

IN THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION

15/11/02

In the matter between

Case no. 4636/2002

CCH SYSTEMS (PROPRIETARY) LIMITED

Applicant

and

SHAUKET FAKIE N.O.

S A M BAQWA N.O.

BULELANI NGCUKA N.O.

M G P LEKOTA N. O.

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	YES
(2) OF INTEREST TO OTHER PARTIES: YES/NO	YES
(3) REVISED:	
15/11/2002	First Respondent
DATE	SIGNATURE

Second Respondent

Third Respondent

Fourth Respondent

JUDGMENT

HARTZENBERG J:

(1) During the years 1998 to 2001 the acquisition of the Strategic Defence Package (SDP) at

an estimated cost of R30,3 billion¹ was highly topical. Because of doubts, criticisms and allegations of impropriety the first respondent, the Auditor-General, performed a high level review but despite that, public disquiet persisted. During November 2000 the first, second and third respondents were appointed as a joint commission to investigate the propriety of the entire SDP. They conducted the investigation and eventually submitted a report on 14 February 2001. It was accepted and approved by Parliament.

(2) This application is one for access to information obtained by the commission during the investigation. It is brought in terms of Act 2 of 2000, the Promotion of Access to Information Act (the Act). The applicant is a supplier of specialised software and computer systems for defence applications. It was excluded as a supplier of sub-systems to be installed on Corvettes ordered by the Department of Defence for use by the South African Navy. It believes that the exclusion was unlawful. The second respondent is the Public Protector. The third respondent is the National Director of Public Prosecutions. The fourth respondent is the Minister of Defence. Although no relief was claimed against the second, third and fourth respondents they all chose to oppose the application. The second and third respondents support the principle of freedom to information but oppose the application on the basis that it will not be in the interest of public of South Africa, good governance, proper relationships with major investors and the security of the country that access be granted to the applicant. The fourth respondent relies on absolute and qualified privilege in terms of the Act.

(3) The applicant applied to the first respondent on 28 November 2001 for the following documents:

It has since escalated tremendously

- 3.1 all draft versions of the report;
- 3.2 all audit files concerning the SDPs from 1 January 1998 to 20 November 2001;
- 3.3 all correspondence concerning the SDPs between the first respondent and the Department of Defence from 1 January 1998 to 20 November 2001; and
- 3.4 all correspondence concerning the SDPs between the first respondent and the second respondent's office from 1 January 1998 to 20 November 2001.

The application was done on the prescribed form and in terms of section 18 of the Act.

(4) The first respondent's reply thereto, dated 18 January 2002, gave three grounds on which the request was refused. They were:

4.1 *"The number of documents is too vast. We do not have the resources or capacity to go through the contents of each and every document and evaluate the information contained therein. The work involved in carefully going through the vast quantity of documentation and processing your request would substantially and unreasonably divert our resources from our core business. The request is therefore refused in terms of Section 43(b) of the Act."*

4.2 *"The documents contain information that was supplied in strict confidence by various third parties. The bulk of the information and documentation was supplied after their confidentiality was guaranteed. We are unable to breach our undertaking. Further, the nature of our work and the need to obtain information from various sources to enable us to carry out our function in the public interest may be jeopardised by our disclosure of information supplied in confidence. The request is therefore refused in terms of Section 37 of the Act".*

4.3 *"The documents contain detailed information relating, inter alia, to the defence and security needs of the Republic and, apart from having been supplied in confidence, their disclosure may also prejudice the position of the Republic in that regard. The request is therefore refused in terms of Section 41(a) of the Act."*

The first respondent invited the applicant, if it disagreed with its decision, to bring a court

application.

(5) On 18 February 2002 the applicant brought the present application. Its prayers were for an order directing the first respondent to provide the applicant with the documents specified in 3.1 to 3.4 above and for costs against the respondents who oppose the application.

