IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISON, PRETORIA

CASE NO.: 36809/2020

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

20-7-21

SIGNATURE DATE

In the matter between:

ECONOMIC FREEDOM FIGHTERS Applicant

and

MATAMELA CYRIL RAMAPHOSA First Respondent

THE SPEAKER OF THE NATIONAL ASSEMBLY Second Respondent

THE PUBLIC PROTECTOR	Third Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
THE NATIONAL POLICE COMMISSIONER	Fifth Respondent
FINANCIAL INTELLIGENCE CENTRE	Sixth Respondent
AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC	Seventh Respondent
INFORMATIVE REGULATOR OF SOUTH AFRICA	Eighth Respondent
BEJANI CHAUKE	Ninth Respondent
JAMES THOKOANA MOTLATSI	Tenth Respondent
DONNE LEIGH NICOL	Eleventh Respondent
RAYMOND SIFISO NDLOVU DABENGWA	Twelfth Respondent
CRISPIAN GARTH OLVER	Thirteenth Respondent
TRUSTEES FOR THE TIME BEING OF THE RIA TENDA TRUST	Fourteenth Respondent

---

JUDGEMENT

SARDIWALLA J:

Introduction

[1] This is an application brought by the applicant against the respondents seeking an order to uplift the directive made by Deputy Judge President Ledwaba J made on 15 August 2019 in the review application under case number 55578/2019.

Background to the Application:

[2] The documents which the applicant seeks to have unsealed comprises of the of the sixth respondents' FIC report which was filed by the third respondent, in the matter brought by the first respondent to review and set aside the third respondent's report No.37 of 2019/20 dated 19 July 2020, which has already been decided by this Court. There is a pending application for leave to appeal before the constitutional court.

[3] The matter was opposed by the first and sixth respondents. The seventh and eighth respondents abide by the Courts decision.

[4] There was an application to intervene in terms Rule 12 of the Uniform Rules of Court. The application was granted and the applicants in that intervening matter were joined as the ninth to fourteenth respondents in this application.

The application

[5] The application is premised on the following basis: -

1. The EFF seeks to vindicate it's right under section 19 (1) of the Constitution as applied in the My Vote Counts 2 case and access the FIC report;

2. The application is brought in the public the interest, presumably to vindicate the general public's right under section 19 (1) the Constitution;

3. The President "accepted that he, and his ANC presidency candidature could not be separated from the Republic, and therefore "the CR17 Campaign private funding could not be divorced from the Republic";

4. "The secrecy of the CR17 campaign private funding also fosters fertile ground for the capture of the president thus compromising his ability to independently fulfil his constitutional obligations";

5. "Clandestine and secret funding, direct or not, of public office bearers limits the applicants and other political parties' ability to hold such office bearers to account should such funding be made on a quid pro quo basis";

6. That the principles by the constitutional court in My Vote Counts, the FIC record should be made public because "transparency in the area of private funding of political parties' area and independent candidates helps in the detection and that helps in the detection or discouragement of improper influence and the fight against corruption".

7. The sealed information is undoubtedly in the public interest and should accordingly be made available;

8. The applicant is entitled to access the FIC report in line with the Political Party Funding Act 8 of 2018;

9. Section 182(5) of the Constitution requires the Public Protector's report to be made public; and

10. The sealed information has already been leaked and "no order could put the confidentiality back in the bottle".

Applicant's Argument

[6] It attacks the respondents' claim of confidentiality of the CR17 donors on the guarantees given by the CR17 Campaign in that it claims the disclosure is of public importance. It claims that if the JSC deliberations which affect the public is not kept secret the same rule of thumb should apply to the first respondent who assumes the highest office in the land. It also submitted that the first respondent is responsible for the Political Funding Act, 8 of 2018 which aims at curbing corruption by making political parties accountable on their private donations. It stated that politicians do not hold power for themselves but rather for and on behalf of the collective interests of the public. They re-iterate that this is not a generalised fishing expedition into the first respondent's campaign finances but is based on the premise that the public Protectors report is in general practice disclosed to the public and therefore the Public Protector's report is open to the public by default. It claims that documents of the Court record should only be sealed in limited circumstances and the fact that the report involves the first respondent as a sitting president and his political party cannot be deemed an exceptional circumstance.

