.
8. Du Toit-Smuts & Mathews Phosa Inc. is a firm of attorneys alleged to be representing ABSA Bank and presumed by the applicant to be aware of the legal dispute between the applicant and ABSA Bank. These attorneys are said to have represented Mr A J Esterhuizen in the insolvency enquiry of

Green Peace Park. The applicant therefore wanted certain information as set out earlier in this judgment.

9. Regarding ABSA Bank the applicant on the 20 October 2003 addressed a four page letter to the respondent in terms of which he asked for a number of documentation and or information. His letter of request starts by stating that the former Premier of Mpumalanga Province Mr Mathews Phosa, was a Chairman of ABSA bank's auditors KPMG, that Mr Phosa was now a partner in attorneys Du Toit-Smuts and most importantly a Chairman of ABSA bank in Mpumalanga. He added by saying ABSA had succeeded in its sole objective to regain the business by using whatever methods possible.

C ISSUES RAISED

10. In my view the following issues were raised in respect of each respondents respectively:

10.1 IN RESPECT OF OFFICE OF THE PRESIDENCY

Whether or not Section 7 of the Act is applicable?

Whether or not Section 12(c) of the Act is applicable?

Whether or not the applicant has to establish a right to be protected? and

Whether or not the applicant has established the document to be in possession of the respondent?

10.2 IN RESPECT OF MPUMALANGA PARKS BOARD

Whether or not the applicant has established that the respondent is in possession of the document so requested?

10.3 IN RESPECT OF AS ESTERHUIZEN

Whether or not the applicant had furnished information or sufficient information regarding the interest or right sought to be protected in terms of Section 50 of the Act?

Whether or not the applicant has established that the respondent is in possession of the documents so required?

Whether or not any right or interest intended to be protected is enforceable?

10.4 IN RESPECT OF DU TOIT-SMUTS & MATHEWS PHOSA

Whether or not the respondent is entitled to refuse information in terms of Section 65 of the Act?

Whether or not the applicant had established a right or interest to be protected?

Whether or not the right or interest intended to be protected is enforceable?

Whether or not the respondent is in possession of the record required?

10.5 IN RESPECT OF ABSA BANK

Whether or not the respondent is entitled to refuse information so requested in terms of Section 68 of the Act?

Whether or not the applicant has stated and established interest or right to be protected?

Whether or not the right so intended to be protected is enforceable?

Whether or not the respondent is in possession of the record so requested?

A. DISCUSSIONS, SUBMISSIONS AND FINDINGS

11. In terms of Section 11 of the Act, a party requesting access to records of public bodies, must be given access to such a record of a public body, if a party requesting the record has complied with all the procedural requirements. of the Act relating to a request for access to that record and that access to that record is not refused in terms of any ground for refusal envisaged in Chapter 4 of the Part. The Act does not apply to a record of the cabinet and its Committees and of an individual member of Parliament or of a provincial Legislature in that capacity. Lastly, the record is in terms of Section 7 of the Act not subject to production whether it being of public or private body if it is requested for the purpose of criminal or civil proceedings, or is requested after the commencement of such criminal or civil proceedings and the production of or access to the record is provided in any other law.

12. The office of the Presidency and Mpumalanga Parks Board are public bodies and any party requesting for a record from these bodies does not have to state whether or not he or she intends to protect an interest or right and what that interest or right is. In my view, this is understandable as any member of the public might want to know, why for example, public funds were or are being utilised. Counsel for the respondent in the Presidency's matter argued that the respondent cannot be heard to act in terms of Section 11 of the Act as such access to the forensic report alleged to be in possession of the respondent is excluded in terms of Section 7. It is common cause or it appeared to have been common caused during the discussion that as at the time when the requested was purported to have been made in terms of Section 11, the applicant wanted the record for the purpose of the civil proceedings which had already been instituted by the applicant, for example against ABSA. The record seems to have been required at the time to encourage or force ABSA to settle its dispute with the applicant. In his replying affidavit, the applicant indicated that the civil proceedings with ABSA were no longer pending. It was of course against this background that it was argued on behalf of the Presidency that the request was premature as it was made before the conclusion of the proceedings referred to. In my view, this submission is correct. The Presidency was under no obligation to produce such a record even if it had it in its possession when the request was made as such access to the record would have been excluded in terms of Section 7. The other issue which worried me, was whether or not Section 12 of the Act was not applicable. In my view, the record is requested from the State President. Although he is cited as "The Office of the Presidency" this in my view relates to the State President as an individual member of Parliament or in

his official capacity as the State President. The access to the forensic report alleged to be in his possession is therefore prohibited in terms of Section 12, for example, in his letter of request dated 14 October 2003, the applicant addressed it to "President T M Mbeki". Lastly, regarding the Presidency

matter, the deponent to the answering affidavit, states in detail under paragraph 4, the dealing he had with the applicant and also the fact that the record so requested never existed. Section 55 deals with what must be stated by a party who does not or did not have a record requested either under Section 11 or 50 of the Act. In my view, the

Presidency has sufficiently explained the non-existence of the record so requested. Consequently the applicant must fail on all legs intended to rely on for access to the record.

13. The issue relating to Mpumalanga Parks Board is in some respects akin to those issues raised in the Presidency's matter. Firstly, it is an organ of the state established under Mpumalanga Parks Board Act. Therefore, the applicant would have been entitled to request for access to the records from Mpumalanga Parks Board in terms of Section 11. However, in this matter as well, the respondent stated that it did not have the record so requested. The applicant was informed during November 2004 that Mpumalanga Parks Board did not have such records. The deponent to the answering affidavit particularly paragraph 6 thereof sets out in detail what led to it not being in possession of the records and possible parties who might presently be in possession of such documents. There was no suggestion to find that the respondent's version that it was no longer in possession of the records so requested was not correct. In my view therefore the applicant cannot succeed on this point alone.