(6) In its answering affidavit the first respondent disclosed that in the main the documents emanated from the Department of Defence and Armscor. Armscor is the procurement arm of the Department of Defence. The members of the investigating team were only allowed to inspect documents under conditions of strict security and confidentiality and were not allowed to remove any original documents. Documentation consisting of about 700 000 pages was perused and about 135 000 pages were copied. Approximately 60 people from the three agencies conducting the investigation were involved. Of them 27 were from the first respondent's team. For purposes of his response to the request he only took into account the 135 000 pages (according to the joint report the exact figure is 134 768 pages) which were copied. Although the documents in his possession are not an audit file he was prepared for the sake of convenience to regard them as such. Apart from the 135 000 pages the audit file comprises working papers, cabinet minutes, minutes of ministerial committee meetings, documents emanating from the Department of Finance which were mainly feasibility studies and economic models, counter investment agreements from the Department of Trade and Industry and draft reports. The total number of pages come to 225 000. The contracts which comprise the SDP, including the counter investment contracts are current and being reciprocally performed. According to him much of the information contained in the contracts are confidential and worthy of protection, and disclosure thereof will be detrimental to the well-being of the Republic.

(7) What the first respondent does not deal with is how the different documents in its possession have been filed and indexed. It is inconceivable that the investigating team did not have a

filing system. One would imagine that it would now be much easier to find and evaluate documents than what the position was when the information was gathered. The first respondent also does not deal, otherwise than in general terms, with the resources available and what the inroad on its ordinary activities will be if the request is to be considered in terms of the Act. It is alleged that the task will "irrespective of how many people are involved, require the expenditure of man hours well in excess of a year". It is not very helpful to form an idea as how long it will take to complete the task. I understand "man hours" in excess of a year to imply that one man will work longer than a year to complete the task. Twelve men may be able to complete it in just over a month and twenty in three weeks. The first respondent "regrets" that he is unable to furnish the court with greater particularity.

(8) In its replying affidavit the applicant limited its request to what has become known as "the reduced record" which relates to the acquisition of the Corvettes and in particular to

8.1 the de-selection of the applicant as the supplier of the Combat Suite's Information Management System and the selection instead of the Detexis Diacerto Combat Suite Databus;

8.2 the selection of the supplier of the System Management System, the Navigation Distribution System and the Integrated Platform Management System Simulator;

8.3 the role of African Defence Systems (Pty) Ltd. (ADS) in the supply of the Combat Suite for the Corvettes and its conflict of interest by virtue of its involvement in the supply of the Corvettes at various different levels; and

8.4 the conflict of interest of Shamin Shaikh (the Chief of Acquisitions in the Department of Defence).

(9) The applicant no longer requires the documents specified in 3.3 and 3.4 above i.e. the correspondence concerning the SDPs between the first respondent and the department of defence and between the first respondent and the second respondent. The first respondent, in the answering affidavit, denied that such correspondence existed. The applicant was in possession of some of those

letters and attached it to its replying affidavit. In a further affidavit the first respondent accused the applicant of having led it into a trap! It attached all the relevant letters. The applicant accepts the first respondent's declaration under oath that all the documents have been supplied.

(10) The Open Democracy Advice Centre (ODAC) brought an application in terms of Rule 16A of the rules of court to be allowed to address the court as *amicus curiae*. It was opposed by the respondents. ODAC wanted to have that application heard well in advance of the hearing of the matter. I indicated that they can bring the application just before the hearing and eventually arranged with counsel that such application, if necessary, can be brought after argument by the parties. After the argument I invited Ms. Bawa, who represented ODAC, to address the court on matters which were relevant and not yet raised. Not surprisingly she sided totally with the applicant and castigated the respondents for not advancing open democracy.

(11) Mr. Maritz for the first respondent in an ingenious argument asks for the dismissal of the application on the following basis: He says that when the first respondent informed the applicant that it was entitled in terms of section 45(b)² of the act to refuse the request (the volume objection), the applicant should have brought a new request in terms of section 18³ for access to the reduced record. He relies on a letter, dated 1 August 2002 by the first respondent to the applicant. In that letter it is stated that the original request was broad, that the applicant conceded in the replying affidavit that it

² Sec 45 reads: "The information officer of a public body may refuse a request for access to a record of the body if -

(a).....