[7] It also claims that the CR17 Campaign funds were used to pay two members of the applicant and is therefore indicative that the sealed information of the conduct of the respondents could potentially compromise the democracy. It maintained its rights in terms of section 19(1) as individuals in that the applicant's members are also citizens. It referred to the My Vote Counts NPC v Minister of Justice and Correctional Services and Another by Mogoeng CJ which highlighted that access to information helps voters and contestants to speak out against and expose corrupt political practices as well as to interrogate the existence of such threats. It further claims that the right to privacy is not absolute and is limited in matters of public interest and placed the burden on the respondents to explain how their rights will be

violated if the documents are disclosed. It submitted that the Political Party Funding Act was signed into law in 2018 and therefore should not only apply to parties but to the individuals within the political parties.

First Respondent's Argument

[8] The first respondent's submitted that the CR17 Campaign had ceased to exist after the election of the ANC national executive committee at the ANC's 54th National Congress in December 2017 and thereafter it was the ANC and not the CR17 Campaign that campaigned for the national and provincial government elections held on 8 May 2018. Therefore, it was the National Assembly that elected him to serve as the President of the Republic which led to his ascension and not the CR17 Campaign. He further stated that his election to appear before the ANC's integrity committee was an internal private political matter and does not concern the applicant nor is a concession to the merits of the applicant's claim. That the applicant is distorting that the first respondent can be held accountable for CR17 Campaign funds deliberately to conflate him with the CR17 Campaign as well as the ANC with the State. He pointed out that the third respondent did not challenge the Court's Court ruling that "the findings of the Public Protector on the disclosure issue are unsustainable. Rational findings must be premised on proper factual and legal foundation. That foundation was lacking in this case. The Public Protector's conclusion that the President breached the Executive Code by failing to disclose donations to the CR17 Campaign was irrational and unlawful and falls to be set aside", in her leave to appeal to the Constitutional Court. Therefore, there was no basis for the applicant's claim before this Court. He aligned himself with the averments made by the ninth to fourteenth respondent's intervention application."

Sixth Respondent's Argument

[9] The sixth respondent's submission is that the applicant has no right to access the sealed information. That the 40 and 41 of Financial Intelligence Centre Act permits access to information by certain person under certain circumstances and therefore the applicant does not fall within the category of persons or circumstances identified by the legislature in the Act. It submitted that the FIC is the owner of the record and asserted confidentiality in respect of same. It stated that although the record was already placed before the Court that it accepted that any part determined by the Court to be relevant would have to be included as part of the public record, if not relevant then it asserted confidentiality over the record. The Court found that the records was irrelevant and the sixth respondent's confidentiality was not disturbed.

Ninth to Fourteenth Respondent's Argument

[10] They submitted that the conflation of the first respondent and the CR17 Campaign is incorrect in that whilst it suggests that it is one in the same, it is only seeking the information to the CR17 Campaign and not the first respondent. Further that the first respondent was but one candidate of the CR17 Campaign and not his personal Campaign. The CR17 Campaign was established to bring together like minded individuals to support the renewal of the ANC with broader political objectives of unity and restoration of the ANC values and did not focus only on promoting an individual's candidacy. It also averred that the first respondent was not involved in the administration, co-ordination and communications. In fact, it was agreed that the first respondent would not be directly involved in the solicitation of donations and it was general practice that such details were not shared with him. The applicant's argument that it was inevitable that once the first respondent became the ANC president that he would become the President of South Africa and therefore elevated the private activities of the CR17 Campaign to "state affairs" is unfounded in that the case must be determined on the facts as

they were at the time and not as they unfolded. There were no guarantees that the first respondent would be elected as the presidential candidate or that he would accede to President of the Republic of South Africa.

