

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2024-0232832

In the matter between:

AFRICAN NATIONAL CONGRESS	1 ST APPLICANT
FIKILE APRIL MBALULA	2 ND APPLICANT
THAPELO MASILELA	3 RD APPLICANT

and

LEON AMOS SCHREIBER	RESPONDENT
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In re:

LEON AMOS SCHREIBER	APPLICANT
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and

AFRICAN NATIONAL CONGRESS	1 ST RESPONDENT
FIKILE APRIL MBALULA	2 ND RESPONDENT
THAPELO MASILELA	3 RD RESPONDENT

NOTICE OF APPLICATION FOR LEAVE TO APPEAL TO THE FULL
COURT OF THE GAUTENG LOCAL DIVISION, JOHANNESBURG OR
THE SUPREME COURT OF APPEAL (SCA)

BE PLEASED TO TAKE NOTICE that the above-mentioned three applicants (hereinafter referred to collectively as “applicants”) intend to bring an application for leave to appeal to the full court of the Gauteng Local Division, Johannesburg or the Supreme Court of Appeal (SCA) against the whole judgment and / or orders in the judgment of the honourable Wanless J the above honourable court which was delivered *ex tempore* on 3 April 2024 for the granting of the respondent’s application for civil contempt of court and certain ancillary relief with costs on attorney and client scale including costs of two counsel.

FURTHER TAKE NOTICE THAT the application for leave to appeal is based on the provisions of section 17 (1) (a) and (c) of the Superior Courts Act 10 of 2013, as amended.

FURTHER TAKE NOTICE THAT the leave to appeal will be based on the following grounds of law and fact:

1. That the honourable court misdirected itself, and ultimately erred, by finding that the applicants are in civil contempt of court of the order of Wepener J granted on 2 February 2023 on the following grounds:

- 1.1. The respondent has failed to prove his case of civil contempt against the applicants on a balance of probabilities.

- 1.2. That there was no prove of the element of *mala fides* and unlawfulness in the conduct of the applicants. *Mala fides* means bad faith or intent to deceive. These attributes are not present in the ANC's handling of the matter. The ANC instead processed information which it had and explained the reasons for redacting some documents; and also explained the non-existing records of 2013-2018, the latter explanation could not be disputed by the respondent, and he ended up conceding to same. Then these cannot be *mala fides*.

- 1.3. Effectively, the material part o the ANC's explanation was admitted by the respondent as a genuine dispute of fact. The former part of the explanation is based on the ANC's understanding of POPIA. Still, this cannot be mala fide even if the ANC could be found to be wrong on its interpretation of POPIA.

- 1.4. More importantly, the honourable court has found that the ANC should have made an effort to inform the data subjects about the court order of Wepener J even though they were given a period of 5 days to comply or at least approach the said court for indulgence. This finding by the honourable court cannot co-exist with its finding that there were acts of *mala fides* or willfulness or unlawfulness on the part of the ANC, and therefore it constitutes a misdirection on the part of the honourable court. This is a tacit admission that there were challenges facing the ANC in terms of disclosing the information of private persons. This should have been a good ground on its own to refuse contempt of court due to lack of *mala fides* or unlawfulness or willfulness on the part of the ANC.
2. That the honourable court misdirected itself by making a finding that the order of Wepener J of 2 February 2023 has the effect of overriding the provisions of section 63 of PAIA and / or Chapter 3 of POPIA in so far as the latter applies to the fulfilment of all 8 conditions prior to the

operational effect of the exceptions in section 27 of POPIA, including sections 11 (1) (c) and 27 (1) (c) of POPIA on the following grounds:

- 2.1. The honourable adopted a selective interpretation in finding that the application of the court order of Wepener J of 2 February 2023 constitute “*an obligation imposed by law on the responsible party*”, then it is not subjected to 8 peremptory conditions in Chapter 3 of POPIA.
- 2.2. This interpretation which was followed by the honourable court has offended Section 8 of POPIA and / or is irreconcilable with same. The two cannot co-exists.
- 2.3. If it is accepted that the court order on 2 February 2023 by Wepener J constitute an obligation imposed by law, as this is common cause, then the said court order must pass the conditions imposed in section 8 of POPIA as those conditions are applicable to all disclosures of information in terms of section 27 (1) (c) of POPIA.

- 2.4. The honourable court misdirected itself by interpreting sections 11 (1) (c) and 27 (1) (c) of POPIA as if the aforesaid two sections are some sort of stand-alone exception(s) to section 26 of POPIA.
3. The honourable court misdirected itself by failing to make a finding regarding the peremptory nature of section 8 of POPIA read with the entire Chapter 3 of POPIA in so far as prior compliance with all the 8 conditions on Chapter 3 is a peremptory jurisdictional fact prior to the ousting of sections 4 (3) and 26 of POPIA or implementation of any of the provisions of section 27 including section 27 (1) (c) of POPIA.
4. The honourable court has misdirected itself by incorrectly applying the provisions of section 2 of POPIA on the purpose of POPIA as if it is intended to grant access to the respondents. The proper purpose of POPIA is to give effect to constitutional right to privacy, by safeguarding personal information when processed by a responsible party subject to justifiable limitations that are aimed at balancing the right to privacy against other rights such as the right of access to information and others.