(b) the work involved in processing the request would substantially and unreasonably divert the resources of the public body."

³ Section 18 provides that the request for access is to be in the prescribed form and that the form must specify a number of requirements one of which is that "the requester (is) to provide sufficient particulars to enable an official .. to identify ... the record ..., and the requester (section 18 (2) (a))

was not aware of the bulk of the record, that in the opinion of the first respondent it should have been aware thereof and that the applicant watered down its request to the reduced record. It is then said that the request for the reduced record constitutes a new request and an irregular request in that it was not preceded by a section 18 request. The applicant is formally invited to withdraw the application, tender costs and to draft a new application. Mr. Maritz adopts the reasoning in the letter and says that it appears from the joint report that 700 000 pages were perused and that 134 768 pages were copied. He says that the applicant therefore knew of the bulk of the record and had to expect to be met with a volume objection.

(12) I do not agree. Section 81(3) of the Act provides that there is an onus on the party claiming that the refusal of a request for access complies with the provisions of the Act. Furthermore in terms of section 9 some of the objects of the Act are to give effect to the constitutional right of access to any information held by the State⁴, and to establish voluntary and mandatory mechanisms which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible⁵. Moreover, section 2(1) of the Act provides that when interpreting a provision of the Act the court must prefer a reasonable interpretation consistent with the objects of the Act over an alternative interpretation inconsistent therewith. The letter of 18 January 2002 is vague. It does not say how many documents are in the possession of the first respondent and what his resources are. It did not discharge any *onus*. The procedure which Mr Maritz wants the court to sanction is slow, expensive and cumbersome. Moreover the first respondent knows very well what documents the applicant require, does not deny that it is in possession thereof but proffers a reason why it is not necessary for it to go and look for them. A new section 18 request will not give any new information to the first respondent to alleviate the obligation

⁴Section 9 (a) (i)

⁵Section 9 (d)

imposed upon it by statute.

(13) Before dealing with chapter 4 of the Act and the protection that it gives to the respondents it is necessary to address another aspect, i.e. the question of what exactly is meant by a record. The respondents contend that all the documents comprise one record. Mr. Maritz goes so far as to argue that if there are draft reports amongst the papers access not only to them but to all the documents, the record, may be refused in terms of section 44(2) (c) of the Act⁶.

(14) "Record" is defined in section 1 of the Act as "any recorded information ... regardless of form or medium in the possession or under the control of that public body". Section 29(2) gives an idea of what recorded information the legislature had in mind. If I understand the section correctly it relates to information in written and printed form, video recordings and photographs, tape recordings, computer data or possible other forms of recordings, yet to be invented. It stands to reason that a single page can constitute a "record". If there is one page about one subject in the possession of the public body it is a "record". If however there are 700 000 pages on one subject, one page of which is the requester's marriage certificate of his marriage in China, and he wants access thereto he can fill out a request in terms of section 18 for the marriage certificate. The "record" required is the one page and not the 700 000 pages. In my judgment each item in itself constitutes a record as envisaged in the Act, be it an original or not.

⁶ It provides that an information officer may refuse a request for access if the record contains a preliminary, working or other draft of an official of a public body.

(15) It is clear that the respondents do not allege that all the documents in the first respondent's possession are entitled to protection in terms of the provisions of chapter 4 of the act. It has invoked the provisions on which they rely in a generalized way. The contention is that some of the documents enjoy the protection against disclosure which is provided for in one or more of the sections in chapter 4 of the Act. Not one of those documents were identified. The defence is therefore that the requested documents are so voluminous that the first respondent cannot reasonably be expected to analyse them all in order to identify those which may be protected from disclosure.

(16) In my view and because of the *onus* created in section 81 it will be necessary for the information officer to identify documents which he wants to withhold. A description of his entitlement to protection is to be given, one would imagine, as in the case of a discovery affidavit in which privilege is claimed in respect of some documents. The question of severability may come into play⁷. Paragraphs may be blocked out or annexures or portions may be detached. The provisions of section 82 of the Act read with section 80 cover the case where there is a dispute about the question if a document or only a portion thereof is to be disclosed and the decision of the court is required to rule if a document is protected in whole or in part.