[11] In response to the section 19(1) of the Constitution claim by the applicant it stated that the right was aimed at natural persons who may form such parties but did not extend to the party itself and therefore their rights are not affected. The relationship between a party and its members in terms of judicial precedent is one of contract and any activities undertaken by its members fall within parameters of the private domain and do not constitute state affairs. Further that the respondents have a right in terms of section 14 of the Constitution to have their information protected and whilst this right is not absolute the applicant it should have brought a claim in terms of PAIA if it required access to information from a private body. It also submitted that the applicant's reliance on the My Vote Counts 2 principles were misguided in that the Constitutional Court's judgment is based on the right to vote in elections for public election in terms of section 19 as it specifically relates to legislative bodies and not internal party elections which are private bodies. It asserts that the public interest argument is again conflated is a conflation of the CR17 Campaign and the President and there is no basis for private intra-political party funding to be disclosed and if there were it would apply to all parties and not in relation to elevation of public office. It summarily dismisses the applicant's claim that the information has already been disclosed and avers that even if that were the case further violation of the right to privacy cannot be sustained. Lastly that none of the cases on which the applicant relies suggest that once there is no effective remedy that the unlawful act becomes unlawful. Therefore, those in unlawful possession of the information can still face criminal consequences if released. Last, the applicant is required to make out its case and not shift the burden on the respondent's to disprove its claim.

Law and Analysis

[12] The issue raised in this application is not new. Whether the public in vindicating its right to make political decisions should be allowed access to information to political parties private Campaign donations, and if so, the extent that this may infringe upon confidentiality and privacy rights. Section 19 of the Constitution is headed "Political Rights" provides that:

"(1) Every citizen is free to make political choices, which includes the right –

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

(3) Every adult citizen has the right –

(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and

(b) to stand for public office and, if elected, to hold office."

[13] The applicant submitted that the right to make political choices is affected by access to information and in this particular case the sealing of the FIC Record. On the aspect of access to information Ngcobo CJ, on behalf of a unanimous Court, in M & G Media Ltd[1]:

"In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability

[1] President of the Republic of South Africa and Others v M & G Media Ltd [2011] ZACC 32; 2012 (2) SA 50 (CC); 2012 (2) BCLR 181 (CC) (M & G Media Ltd) at para 10.

of citizens to make responsible political decisions and participate meaningfully in public life is undermined."

[14] Section 19(1) of the Constitution envisages that every citizen is "free to make political choices". This includes forming a political party, participating in a political party's activities, and campaigning for a political party or cause. It also includes, of course, the freedom to choose one's leaders. But that choice, like all others, is valuable only if one knows what one is choosing. It loses its value if it is based on insufficient information or misinformation. This the Constitution recognises this by insisting that government is not only democratic but openly accessible. However, from the reading of this section it is clear that right which vests in the individual is that it may either join or form political parties. Therefore, I am of the view that the individual members of the applicant possess this right and not the applicant itself. That being said the applicant has in any event failed to adequately state on the papers how its right under this section has been affected, if at all. It is that the clear right to make political decisions is about knowing parties and its leaders and how they will contribute to our constitutional democracy and the attainment of our constitutional goals. However, does this include knowing the private sources of rival political parties' funding?

[15] It is common practice that all political parties receive money from public and private sources. The law deals differently with the two types. At the time of this application there was no legislation which enabled a party to have such rights requiring systematic and proactive disclosure of private funding of political parties. Consequently, political parties were under no express legal obligation to disclose the sources of their private funding, at elections or other times. The applicant seeks a change to that having relied on the Political Funding Act No. 8 of 2018 and the dicta from the My Vote Counts NPC V Minister of Justice

and Correctional Services and Another[2]. Notably significant is that the Act on which the applicant relies was not in effect at the time of this application and therefore has no bearing on the merits of this matter. Of more significance is that the Constitutional court judgment was in relation to the rights of voters being able to make an informed decision and did not entail the right to contest the elections. Which in a manner of speaking is what the applicant in this case is attempting to do. A further point which was argued by the respondents which in my view is correct is that Ledwaba DJP in his directive encouraged any party that wished to challenge his directive to do so and the applicant did not make such an application. The applicant fails to appreciate that once the record was sealed it no longer formed part of the Court record and therefore its argument that it is unable to have brought its application in terms of PAIA must be rejected.

