



MINDE SCHAPIRO & SMITH

Docex 1 | Tygerberg
PO Box 4040 | Tyger Valley | 7536 | South Africa
Tyger Valley Office Park | Building Number 1 | Cnr Willie van Schoor & Old Oak Roads | Bellville
T: 021 918 9000 | 021 918 9020 (Direct Line) | F: 021 918 9070 (General) | 021 918 9070 (Direct Fax)

E: karin@mindes.co.za | www.mindes.co.za

Our Ref: DEM16/0769/ELZANNE JONKER/ks | Your Ref: | Date: 22 February 2024

MAFETSA ATTORNEYS

Suite 2A 9th Floor, IBM Building

90 Grayston Drive

Sandton

Email: info@mafetsaattorneys.co.za

Dear Sir / Madam

RE: NON-COMPLIANCE WITH THE HIGH COURT ORDER IN SCHREIBER AND ANOTHER V THE AFRICAN NATIONAL CONGRESS (CASE 2021/26339)

- 1 We address this letter on behalf of Mr Leon Schreiber ("**our client**") in the above-mentioned matter.
- 2 Your letter dated 19 February 2024 and the ANC's purported compliance with the order of the High Court per Wepener J in Case 2021/26339, dated 2 February 2023 refers ("**the Court order**").
- 3 We do not deal with each and every allegation in your letter or in the affidavit of Mr Fikile April Mbalula and the confirmatory affidavits thereto. We also do not address each and every way in which the ANC has failed to comply with the Court order. This does not amount to an admission, to acquiescence to the ANC's unlawful conduct, or to a waiver of our client's rights. Our client's rights remain fully reserved.

THE REQUIRED DISCLOSURES

- 4 The effect of the Constitutional Court order handed down on 12 February 2024 is that the High Court order has now become final and immediately enforceable.

Minde Schapiro & Smith Incorporated | Attorneys Notaries & Conveyancers since 1929 | Registration number 2010/025182/21

Directors: Heinrich Crous BA LLB | Elzanne Jonker BA LLB | *Jonathan Rubín BComm LLB LLM | Venesen Reddy LLB

Senior Associate: Gerhard Lourens FPSA® BA LLB

Associates: Marlon Koen LLB | Lauren Hermanus LLB | Kyle Pienaar BComm LLB | Shannon Solomon LLB

Consultants: Louis Meyer BJuris LLB | Marianne Olivier BComm LLB LLM | Marais Hoon BA LLB | Patrick Stilwell BA LLB

Vat registration number: 4580257428 | *At Greenacres, Gqeberha (previously Port Elizabeth)

- 5 The Court order directs the ANC "to provide all the information and records sought in Schreiber's request for access to information dated 22 February 2021 within 5 court days".
- 6 Our client's request for information refers in turn to the following information which must be disclosed by the ANC under the Court order:
- 6.1 Information on the processes followed and decisions taken by the ANC's Cadre Deployment Committee ("**the Committee**") between 1 January 2013 and 1 January 2021.
 - 6.2 The full contents of the ANC's cadre deployment policy including any amendments or changes introduced during the period of 1 January 2013 and 1 January 2021.
 - 6.3 Complete minutes including attendance registers for each meeting of the Committee during 1 January 2013 and 1 January 2021.
 - 6.4 A list of all decisions taken by the Committee during 1 January 2013 and 1 January 2021.
 - 6.5 The contents of any email, WhatsApp or other social media exchanges where decisions of the Committee were discussed, deliberated or taken during 1 January 2013 and 1 January 2021.
 - 6.6 Copies of all documents, including CVs and vacancy notices considered by the Committee during 1 January 2013 and 1 January 2021.
 - 6.7 All correspondence communicating the decisions of the Committee to government officials, members of Cabinet, members of selection panels, or any other appointing authorities in the state.

THE ANC HAS FAILED TO COMPLY WITH THE COURT ORDER

- 7 The ANC has failed to comply with the Court order in several respects.



