THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case no: 864/2011

In the matter between:

M QOBOSHIYANE NO	First Appellant
STANLEY KHANYILE NO	Second Appellant
DEPARTMENT OF LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS, EASTERN CAPE	Third Appellant
and	
AVUSA PUBLISHING EASTERN CAPE (PTY) LTD	First Respondent
NELSON MANDELA BAY METROPOLITAN MUNICIPALITY	Second Respondent
JOHN GRAHAM RICHARDS	Third Respondent

Neutral citation: *Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd* (864/2011) **[**2012] 166 ZASCA (21 November 2012)

Coram: MTHIYANE DP, BOSIELO, LEACH et WALLIS JJA et PLASKET AJA.

Heard: 14 November 2012

Delivered: 21 November 2012

Summary: Promotion of Access to Information Act 2 of 2000 (PAIA) – report obtained by MEC into maladministration in a municipality in terms

of s 106(1)*(b)* of the Local Government: Municipal Systems Act 32 of 2000 – request for access by newspaper group – refusal – ss 44 and 46 of (PAIA) – report delivered in terms of order of high court – peremption of appeal – mootness – s 21A(1) of Supreme Court Act 59 of 1959.

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Dukada AJ sitting as court of first instance):

The appeal is dismissed with costs

JUDGMENT

WALLIS JA (MTHIYANE DP, BOSIELO, LEACH JJA et PLASKET AJA concurring)

[1] In August 2009 the MEC responsible for the Department of Local Government and Traditional Affairs in the Eastern Cape appointed Kabuso CC to investigate concerns of maladministration in relation to the affairs of the Nelson Mandela Bay Metropolitan Municipality. The MEC was acting in terms of s 106(1)*(b)* of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). Kabuso CC's report (the Kabuso report) was handed to the MEC in February 2010. In November 2010 Avusa Publishing Eastern Cape (Pty) Ltd (Avusa), the first respondent, which publishes The Herald and the Weekend Post newspapers in the Eastern Cape, sought access to the Kabuso report in terms of the provisions of the Promotion of Access to Information Act 2 of 2000 (PAIA). The refusal of that request, initially by the information officer and on appeal by Mr Qoboshiyane, the first appellant and the present incumbent of the post of MEC for Local Government and

Traditional Affairs in the Eastern Cape, led Avusa to commence proceedings in terms of ss 78 and 82 of PAIA to obtain access to the report.

[2] The application was granted by Dukada AJ on the basis that, whilst the MEC had shown grounds for not disclosing the report in terms of s 44 of PAIA, it was nonetheless subject to mandatory disclosure in the public interest under s 46 of PAIA. He ordered that the report be disclosed within five days. Such disclosure was duly made at a public ceremony at which the MEC handed the report to a representative of the newspaper. At the handing over the MEC made a public statement that although he disagreed with the judgment he would deliver a copy of the report and its annexures as ordered by the court. Eight days later an application for leave to appeal was lodged. Some two months later the judge granted leave to appeal to this court on the basis that there were no decided cases on the application of s 46 of PAIA and that the concept of disclosure in the public interest was important and likely to arise again in other cases in the future. He did not address the fact that the report had already been disclosed.

[3] In their heads of argument the parties addressed questions of mootness. However, they overlooked the prior question whether the appellant's unequivocal compliance with the terms of the court's order perempted the appeal. Where, after judgment, a party unequivocally conveys an intention to be bound by the judgment any right of appeal is abandoned. The principle can be traced back to the judgment of this court in *Dabner v South African Railways & Harbours*,[1] where Innes CJ said:

[1] *Dabner v South African Railways & Harbours* 1920 AD 583 at 594.

'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.'

That judgment has been consistently followed in this court.[2]

[4] The facts here are simple. The MEC was ordered to disclose a copy of the report to Avusa within five days of the court's order. He did so. He did not indicate any reservation of rights or any intention to appeal at that time. The application for leave to appeal was delivered later. There was only one thing that the MEC had to do in terms of the court's order and he did it without reservation. His conduct was unequivocal and inconsistent with an intention thereafter to challenge the judgment on its merits. The appeal was perempted and must be dismissed. In those circumstances it is strictly unnecessary for the court to reach the question of mootness. However, as it leads to the same result I will briefly deal with it.