[16] I endorse the principle of open justice and appreciate its overwhelming importance in ensuring that justice is transparent and that it promotes the accountability of courts and the administration of justice. Open justice contributes towards the retention of public confidence in the Judiciary and it lies at the heart of the oft-quoted principle "that justice should both be done and manifestly seen to be done".[3]

[17] The Supreme Court of Appeal notes the importance of the media's "vital watchdog role in respect of the court process".[4] The Supreme Court of Appeal has recently held:

"It is thus important to emphasise that giving effect to the principle of open justice and its

[2] 2018 (5) 380 (CC)
[3] R v Sussex Justices, Ex parte McCarthy [1923] All ER 233 (KB) at 234
[4] Van Breda v Media 24 Limited; National Director of Public Prosecutions v Media 24 Limited [2017] ZASCA 97; 2017 (2) SACR 491 (SCA) at para 47.

underlying aims now means more than merely keeping the courtroom doors open. It means that court proceedings must where possible be meaningfully accessible to any member of the public who wishes to be timeously and accurately apprised of such proceedings."[5]

[18] However this application differs in that it is not brought by the media or the general public but by the applicant who avers that it is acting not only as individual citizens but on behalf of the greater public. Therefore, there is an interrelated aspect of this principle that requires further interrogation, the distinction between what is in the public interest and what is merely interesting to the public. There is indeed a difference between the two; the former is attached to a legitimate and genuine interest, one founded on fact and one that contributes towards the public's constitutional right to be informed. However, this Court is mindful that public interest can still be served and protected without revealing the names and identities of participants. Media Monitoring Africa's submissions in the High Court on this aspect are most useful:

"In reporting on children, what is necessary to consider is both the public interest and in the best interests of the child. In this regard it is helpful to distinguish between the public interest and what is of interest to the public. Merely because the public might be curious to know the child's identity does not make it appropriate for the media to satisfy this curiosity. Even in cases where the story is in the public interest, like the Eugene Terreblanche murder trial, reporting must still be sensitive to the interests of the child. The story may be in the public interest, but it does not follow disclosing that the identity of the child involved is in the public interest."[6]

[5] Id at para 46
[6] See Financial Mail (Pty) Ltd v SAGE Holdings Ltd [1993] ZASCA 3; 1993 (2) SA 451 (A) at 464A-C; National Media Limited v Bogoshi [1998] ZASCA 94; 1998 4 SA 1196 (SCA) at 1212J; and Heroldt v

[19] A restriction placed on public access to proceedings is only permissible as an exceptional occurrence and that the party seeking to restrict the court record bears a true onus of demonstrating that the restriction is justifiable. The logical consequence of this stance is that all court records may not be restricted except in exceptional circumstances, by a court order after a formal application, on notice to interested parties and after a hearing in an open court. In other words, I accept that the default position is one of openness. The difficulty arises in defining the circumstances in which that default position does not apply.

[20] The cluster of rights that enjoins open justice derives from the Bill of Rights and that important as these rights are individually and collectively, like all entrenched rights, they are not absolute.[7] They may be limited by a law of general application provided the limitation is

---

Willis 2013 (2) SA 530 (GSJ) at para 27. While these cases relate to defamation, they highlight the important distinction between what is in the public interest to make known and what is of interest to the public.

[7] See *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (6) BCLR 615 (CC); 1999 (4) SA 469 (CC) at paras 7-8, which deals with freedom of expression, in which O'Regan J held that "freedom of expression lies at the heart of a democracy . . . [and] is one of a 'web of mutually supporting rights' in the Constitution."

O'Regan J held at para 9 that while the provisions in question did in fact infringe on the rights of members of the National Defence Force to freedom of expression, the question which had to be answered was whether the provisions were justifiable limitations of the right, as contemplated by section 36 of the Constitution.

In *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* [2001] ZACC 17; 2001 (5) BCLR 449 (CC); 2001 (3) SA 409 (CC) at paras 40-1 it was held that our Constitution, unlike the American one, does not rank freedom of expression above all other rights, or declaim it as an unqualified right.

Similarly, this Court held in *Laugh It Off Promotions CC v SAB International (Finance) BV t/a SABMARK International (Freedom of Expression Institute as* Amicus Curiae) [2005] ZACC 7; 2005 (8) BCLR 743 (CC); 2006 (1) SA 144 (CC) at para 47 that "the right to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless."