(17) The approach of the respondents, even in respect of the reduced, record makes it impossible to evaluate if the respondents justifiably claim privilege in respect of documents and if portions thereof are not to be given access to. In the result I agree with Mr. Rogers that the only objection which has in fact been raised is the volume objection. If regard is had to the media coverage which this matter enjoyed and the prominence of the members of the joint commission this

⁷ Section 28 provides that if a request for access to a record is made which may or must be refused in terms of chapter 4 every part that can reasonably be severed from any part that contains such information must be disclosed

is certainly a case where maximum access is necessary to dispel any suspicion of a cover-up. It is not good enough to hide behind generalities. If it means that the first respondent has to employ extra staff it must be done. The applicant alludes to conflicts of interest and political pressure. If at all feasible such suspicions must be put to rest.

(18) The applicant argues that if he was de-selected as supplier due to political pressure or some impropriety a comparison between draft reports and the final one may indicate that that is what happened. Conversely if there was no impropriety the very same comparison will prove that. That raises the question what the object of section 44 is. It was submitted that it is not to hamper a public body in its administration and formulation of policy and to guard against the supply of confidential information prematurely. Senior and junior officials must be able to talk freely about the development of policy matters and their interaction at a stage before finalisation should not at that stage be accessible. Opportunistic entrepreneurs should not be allowed to obtain information along this route which give them an unfair advantage over their rivals. In my view it does not deal with historic situations. The joint report has been finalized and accepted by Parliament. At this stage the draft reports are only of historic importance and cannot obstruct the joint commission in its work. In my view they are no longer protected by the provisions of section 44.

(19) When it comes to confidential matters it is so that section 37 provides that an information officer must refuse access if disclosure will lead to a breach of a duty of confidence and may refuse access if disclosure may lead to cutting off a source of information. One can understand the rationale behind the provision. It is in a strange way to be compared with the position of the police informer. On the other hand it must be remembered that the definition of a third party in section 1 of the Act specifically excludes "public bodies." It is to prevent technical objections based on what department is really in possession of a document. Ms. Bawa referred me to the matter of *McGehee v CIA* case no. 82-1096 argued on 15 September 1982 in the U. S. D. C. Circuit Court of

Appeals in the District of Columbia. The judgment of Circuit Judge Harry T Edwards was delivered on 4 January 1983⁸. Under the heading "Agency Records" Covered by the Act" he said the following:

"If records obtained from other agencies could not be reached by a FOIA (the American equivalent of the Act) request, an agency seeking to shield documents from the public could transfer the documents for safekeeping to another government department. It could thereafter decline to afford requesters access to the materials on the ground that it lacked "custody" or "control" over the records and had no duty to retrieve them. The agency holding the documents could likewise resist disclosure on the theory that, from its perspective, the documents were not "agency records." The net effect could be wholly to frustrate the purposes of the Act."

(20) Of course it is likely that there are many instances of information which was given in strict confidence, not by other departments but by third parties. One can understand that there is a duty to protect such third parties and that the respondents would be remiss if they did not do so. In my view however it is for the respondents to identify the record which is to be protected and to state concisely why it maintains that access to it can be withheld. Arguments may arise as to severability and may end up before a judge. Exactly the same considerations apply to documents which may be withheld in terms of section 41 on the basis that its disclosure may cause prejudice to the defence, security and international relations of the country or would reveal information specified in section 41(1)(b).

⁸ Unfortunately I was handed a copy of the judgment without the precise reference.

