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Presidency and M&G in court again

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The five-year court battle between the *Mail & Guardian* and the Presidency over access to a report on the controversial 2002 election in Zimbabwe will be back at the Supreme Court of Appeal next month.

Former president Thabo Mbeki commissioned the report. (Image: The White House)

Three consecutive presidents have resisted handing over the report, commissioned by former president Thabo Mbeki and written by Constitutional Court judges Dikgang Moseneke and Sisi Khampepe. In court papers, the Presidency said the report was about "legal and constitutional issues" related to the election. The newspaper suspects it might shed light on whether the election was free and fair.

The dispute has already been to the High Court, the Supreme Court of Appeal, the Constitutional Court, and back to the High Court. This means it has been considered and pronounced upon by 16 judges.

And, in the meantime, an intervening mini-drama threatened to put paid to the litigation: the report went missing from High Court Judge Joseph Raulinga's chambers.

Judge Raulinga was the second High Court judge to hear the case. The report disappeared after he had ordered that it be handed over to the *Mail & Guardian* and had granted leave to appeal, but before it was sent to the Supreme Court of Appeal.

Missing report 'turned up'

The judges then informed the parties they had a copy and could make it available. The presidency indicated they should hand it to the president. But Supreme Court of Appeal president Lex Mpati said it should be handed to the court.

Judge Raulinga later said the report had turned up.

In heads of argument, the *Mail & Guardian*'s counsel Jeremy Gauntlett SC said President Jacob Zuma first asserted the missing report was the only copy and then "resisted the offer" by the two judges to make their copies available to the appeal court.

This "has itself achieved public notoriety and increased the public interest in its contents", he said.

However, the Supreme Court of Appeal will have to decide whether Judge Raulinga was - after having looked at the report - right to order that it be handed to the newspaper.

Judge Raulinga has rejected one of Zuma's main arguments

No reason to keep the report secret

Rejecting one of the President's main arguments for keeping the report secret, Judge Raulinga said: "This can never reasonably be construed as information supplied in confidence by or on behalf of another state. In my view most of the information is public knowledge. The report itself does not reveal that it was intended to be kept secret."

The first time the case was heard in the High Court and, later, the Supreme Court of Appeal, both ordered that the report be handed to the *Mail & Guardian* and neither thought it necessary to look

for keeping the report secret.
(Image: GCIS)

at it.

But the Constitutional Court disagreed, saying that, before ordering the Presidency to hand over the report, the court should have looked at it first.

The Promotion of Access to Information Act allows a judge in certain circumstances to have a "judicial peek" at the information being sought - to determine whether the government would be justified in refusing to grant access.

In court papers, Zuma's counsel, Marumo Moerane SC, said Judge Raulinga was wrong not to allow last-minute affidavits from Mbeki and Zuma as evidence.

Section 80 of the Act and its rules - which deal with the judicial peek scenario - allows the parties to make representations to the court in light of the new information.

Moerane said Judge Raulinga first called for those submissions (the affidavits), but then declined to consider them for purposes of his judgment. Had the judge considered the submissions, he would have decided differently, he said. The case will be heard on 4 September.

Source: *Business Day*, via I-Net Bridge