The ANC is not permitted to redact documents

- 8 The ANC has infringed the Court order by unilaterally redacting and thereby withholding select portions of the documents that have been disclosed. In particular, our client objects to the redaction of the names of Committee members, parties to communications, and the individuals discussed by the Committee.
- 9 The ANC purports to have made these redactions in order to comply with the Protection of Personal Information Act 4 of 2013 (“**POPIA**”).
- 10 The ANC’s conduct in unilaterally effecting these redactions before disclosing the documents is unlawful and constitutes a breach of the Court order.
 - 10.1 POPIA does not require or authorise the ANC to conduct those redactions.
 - 10.2 Section 26 of POPIA read with section 27(1)(b) has the effect of generally prohibiting the processing of personal information but this prohibition does not apply if the processing is necessary for the establishment, exercise or defence of a right or obligation in law (section 27(1)(b)).
 - 10.3 This reflects the general authorisation in section 11(1)(c) of POPIA which allows personal information to be processed if it complies with an obligation imposed by law on the responsible party.
 - 10.4 In any event, even if POPIA did preclude certain disclosures (which it does not), the provisions of PAIA, and thus the Court order, take precedence. After all, section 5 of PAIA provides that it applies “to the exclusion of other legislation that... (a) prohibits or restricts the disclosure of a record of a public or private body; and (b) is materially inconsistent with an object, or a specific provision, of this Act”.
- 11 Disclosure of the complete unredacted records is required in order to comply with the order of Wepener J. As a result, any processing of personal information which is entailed by making that disclosure is permissible under POPIA because it constitutes compliance with a legal obligation which the ANC has.
- 12 As a result, Mr Mbalula's contention that POPIA required the ANC to carry out these redactions is unsustainable. The duty to disclose the full records in terms of a court

order constitutes an obligation imposed by law as contemplated in section 11 and 27 of POPIA and, accordingly, must be complied with and the processing is authorised in terms of those provisions.

- 13 Moreover, the only time at which it may have been permissible for the ANC to raise concerns about the disclosure of personal information was when the ANC dealt with our client's PAIA requests.
 - 13.1 If there was any genuine confidentiality or privacy concerned arising out of the disclosure of the documents sought, the ANC was required to refuse the request for access on this basis in terms of section 63(1) of PAIA. The ANC did not do so.
 - 13.2 Moreover, the general duty on the ANC in section 63(1) of PAIA to refuse to disclose personal information is repeated in section 23(4)(a) of POPIA.
 - 13.3 As a result, if the ANC wished to redact portions of the records it would have had to justify those redactions in the litigation in response to our client's PAIA request. It cannot now unilaterally redact the documents, having failed to raise this issue in the litigation. Its conduct in purporting to do so subverts and undermines the court order.

No information for a five-year period

- 14 The ANC has not complied with 6.1 and 6.3 above in that it has failed to disclose any minutes or attendance registers of the Committee's proceedings for the period 1 January 2013 – May 2018.
- 15 The ANC's claim to be unable to find any documentation at all for the period December 2012 to May 2018 and for June 2020 is not credible.
 - 15.1 The ANC has at no stage following Mr Schreiber's PAIA request or during the litigation stated that the record or any portion thereof does not exist.
 - 15.1.1 To the contrary, Mr Krish Naidoo's communications with our client on his PAIA request expressed a willingness to disclose the requested information but for his objections, so inferring his knowledge of the record and that it existed.

- 15.1.2 The ANC vehemently opposed the Court order and would certainly have alleged that the information did not exist for a full five-year period of the request if this were true. It failed to raise this as a defence at any stage in the litigation.
- 15.1.3 If the ANC intended to rely on the alleged non-existence of the requested documents, it was obliged by section 55 of PAIA, after the request was received, to confirm on oath that the documents did not exist and the steps it had taken to locate the documents. It failed to do so.
- 15.2 The PAIA request is not limited to minutes of Committee meetings but extends to all information on the processes and decisions of the Committee during the period 2013 – 2021. Therefore, even if meeting minutes were not kept between 2013 – 2018 (which our client denies) this does not preclude the ANC from disclosing other sources of information on the Committee's processes and decisions during this time. It is not credible for the ANC to claim that there exists no documentary or digital trace at all of any communications on the Committee's processes during this five-year period.
- 15.3 The portion of the Zondo Commission report attached at "ANC12" in fact confirms that there exists information relating to the Committee's processes during the 2013 – 2018 period, even if not in the form of minutes. At paragraph 394, President Ramaphosa is reported as stating "*I think those who are in charge will just take notes and just record a decision and it is then communicated*". The ANC is required to disclose all of this information, including the "*notes*" taken, the decisions recorded, and the communication of those decisions as referred to by President Ramaphosa.
- 15.4 We stress, moreover, that the Commission held at paragraph 396 of "ANC12" that it was "*improbable that there are no records of the Committee's activities between 2012 and 2017*" and refers, amongst others, to the ANC's history of always ensuring important meetings are minuted. The ANC has not proven otherwise.
- 15.5 Mr Mbalula states at paragraph 10(a) of his affidavit that the fact that minutes were not kept is confirmed by Ms Desmoreen Carolus and Mr Lungi Mtshali who

he says “were often present during those meetings” during the period December 2012 to December 2017. However, the affidavits of Ms Carolus and Mr Mtshali do not confirm the allegation:

