

Public interest appeal goes before SCA

An appeal concerning the principle of public interest in ongoing state investigations was heard by the Supreme Court of Appeal in Bloemfontein on Wednesday (14 November).

It was brought by Eastern Cape local government MEC, Mlibo Qoboshiyane.

The matter related to a case between the MEC and Avusa Publishing's *Herald* newspaper, in Port Elizabeth. It was brought before the Port Elizabeth High Court in March 2011.

The *Herald* applied on November 24, 2010, for access to the Kabuso Report, a section 106 report, in terms of the Municipal Systems Act.

The report, which the MEC received in February 2010, followed an investigation into possible maladministration at the Nelson Mandela Bay metro municipality.

In October 2011, the high court ordered that the report be handed to the newspaper within five days, which was done by the MEC.

In papers in the Supreme Court of Appeal (SCA), the MEC agreed with the high court findings about handing the report to the newspaper, but questioned the court's conclusion that section 46 of the Promotion of Access to Justice Act required disclosure of the report.

Section 46 provides a limited public interest override of the mandatory protection of information.

On Wednesday, the judges of a full SCA Bench questioned the appeal, because the right to appeal stopped when the MEC complied with the court order.

There was also no indication on the papers that the MEC had reserved the right to appeal when he handed over the report.

"There is no issue on the papers that there was a right reserved," said Appeal Court Judge Kenneth Mthiyane.

Richard Buchanan, for the MEC, said what was required was a decision whether information in a section 106 investigation could be made available before the end of the investigative process and before an MEC's final decision.

"Is it proper to hold back a report if the process [investigation] was not finished?" he asked.

He argued that this was a different situation from whether a similar report was deliberately delayed, which would set in motion an argument of public interest.

Buchanan submitted that section 106 investigations would be undermined if the investigative process were played out on the front pages of the press.

Section 106 investigations would always end in a decision by an MEC, which would be in the public domain.

Buchanan submitted that a court decision on "premature disclosures" would set a guide for the press, public and government officials on how to handle similar situations, which were sure to surface in the future.

Jason Brickhill, for Avusa, submitted that the appeal should be dismissed with costs.

He said that in the case before court, the section 106 investigation was completed by the time access was sought by the newspaper.

"We accept there was ongoing exchange between the MEC and the municipality, but the report was finished."

Brickhill argued that any public interest argument was fact based within its own context, and rested on a discretionary aspect.

Referring to the Kabuso report, Brickhill said a delay of 18 months after the report was finished and no finality in the section 106 processes would bring a significant aspect of public interest into play in any similar matters.

The SCA asked the MEC for additional information.

This included whether the report was handed over during a public ceremony and whether there was a reservation lodged for a possible appeal.

Mthiyane reserved judgment on the matter.

Source: *Sapa* via I-Net Bridge

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