(21) It has been argued that the applicant knows exactly what he wants and is already in possession thereof and that that is evident from the particulars of claim in an action which he has instituted against the fourth respondent. The argument is that he does not really need the records. There is a further argument that as he has instituted action against the fourth respondent during August 2002 he is precluded in terms of the provisions of section 7 of the Act to get access. Section 7 provides that the Act does not apply to a record requested after commencement of criminal or civil proceedings. In this matter the request was long before institution of action. The prohibition against access after commencement of proceedings was obviously included in the act to see to it that litigants make use of their remedies as to discovery in terms of the rules of the relevant court and to avoid the possibility that one litigant gets an unfair advantage over his adversary. Before a litigant has instituted proceedings and even if he wants to institute proceedings he is, in my view not prohibited from invoking the provisions of the Act to get access. One of the objects of the Act must be that citizens can get information regarding wrongs perpetrated against them to enable them to hold the wrongdoers accountable in a court of law. See section 9 (c) and especially 9 (e)⁹. To interpret the Act that everybody who contemplates legal action is prohibited from requesting access will be to render the Act nugatory for the very purpose for which it was promulgated.

(22) Although I am satisfied that the first respondent is obliged to provide the relevant documents to the applicant I have come to the conclusion that it may cause prejudice to the Defence Force and the Government to order it to produce the whole reduced record. Mr. Rogers suggested that in such a case a *via media* is to be followed i.e. to order the first respondent to make available those records to which no objection is raised, within a stated period of time, and in respect of the balance of the records of the reduced record, to identify them and state the reasons why access may or must be refused and in respect of which portion of the record it is to be refused. I agree with that

⁹ Section 9(e) provides that one of the objects of the Act is "generally, to promote transparency, accountability and effective governance of all ... public bodies..."

submission. Forty court days or eight weeks seem to me to be enough for it to do so.

I make the following order:

1. The first respondent is ordered to provide the applicant by no later than 40 court days from the date of this order with the following records:

1.1. all draft versions of the report submitted to Parliament by the joint investigating team regarding the so-called Strategic Defence Packages for the procurement of armaments for the South African National Defence Force.

1.2. in respect of all audit files concerning the Strategic Defence Packages for the procurement of armaments for the S A National Defence Force from 1 January 1998 to 20 November 2001 dealing with:

1.2.1 the de-selection of the applicant as a supplier of the Combat Suite's Information Management System and the selection instead of the Detexis Diacerto Combat Suite Databus

1.2.2 the selection of the supplier of the Systems Management System, Navigation Distribution System and the Integrated Platform Management System Simulator

1.2.3 the role of African Defence Systems (Pty) Ltd, a company controlled by Thomson-CSF of France (which later changed its name to Thales International), in the supply of the Combat Suite for the Corvettes and its conflict of interest by virtue of its involvement in the supply of the Corvettes at various different levels, namely as:

1.2.3.1 a member of the consortium constituting the prime contractor for the supply of Corvettes;

1.2.3.2 the supplier of Combat Suite and at the same time being the Combat Suite Integrator;

14

1.2.3.3 the supplier of various systems and sub-systems for the Combat Suite, including the SMS and the Combat Management System ; and

1.2.3.4 an associate company (i.e. a company in the Thopson-CSF group) of the supplier of the Detexis system;

1.2.4 the conflict of interest of Shamin Shaikh as:

1.2.4.1 the Department of Defence's Chief of Acquisitions and chairperson or member of various committees and boards involved in the assessment of the SDP; and

1.2.4.2 brother of Schabir Shaikh, who at all material times had an indirect interest in ADS

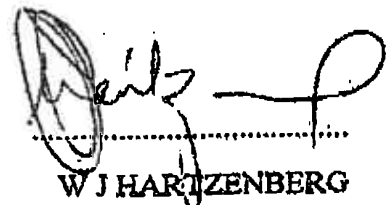
1.3 all the documents and records in respect of which it has no objection in terms of chapter 4 or section 12 of Act 2 of 2000; and

1.4 a list of all the documents and records in respect of which it objects in terms of the provisions of the aforesaid Act 2 of 2000, setting out clearly and concisely

(a) a description of the document or record, (b) the basis for the objection,

(c) an indication if the objection relates to the whole document or only to portions thereof and if so, (d) to which portions.

2 The respondents are ordered jointly and severally to pay the applicants costs of the application inclusive of the costs of two counsel.



W J HARTZENBERG
JUDGE OF THE HIGH COURT