[5] The disclosure of the report means that any judgment or order by this court will have no practical effect or result as between the parties. In the circumstances this court may dismiss the appeal on that ground alone.[3] The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the

[2] *Standard Bank v Estate van Rhyn* 1925 AD 266 at 268; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 600A–D; *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA) ([1998] 4 All SA 258) at 443F-G; *Samancor Group Pension Fund v Samancor Chrome & others* 2010 (4) SA 540 (SCA) para 25.

[3] Section 21A(1) of the Supreme Court Act 59 of 1959.

parties to the litigation, it has dealt with the merits of an appeal.[4] With those cases must be contrasted a number where the court has refused to deal with the merits.[5] The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose. In exercising its discretion the court is always mindful of the wise words of Innes CJ in *Geldenhuys & Neethling v Beuthin*[6] that:

'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'

[6] The present case raises issues under the Constitution, because PAIA was enacted to give effect to the constitutional guarantee of the right of access to information.[7] There is no provision governing the business of the Constitutional Court similar to s 21A(1) of the Supreme Court Act. However, the court has itself developed jurisprudence around the issue of mootness that largely parallels that of this court under s 21A(1). Thus in *National Coalition for Gay & Lesbian Equality & others v Minister of Home Affairs & others*[8] it was said:

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

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[4] *Natal Rugby Union v Gould* supra at 441I-445B; *Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA) para 4 and *Executive Officer, Financial Services Board v Dynamic Wealth Ltd & others* 2012 (1) SA 453 (SCA) paras 43 and 44.

[5] See for example *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 7; *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 18; *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA) paras 40-41 and *Minister of Trade and Industry v Klein NO* [2009] 4 All SA 328 (SCA) paras 16-17.

[6] *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441.

[7] Section 32 of the Constitution.

[8] *National Coalition for Gay & Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) at footnote 18.

Although that is the basic principle, the Constitutional Court has held that, where it is in the interests of justice to do so, it has a discretion to consider and determine matters even if they have become moot.[9] There is little if any discernible difference between the approach of the Constitutional Court and that of this court.[10]

[7] The starting point of the enquiry is therefore to identify the issue that the MEC says should be determined, notwithstanding the admitted mootness of this appeal. The reason he gave for withholding the report was that his predecessor initiated a process under s 106(1)*(b)* of the Systems Act that resulted in the production of the Kabuso report. He said that this process was still incomplete because he had not yet decided what to do in relation to the report's contents. He engaged with the municipality, but that engagement was not complete. The municipality had not decided whether it would take steps pursuant to the report. Depending on its decision, he said he would have to decide whether to exercise his powers to intervene in the affairs of the municipality in terms of s 139(1)*(a)* of the Constitution. He accordingly claimed that the process was incomplete.

[8] Insofar as disclosure of the report under PAIA was concerned the MEC said:

'… the disclosure of the entire Kabuso report, together with all its annexures, at this stage, is inappropriate and would inevitably tend to undermine the process commenced by my predecessor and which is still underway.'

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[9] See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 11; *MEC for Education, KwaZulu Natal & others v Pillay* 2008 (1) SA 474 (CC) para 32; *Mohamed & another v President of the Republic of South Africa and others* 2001 (3) SA 893 (CC) para 70; *Pheko & others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) para 32.

[10] *Clear Enterprises (Pty) Ltd v SARS* [2011] ZASCA 164 paras 17 to 20.

He went on to indicate that this did not rule out the disclosure of the report in due course 'once I have taken relevant decisions'. However, at the time it was asked for, and for the reasons he had given, he claimed to be entitled to withhold it in terms of ss 44(1)*(a)* and *(b)* of PAIA. He went on to submit that the disclosure of the report was not 'at present' in the public interest. He does not appear to have addressed his mind to s 46 of PAIA.

[9] Section 46 is headed 'Mandatory disclosure in public interest' and provides that:

'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.'

[10] The final stage in an information officer's consideration of a request for access to a record, if circumstances exist that would otherwise justify refusing access, must be to consider whether nonetheless the record must be disclosed under s 46. The section provides that the information officer is obliged[11] to disclose the record where two conditions are met. The first is that disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law.[12] The MEC accepted that this condition was met. The second

[11] The word is 'must'.

[12] There is a second possibility that it would reveal evidence of 'an imminent and serious public safety or environmental risk' a matter not relevant for present purposes.

condition is that the public interest in the disclosure clearly outweighs the harm contemplated in the provision under which the record could otherwise be withheld. The section applies where the record could otherwise legitimately be withheld for one of the reasons set out in PAIA and, as the heading makes clear, disclosure is mandatory where the conditions set out in the section are satisfied. If the information officer does not provide access the court will order him or her to do so. That is what happened here.