In *NM and Others v Smith and Others (Freedom of Expression Institute as* Amicus Curiae*)* [2007] ZACC 6; 2007 (7) BCLR 751 (CC); 2007 (5) SA 250 (CC) at para 66 this Court recognised that—

> "[i]t cannot be gainsaid that freedom of expression lies at the heart of democracy. This Court has recognised in other cases that freedom of expression is one of a 'web of mutually supporting rights'."

It was held further at para 94 that:

> "This Court and the Supreme Court of Appeal have held that the media, as a consequence of their power, bear a particular constitutional responsibility to ensure that the vital right of freedom of expression is not used in a manner that improperly infringes on other constitutional rights." (Footnotes omitted.)

reasonable and justifiable. It is not uncommon that legislation and the common law in this country, and elsewhere in open and democratic societies, limit open court hearings when fair trial rights or dignity or rights of a child or rights of other vulnerable groups are implicated.[8]

Another encroachment on these rights may occur in a manner the Court pointed out in *SABC v NDPP*.[9] The right of the media or public to attend, receive and impart workings of a courtroom may be attenuated by a court where it exercises its inherent power to regulate its own process under section 173 of the Constitution.[10] If in so doing "it impinges upon rights entrenched in chapter 2 of the Constitution, it must ensure that the extent of the impairment of rights is proportional to the purpose the court seeks to achieve."[11] It may be added that the right to an open court hearing and the right to report on it does not automatically mean that court proceedings must necessarily be open in all circumstances. There may be instances where the interests of justice in a court hearing dictate that oral evidence of a minor or of certain classes of rape survivors or confidential material related to police crime investigation methods or to

---

The Cape High Court also held in *Director of Public Prosecutions (WC) v Midi Television (Pty) Ltd t/a E TV* 2006 (6) BCLR 751 (C); 2006 (3) SA 92 (C) at para 33 that—

> "[f]reedom of expression however, does not enjoy superior status in our law . . . and needs to be construed in the context of the values of human dignity, freedom and equality enshrined in our Constitution".

[8] Section 153(1) of the Criminal Procedure Act 51 of 1977 provides that:

> "If it appears to any court that it would, in any criminal proceedings pending before that court, be in the interests of the security of the State or of good order or of public morals or of the administration of justice that such proceedings be held behind closed doors, it may direct that the public or any class thereof shall not be present at such proceedings or any part thereof."

Similarly, section 5(2) of the Magistrates' Courts Act 32 of 1944 states that:

> "The court may in any case, in the interests of good order or public morals, direct that a civil trial shall be held with closed doors, or that (with such exceptions as the court may direct) minors or the public generally shall not be permitted to be present thereat."

In terms of section 56 of the Children's Act 38 of 2005, proceedings of a children's court are closed and may be attended only by certain persons specifically mentioned in the section.

[9] Above n 11.

[10] Section 173 states:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[11] See the majority judgment in *SABC v NDPP* above n 11 at para 42.

national security be heard in camera.[12] In each case, the court will have to weigh the competing rights or interests carefully with the view to ensuring that the limitation it places on open justice is properly tailored and proportionate to the end it seeks to attain. In the end, the contours of our constitutional rights are shaped by the justifiable limitation that the context presents and the law permits.

[21] Lastly, it was argued that by the applicant that the party that seeking to restrict open justice must bear the onus. It is so that a party that contends for a restriction of a right protected in the Bill of Rights or the Constitution must place before the court material which justifies the limitation sought. This does not, however, mean that that party carries an evidentiary burden or an onus in the strict sense of the word.[13] At the end of the day, a court is obliged to have regard to all factual matter and factors before it in order to decide whether the limitation on the right to open courtrooms passes constitutional muster.

---

[12] Id at para 51.

[13] For a similar approach in relation to the nature of the onus in a proportionality evaluation compare *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as* Amicus Curiae*)* [2001] ZACC 21; 2001 (8) BCLR 765 (CC); 2001 (4) SA 491 (CC) where this Court was asked to confirm an order of invalidity made by the High Court of section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, on the ground that the section infringed a litigant's section 34 constitutional right of access to courts. Somyalo AJ stated at para 18 that—

> "[i]t is by now settled law what a limitation exercise under section 36 of the Constitution requires. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC) at paras [33]-[35] the nature, purpose and process of the exercise were explained thus:
>
> > '[33] Although s 36(1) of the 1996 Constitution differs in various respects from s 33 of the interim Constitution its application still involves a process, described in *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) as the ". . . weighing up of competing values, and ultimately an assessment based on proportionality . . . which calls for the balancing of different interests".'"