15.5.1 Ms Carolus states that she had nothing to do with the Committee at paragraph 5 of her affidavit and that “it never came across my desk in any form”. There is therefore no basis for her to swear to whether or not records of the Committee’s meetings and decisions were made. She also refers to an email as Annexure “DC1” but attaches no email to her affidavit.

15.5.2 Mr Mtshali does not state the period in which he acted as the coordinator in the office of the Deputy Secretary General or on what basis he would have knowledge of whether or not the Committee kept minutes or any other recording of its meetings. He discloses no efforts to locate his laptop or extract the documents thereon nor of any efforts to locate or extract documents or communications relating to the Committee which would likely have been stored on his email account. He refers to an email as Annexure “LM1” but attaches no such email to his affidavit.

Failure to list decisions taken

16 The ANC has not complied with 6.1 and 6.4 above in that it has failed to list any decisions taken by the Committee between 1 January 2013 – May 2018. Annexure “ANC4” does not in any event list the particular decisions taken by the Committee at all but refers only to “positions considered”.

Impermissible restriction to 2020 communications of Mr Masilela

17 The ANC has not complied with 6.1, 6.5 and 6.7 above in that:

17.1 As stated in paragraph 10(e) of Mr Mbalula’s affidavit, the ANC has unilaterally decided to limit the scope of the information to those between Mr Masilela and the members of the Committee. The ANC was required to provide “any and all” such communications where decisions of the Committee were discussed, deliberated or taken. This includes communications between Committee members.

- 17.2 The ANC has solely disclosed a select portion of largely illegible communications from 2020 and a few from 2019 and 2021. This precludes, amongst others, any and all emails, WhatsApps or other social media exchanges where decisions of the Committee were discussed, deliberated or taken during 2013 – 2018.
- 17.3 The ANC has failed to disclose any of the attachments to the communications in “ANC6”.

Illegible documents

- 18 The ANC has failed to comply with the Court order insofar as it has provided certain documents which are entirely illegible. The obviously poor quality of these documents exemplifies the obstructiveness of the ANC’s approach to fulfilling the Court order.
- 19 Subsequent to the disclosure, we requested to be provided with legible copies of the WhatsApp communications. The document subsequently provided to us labelled “*Legible ANC5 – Whasapp correspondence*” continues to include indecipherable information at pages 17 – 19 and 24 – 41.
- 20 Further to this, the following pages of the disclosures are illegible: page 10 of “ANC7 P1”, pages 55 – 57 of “ANC7 P3”, page 33 of “ANC7 P5”, page 56 of “ANC7 P6”, page 1 of “ANC7 P8”, and page 29 of “ANC7 P11”.

Minutes that were not adopted must be disclosed

- 21 Mr Mbalula states at paragraph 10(b) of his affidavit that minutes of meetings that were not officially adopted have not been disclosed. This is impermissible and in breach of the Court order.
- 22 The Court order obliges the ANC to disclose all information on the processes and decisions of the Committee during the period 2013 – 2021. This would include documentary records of meetings in the form of notes and draft minutes, whether or not those minutes were ultimately adopted by the Committee.

Mr Mtshali's conduct is a criminal offence under PAIA

- 23 Mr Thapelo Masilela, an official of the ANC, states under oath in paragraph 6 of his affidavit, that he destroyed a number of the records that were the subject of the PAIA request after the Court order had been granted, and while the ANC's applications for leave to appeal were still pending.
- 24 This conduct constitutes an offence in terms of section 90(1) of PAIA which provides that:
- “(1) A person who with intent to deny a right of access in terms of this Act—
- (a) destroys, damages or alters a record;
- (b) conceals a record; or
- (c) falsifies a record or makes a false record,
- commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding two years.”
- 25 Mr Masilela's conduct was plainly conducted with the intent of denying our client's right of access in terms of PAIA and accordingly constitutes a criminal offence. This too demonstrates the extent to which the ANC intends to subvert the Court order.
- 26 An appropriate criminal charge will be laid against Mr Masilela and these facts will be placed before the court which hears any contempt application should it be necessary to approach the court for such relief.