[11] The point of principle that the MEC claimed arose in this case was that the obligation on the information officer to make this mandatory disclosure is subject to a limitation, where there is an ongoing investigation under s 106 of the Systems Act and disclosure of a record would tend to undermine that process or hamper its proper completion. It was submitted that it is better that MEC's should be permitted to complete the process, and decide what they are going to do about the matters raised in a report furnished after an investigation under s 106(1)*(b)* of the Systems Act, before being obliged to disclose the contents of such reports. On that footing it was submitted that the public interest override in s 46 of PAIA is subject to a limitation that, after some debate, can be formulated in the following terms:

'Where an MEC has called for an investigation and report under s 106 of the Systems Act, the information officer must withhold the report until such time as the MEC has taken a decision on the steps to be taken in respect of the contents of the report and no information officer (and by extension no court on appeal to it) is entitled in terms of s 46 to order disclosure of that report in the public interest.'

[12] There is no warrant in the language of s 46, as construed in the light of PAIA as a whole and the broader context provided by the Constitution, for this limitation upon the obligations of the information

officer. I will assume in favour of the MEC, without deciding, the matter being in dispute, that these considerations may provide a justification for refusing access to a record under ss 44(1)*(a)* or *(b)* of PAIA. However, s 46 expressly operates *after* it has been decided that a record may legitimately be withheld under *inter alia* ss 44(1)*(a)* and *(b)*. These provisions are part of chapter 4 of PAIA, which deals with the grounds upon which it is permissible to refuse access to a record. Some of those grounds are expressed as mandatory ('must') and some are discretionary ('may'). Section 33(1), which commences the chapter, sets out these two categories and adds that the power to refuse access in each of them is exercisable 'unless the provisions of s 46 apply'. That section contains an obligation to make disclosure where the specified criteria are met. Disclosure is not optional or discretionary. There is an obligation to permit access.

[13] The structure of chapter 4 of PAIA is a careful balance between the constitutional right of access to information in s 32(1) of the Constitution and the protection from disclosure of information in certain defined circumstances. Those circumstances are in turn divided into two categories – those where access to a record must be refused and those where access may be refused. Finally, in all situations where access must or may be refused,[13] there is an obligation to afford access where the record contains certain types of evidence and the public interest in disclosure outweighs the harm that will follow from disclosure.

[14] Counsel could not refer us to anything in either the language or the context of PAIA that would justify the suggested restriction on the

[13] There is an exception in relation to certain records of the South African Revenue Services. Access to those records must be refused under s 35(1) and s 46 does not provide for a public interest override in relation to such refusal.

language of s 46. When examples were put to him in argument, in order to test the validity of the suggested construction, he repeatedly sought to justify it by reference to 'the facts of this case'. All that did was to highlight the point that the exercise that an information officer must undertake under s 46 is a careful balancing, on the facts of the particular case, of the harm that would accrue from permitting disclosure of the record and the public interest in its disclosure. In other words the enquiry in every case is a fact-sensitive one, the outcome of which will vary from case to case depending on the particular facts. Assuming, as I have done for the purposes of this argument, that the grounds advanced by the MEC constituted grounds upon which he was entitled ('may') to refuse access, there was nonetheless an obligation on him to weigh the harm that would arise from disclosure against the public interest in disclosure. It does not appear from the record that he undertook that exercise. In any event the judge held that the public interest in disclosure outweighed the harm that would be caused thereby and ordered him to provide access to the Kabuso report. In another case the position may have been different.

[15] Once that conclusion is reached it follows that there is no point of general importance in this case. The attempt to formulate a legal principle is in truth nothing more than a repetition of the arguments before the judge that the public interest in disclosure should not outweigh the harm that would be occasioned by disclosure in this particular case. The high court decided that issue on the facts before it and held that the MEC was obliged to disclose the Kabuso report in terms of s 46 of PAIA. As he had not done so, the high court ordered him to do so. He complied with that order. Whether the judge was right in his conclusion – and I do not suggest that he was not right – will not affect the situation in any way. A

decision that he was wrong would have no practical effect or result. Accordingly the appeal is dismissed with costs.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellants:	R G Buchanan SC (with him G Ngcangisa) Instructed by: The State Attorney, Port Elizabeth and Bloemfontein.
For first respondent:	J Brickhill Instructed by: Cheadle Thompson and Haysom Inc, Johannesburg; Webbers, Bloemfontein.