Statutory Protection of information obtained from FIC

[22] What remains is to evaluate is the confidentiality claim. Section 40 and 41 of the Financial Intelligence Act 38 of 2001 is an important starting point, and provides that: -

"40. Access to information held by Centre

(1) Subject to this section, the Centre must make information reported to it, or obtained by it under this Part and information generated by its analysis of information so reported or obtained, available to-

(a) an investigating authority in the Republic;

(aA) the National Prosecuting Authority;

(aB) the Independent Police Investigative Directorate;

(aC) an intelligence service;

(aD) the Intelligence Division of the National Defence Force;

(aE) a Special Investigating Unit;

(aF) an investigative division in an organ of state;

(aG) the Public Protector; or

(aH) the South African Revenue Service;

(b) an entity outside the Republic performing similar functions to those of the Centre, or an investigating authority outside the Republic;

(c) ...

(d) a supervisory body;

(e) a person who is entitled to receive such information in terms of an order of a court; or

(f) a person who is entitled to receive such information in terms of other national legislation.

(1A) Information contemplated in subsection (1) may only be made available to an entity referred to in subsection (1)(a), (aA), (aB), (aC), (aD), (aE), (aF), (aG) or (aH)—

(a) at the initiative of the Centre or at the request of an authorised officer of the entity; and

(b) if the Centre reasonably believes such information is required to investigate suspected unlawful activity.

(1B) Information contemplated in subsection (1) may only be made available to an entity or authority referred to in subsection (1)(b)—

(a) at the initiative of the Centre or at the request of the entity or authority; and

(b) if the Centre reasonably believes such information is relevant to the identification of the proceeds of unlawful activities or the combating of money laundering or financing of terrorist and related activities or similar offences in the country in which the entity or authority is established.

(1C) Information contemplated in subsection (1) may only be made available to a supervisory body referred to in subsection (1)(d)—

(a) at the initiative of the Centre or at the request of the supervisory body; and

(b) if the Centre reasonably believes such information is relevant to the exercise by the supervisory body of its powers or performance by it of its functions under any law.

(2) A request for information contemplated in subsection (1A) or (1C) must be in writing and must specify the required information and the purpose for which the information is required.

(3) The Director may, as a condition to the provision of any information contemplated in subsection (1), make the reasonable procedural arrangements and impose the reasonable safeguards regarding the furnishing of such information that the Director considers

appropriate to maintain the confidentiality of that information before the information is provided.

(4) Information contemplated in subsection (1) may only be provided to an entity or authority referred to in subsection (1)(b) pursuant to a written agreement between the Centre and the entity or the authority which is responsible for the entity or authority, regulating the exchange of information between the Centre and the entity or authority.

(5) An agreement referred to in subsection (4) does not—

(a) take effect until it has been approved in writing by the Minister;

(b) permit the Centre to provide any category of information to the entity or authority in respect of which the agreement is concluded which the entity or authority is not permitted to provide to the Centre.

(6) A person who obtains information from the Centre may use that information only—

(a) within the scope of that person's powers and duties; and

(b) in the case of a request contemplated in subsection (2), for the purpose specified in that request.

(7) The Centre may make available any information obtained by it during an inspection to an organ of state, a supervisory body, other regulatory authority, self-regulating association or organisation which the Centre reasonably believes is affected by or has an interest in that information.

(8) The Centre must make information it holds available to the appropriate National Intelligence Structure, as defined in section 1 of the National Strategic Intelligence Act, 1994 (Act 39 of 1994), if it reasonably believes that the information relates to any potential threat or threat to the national security, as defined in section 1 of that Act.