14. A.G. Esterhuizen is sued in a representative capacity. The applicant in his affidavit states that he wants to protect interest or right in regard to the recovery of losses alleged to have suffered by himself, his wife and company in which he had interest resulting from alleged illegal financial activities
- of ABSA. Firstly, the applicant can only pursue protection of his own interest and not of other people who are not before court. Secondly, it is not quite clear what interest does the applicant want to protect and lastly from the request made in the letter of 14 October 2003, it appears that the applicant's cause of action if any, relates to the events of mid to towards the end of the nineties. For example, reference is made to the events of February 1996. In my view, any interest or right which the applicant seeks to protect would be unenforceable due to prescription. I am not satisfied that the applicant succeeded in showing that there is any interest or right of his which needs to be protected. Secondly, the applicant had not succeeded in showing that such right or interest will be enforceable and not subject to prescription. In any event, the documents or records so requested are said not to be in possession of the respondent. In my view, the respondent had complied with the provisions of Section 55 in terms of which a party to whom a request is directed, must show that all reasonable steps have been taken to find the record and that there are reasonable grounds for believing that the record cannot be found or does not exist. In his affidavit the respondent states that all the documents requested were handed over to one Wonda and that the other documents had been destroyed after the auditor had suggested that the documents could be destroyed. The applicant should therefore also fail on this ground.

15. As regard Du Toit-Smuts, and Mathews Phosa attorneys, the applicant is asking for record which in my view goes into the heart of privilege between an attorney and client. Section 65 of the Act provides that the head of a private body must refuse a request for access to a record of the body if its disclosure would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement. For example, in the instant case the applicant is asking for the record relating to original account sent to one Mr Esterhuizen for consultations and representations at the insolvency enquiry, payments received from Mr Esterhuizen, and original diary showing a meeting with Mr Esterhuizen to take instructions, as well as notes and records of the meeting. If anything like this was to happen, will in my view, damage a relationship between an attorney and client and this will destroy the confidence with which clients should consult with their attorneys. It is not clear what the applicant wants the information for. Neither in his letter of request dated the 14 October 2003 nor in his founding affidavit does the applicant set out at all or in detail or sufficiently the reasons for wanting such records. In my view, the applicant has not succeeded in satisfying the requirements of Section 50 of the Act. Lastly, the records so requested are said to have been destroyed after three years of their existence. It was suggested during argument that adverse inference should be drawn against the respondent for having destroyed such documents after three years. There may not be a need to keep each and every record in an attorney's office for long, except insofar as those financial records relating to a client which must be kept for at least five years. However, like in the present case once it is shown that a document or record has been destroyed whether rightly or wrongly so, it will serve no purpose to make an

order allowing the applicant to have access to a record which does not exist. Only if the court was to doubt the assertion that the record is destroyed, would the court make such an order. I do not have such a doubt in the instant case that

the respondent is not in a position to produce the documents or records in question. Lastly, the right or interest which the applicant wants to protect relates to the activities of Mr Esterhuizen. Such events appeared to have taken place in

the mid nineties or late nineties. Such a right or interest will not be enforceable as prescription will militate against any action the applicant may now wish to institute. A suggestion that the applicant should be entitled to rely on interruption of prescription based on the information which he did not have before, in my view, is not convincing. On all grounds, the applicant must fail.

16. In terms of Section 67 of the Act the head of a private body must refuse a request for access to a record of the body, if the record is privileged from production in legal proceedings, unless the person entitled to the privilege has waived the privilege. In his application against ABSA bank, the applicant is asking for records relating to particulars of the account number of other people kept by the respondent ABSA bank, details of which are contained in a four page letter dated the 16 October 2003. I do not intend repeating the details of these records. Save to say that a banking institution should be entitled to refuse to divulge information concerning the accounts and particulars of its clients as kept by it. Failure to protect such information and to deal with it confidentially may result in hampering free banking activities and this might have a negative impact on the economy as whole. In my view therefore, the disclosure of the information required will offend against the provision of

Section 67. For example, the applicant seeks from the ABSA disclosure of documentations relating to the banking accounts of Green Peace Park (PTY) Ltd, Pace Projects (PTY) Ltd and Path Construction (PTY) Ltd. The documentations are being requested without the necessary authorisation from the account holders. In my view therefore, and on this ground alone, the applicant should not be entitled to the relief sought.

17. This should then bring me to consider further whether the applicant had stated the right he seeks to protect through the documentations requested from ABSA. In his letter of request dated 16 October 2003, the applicant started by stating as follows:

"At last, we are going to be able to close the chapter on you, ABSA, Mathews Phosa and myself and my family.

This will be done by using the above Act, so I am going to ask you to send the requested information in terms of the said Act within the prescribed period. information Also send the on the required fee".

The Act referred to in the quotation above is the Promotion of Access to Information Act 2 of 2002.

It is worth noting that

nothing in terms of the quotation, does the applicant sets out the right that is sought to be protected nor does such a right indicated anywhere in the letter of request. Again, the applicant cannot succeed on this ground.

Lastly, the documentation requested date as far back as 1995 with no indication at all that any event concerning the documentations requested would not be hit by prescription in

the event the applicant wanted to protect any right based on the documents. I have already dealt with the difficulty facing the applicant regarding prescription and therefore also in regard to ABSA, the application should fail as no right can legally be enforced due to prescription.

18. CONCLUSION

Consequently, the applicant's application against the respondents in different case numbers is dismissed with costs.

M F LEGODI
JUDGE OF THE HIGH COURT \

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