- 4.1. The short of it is that the purpose is to protect personal information; and then balance same with other competing rights. The honourable court approached this subject incorrectly by finding that the purpose is to give information “rather than to protect it”.
- 4.2. The honourable court misdirected itself by finding that if the court order of 2 February 2023 was intended to limit the scope of access to information, it would have mentioned so. The honourable court missed the point that the matter before Wepener J was in terms of PAIA, and not POPIA.
- 4.3. The honourable court misdirected itself by missing the point that whatever disclosure of information which is done in terms of PAIA, with or without a court order, is still subject to the provisions of POPIA. The mere fact that the PAIA disclosure has been ordered by the court as it is the case herein, does not oust the application of POPIA when such information is processed by the responsible party.

5. The honourable court has misdirected itself by finding that the applicants should have raised their defence based on POPIA at the hearing before Wepener J on the following grounds:

5.1. There is no authority to that effect that once a party is ordered to disclose information he simply has to ignore the provisions of POPIA. This cannot be the case because POPIA imposes several duties on the responsible party before disclosing information of third parties.

5.2. The provisions of section 63 of PAIA do apply even after the court order was made on 2 February 2023. Each case is determined on its own merits. The merits of this case are such that the respondent was fully aware that the information sought will include personal information of data subjects (private natural persons). Therefore, the order sought by them should have addressed this aspect in their application.

- 5.3. It was a misdirection on the part of the honourable court to simply dismiss the respondents' submission simply because it was not raised before Wepener J.
6. The honourable court has misdirected itself by finding that the affidavit of the president of the ANC as the chairperson of the national Cadre Deployment Committee of the ANC from 2013 to 2018 was necessary, on the following grounds:
- 6.1. The respondents have admitted that there is a genuine dispute of fact regarding the period from January 2013 to 2018 and as such they will not persist with a prayer relating to the disclosure of the aforesaid information. The court has noted this concession in its *ex tempore* judgment.
- 6.2. The version of the applicants is that there were no records kept for the said period. This respondent was not able to dispute this version; and opted to abandon his case in that regard.

- 6.3. It is common cause that the present ANC president, His Excellency Cyril Ramaphosa, was the chairperson of the national cadre deployment committee at the aforesaid time.
- 6.4. Based on the above, it was then a misdirection for the honourable court to make a finding that the president of the ANC must still explain the period in which the respondent is no longer raising an issue about.
- 6.5. The essence of the above concession by the respondent is that the order by Wepener J of 2 February 2023 regarding the period from 2013 to 2018 is no longer a live issue as the respondent has expressly abandoned same. Therefore, the ANC president cannot be expected to explain the above.
- 6.6. It is further common cause that the late Jessie Duarte as the coordinator of the National Cadre Deployment Committee was the custodian of the records, if there were any. Therefore, she is the one who could explain their whereabouts, not the president of the ANC.

7. The honourable court misdirected itself by granting the structured interdict that the third applicant's laptop, hard drive and email be subjected to scrutiny by experts in an attempt to retrieve the deleted information, on the following grounds:

7.1. The honourable court misdirected itself by making a finding that the third applicant has admitted to deleting information knowing that it is the subject-matter of access to information order in terms of PAIA. This is not a correct factual position. The fact stated by the third applicant is that he was not aware of the court order by Wepener J.

7.2. The honourable court found that the third applicant was the custodian of the records of the national cadre deployment committee. This is also an incorrect finding of fact. The third applicant stated that he only came in towards the end of 2018. All the information required for the said period have been furnished albeit that some of it is redacted.

- 7.3. The applicants have already stated that the records for the period from 2013 to 2018 does not exist or never existed, and this point is settled. Therefore, it was a misdirection for this honourable court to subject the third applicant to the structured interdict granted in this matter.
8. That the honourable court should have dismissed the respondent's application with costs on attorney and client scale, including costs of two counsel.

WHEREFORE the applicants pray that leave to appeal be granted to the full court of the Gauteng Local Division, Johannesburg or the Supreme Court of Appeal (SCA), with costs being costs in the appeal.

FURTHER TAKE NOTICE THAT the applicants reserve their rights to amend or supplement this notice of application for leave to appeal upon receipt of the full transcribed judgment of the court granted *ex tempore* on 3 April 2024.

DATED AT Johannesburg ON THIS THE 5th DAY OF April 2024.



MAMATHUNTSHA INC. ATTORNEYS

APPLICANTS' ATTORNEYS

1207 BRAM FISCHER TOWERS

20 ALBERT STREET

MARSHALLTOWN

JOHANNESBURG, 2000

TEL: 011 492 0622

EMAIL: chris@mamathuntshaatt.co.za

info@mamathuntshaatt.co.za

REF:CM/CIV/07394/24

TO: REGISTRAR OF THE HIGH COURT
JOHANNESBURG

AND TO: MINDE SHAPIRO & SMITH INC
RESPONDENT'S ATTORNEYS
TYGER VALLEY OFFICE PARK
BUILDING NO 1
CNR WILLIE VAN SCHOOR & OLD OAK ROADS
BELLVILLE, CAPE TOWN

TEL: 021 918 9000

EMAIL: elzanne@mindes.co.za

EMAIL: karin@mindes.co.za

EMAIL: shannon@mindes.co.za

C/O CHRISTOUDOLOU NAVRIKIS

OFFICE 104B, 104 OXFORD BUILDING

11 9th STREET, HOUGHTON

JOHANNESBURG

REF: Mr Protulis/rv

TEL: 011 325 4201

EMAIL: alex@cm-attorneys.com

(REF: DEM16/0768/E Jonker/ks