(9) The Centre may, at the initiative of the Centre or on written request, disclose information it holds, other than information contemplated in subsections (1), (7) and (8), to an

accountable institution or class of accountable institutions or any other person unless the Centre reasonably believes that the disclosure may—

(a) inhibit the achievement of the Centre's objectives or the performance of its functions, or the achievement of the objectives or the performance of the functions of another organ of state; or

(b) prejudice the rights of any person.

41. Protection of confidential information

No person may disclose confidential information held by or obtained from the Centre except—

(a) within the scope of that person's powers and duties in terms of any legislation;

(b) for the purpose of carrying out the provisions of this Act;

(c) with the permission of the Centre;

(d) for the purpose of legal proceedings, including any proceedings before a judge in chambers; or

(e) in terms of an order of court."

[23] It will be recalled that the applicant contended that the starting point in resolving its disclosure claim is the right to open justice. The sixth respondent approached the matter from the opposite end. They asserted confidentiality in terms of the above sections that protect sensitive information as a control measure except in certain limited exceptions to the rule. It argued that although it is mandated to provide reports to certain legislated institutions either at the instance of the FIC or at request off such legislative office, that section 41 prevents that institution from disclosing that information and regulates the circumstances within which

disclosure is permitted. Further that the Act regulates the misuse in section 60 which makes such conduct an offence. In essence the applicant is not a legislative institution entitled to the information.

[24] The argument goes on that the third respondent made a request in terms of section 40(2) of the Act as she was entitled to do as a legislated office and received information in terms of section 40 (1) (aG) of the Act. The report was then made available to the third respondent with a cover letter from the Director of FIC exercising her powers in terms of section 40 (3) of the Act imposing further conditions on the disclosure of the information being reasonable safeguards which the Director considered appropriate to maintain the confidentiality of that information. The third respondent then ignored the safeguards imposed and filed the report as part of the record in the Rule 53. Even once the third respondent received the report it was duty bound to conduct its own investigations. Therefore, the claim by the applicant that in terms of section 182 (5) that all reports of the third respondent must be made public does not apply to the present matter as it was not relevant to her findings and must be rejected. Of significance also is that the review court found that the FIC record was irrelevant to the proceedings and was inadmissible as evidence as such the FIC's confidentiality remained undisturbed.

[25] In my view, the sixth respondent has correctly referred to legislative provisions on the classification and protection of its information. Ultimately there are different considerations that may very well apply where the request to disclose classified intelligence documents occurs in any context other than where the documents have been placed before a court by a party to the proceedings and thus form part of the court record. In that event, a court will always have the power to regulate the proceedings before it because it is clothed by section

173 of the Constitution with an inherent power to regulate its own process, taking into account what is in the interests of justice. It seems such process was followed by the Court when the record was disputed which led to the Ledwaba DJP directing the sealing of the record. Most importantly the applicant in the present matter does in in any of its papers before this Court dispute the confidentiality assertions by the sixth respondent.

[26] I am unable to identify any right on behalf of the applicant or the interests of justice that warrant the disclosure. In any event, it is evident from the press clippings placed before me that the information which the sixth respondent seeks to protect is not within the public domain and media discourse and is therefore still worthy of the confidentiality protection. I do think that there is a valid basis for further restriction of the protected FIC report. I can find no compelling reasons why the material should be disclosed to the public at large. The applicant has not advanced any public or private good that will be served by public disclosure as against the personal danger in which parties of the CR17 Campaign concerned and their activities will be placed.

[27] **I accordingly make the following order:**

1. **The application by the applicant to have the directive by Ledwaba DJP in the review application under case number 55578/2019 made on 15 August 2019 to seal the FIC record, uplifted, is dismissed.**
2. **Applicant to pay the costs.**

SARDIWALLA J
JUDGE OF THE HIGH COURT

Date of Hearing:
Date of Judgement:

Appearances:

For the Applicant:	Ishmael A. M Semenya SC Kameel Premhid MFesane M. Ka-Siboto
Instructed by:	Ian Levitt Attorneys
For the First, Ninth to Fourteenth respondents:	W. Tengrove SC T. Ngcukaitobi SC Ndumiso Luthuli
Instructed by:	Harris Nupen Molebatsi Inc.
For the Sixth Respondent:	L.J Morrison SC G. Ngcangisa
Instructed by:	Cliffe Dekker Hofmeyer Inc