The steps to locate the information are inadequate

- 27 The steps allegedly taken by the ANC to locate the requested information are inadequate and do not amount to reasonable compliance with the Court order.
- 28 Mr Mbalula states only that the files of the late Ms Duarte were searched and that staff members who provided secretarial services to the Committee were consulted. Mr Mbalula does not state:
- 28.1 which staff members were consulted; or

28.2 that any or all of the still living members of the Committee during 2013 – 2021 were consulted or their files examined.

29 Had the ANC genuinely endeavoured to make a full disclosure as the Court order requires it to do, it would have timeously contacted and obtained information from each and every member of the Committee during the period 2013 to 2021.

THE ANC IS IN CONTEMPT OF THE COURT ORDER

30 The ANC's conduct subverts the Court order and amounts to contempt of court.

30.1 The ANC is clearly aware of the Court order and has disobeyed it as set out above.

30.2 The ANC's disobedience is wilful and *mala fide*.

DEMAND

31 We are instructed to demand that, within two days of this letter, the ANC discloses:

31.1 all information relating to the processes and decisions of the Cadre Deployment Committee during the period January 2013 to May 2018, including but not limited to minutes of meetings, notes, WhatsApps, emails and all other communications;

31.2 a list of all decisions taken by the Committee during 1 January 2013 and 1 January 2021;

31.3 all emails, WhatsApps or other social media exchanges where decisions of the Committee were discussed, deliberated or taken during 1 January 2013 and 1 January 2021, not limited to those between Mr Masilela and the Committee Members and including all communications between and amongst Committee Members of this nature;

31.4 all of the attachments to the communications in "ANC6";

31.5 legible copies of the information at pages 17 – 19 and 24 – 41 of the document titled "*Legible ANC5 Whatsapp correspondence*" and at page 10 of "ANC7"

P1", pages 55 – 57 of "ANC7 P3", page 33 of "ANC7 P5", page 56 of "ANC7 P6", page 1 of "ANC7 P8", and page 29 of "ANC7 P11";

- 31.6 all draft minutes, notes and attendance registers of Committee meetings during the period 1 January 2013 and January 2021 which were excluded from the disclosure on the basis that the minutes were not adopted;
- 31.7 the unredacted versions of all documents so as to indicate the names of all persons appearing therein or referred to. For the avoidance of doubt, our client requires only the names of the individuals referred to in the Cadre Deployment records to be disclosed and do not require other personal information to the extent that it is there, such as cell phone numbers and addresses.
- 32 We are further instructed to demand that the ANC make available the following within two days of this letter for inspection by an independent third-party IT expert agreed to by our clients for purposes of extracting information required to be disclosed by the Court order:
- 32.1 the hard drive and / or laptop referred to by Mr Masilela at paragraph 5 of his affidavit;
- 32.2 the personal email of Mr Masilela referred to at paragraph 6 of his affidavit; and
- 32.3 the laptop referred to by Mr Mtshali at paragraph 7 of his affidavit.
- 33 Should the ANC fail to abide by our client's demands, our client has instructed us to approach the court on an urgent basis for appropriate relief.

Yours faithfully

MINDE SCHAPIRO & SMITH INC.

per:





Minde Schapiro & Smith Incorporated | Attorneys Notaries & Conveyancers since 1929 | Registration number 2010/025182/21

Directors: Heinrich Crous BA LLB | Elzanne Jonker BA LLB | *Jonathan Rubin BComm LLB LLM | Venesen Reddy LLB

Senior Associate: Gerhard Lourens FPSA® BA LLB

Associates: Marlon Koen LLB | Lauren Hermanus LLB | Kyle Pienaar BComm LLB | Shannon Solomon LLB
Consultants: Louis Meyer BJuris LLB | Marianne Olivier BComm LLB LLM | Marais Hoon BA LLB | Patrick Stilwell BA LLB

Vat registration number: 4580257428 | *At Greenacres, Gqeberha (previously Port Elizabeth)