

State grilled over 'secret' Zimbabwe report 32

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Lawyers for President Jacob Zuma faced a barrage of questions from the judges of the Supreme Court of Appeal (SCA) on Monday, November 22, as they tried to justify the presidency's decision to keep secret a report on the constitutional and legal conditions surrounding Zimbabwe's controversial 2002 elections.

Presiding judge Robert Nugent repeatedly pressed Zuma's counsel, Marumo Moerane, over the failure of the presidency, following a Promotion of Access to Information (PAIA) request from the *Mail & Guardian*, to provide reasons for its failure to release the report, which was commissioned by then president Thabo Mbeki from judges Sisi Khampepe and Dikgang Moseneke.

The request was refused twice, first by Trevor Fowler in his capacity as presidency information officer, and later by then Minister in the Presidency Manto Tshabalala-Msimang. The *M&G* then took the case to the North Gauteng High Court, which ruled that Zuma must hand over the report. The presidency appealed that judgment in the SCA.

Moerane explained that on the basis of a reading of the report, Fowler had concluded that releasing it would be improper as it would breach the confidence afforded the judges as representatives of Mbeki by Zimbabwean officials, and would damage relations with that country.

"If Mr Fowler says, 'That's my opinion', then that is the end of the matter and the court must just accept it?" Nugent asked.

Judges Azhar Cachalia, Mandisa Maya and Belinda van Heerden all took a similar line, asking Moerane why no detailed information about the nature of the judges' mission had been provided, and pointing out contradictions in the version of events offered on affidavit as "personal knowledge" by Fowler and by Frank Chikane, the director general in the presidency.

Much of the discussion turned on the nature of the mission undertaken by the judges. Were they sent by Mbeki to undertake an independent inquiry into the "constitutional and legal" environment surrounding the elections, which were widely seen as rigged? Or were they, as Chikane and Fowler claimed, acting as "envoys" of the South African state? Was it something uncomfortably in between?

If Khampepe and Moseneke were operating independently, the case for keeping the information secret is greatly weakened as no state-to-state confidentiality would apply. If they went as quasi-diplomats, then serious constitutional concerns would arise, because undertaking such a role would breach the separation of powers between judiciary and executive, and be in violation of the Constitutional Court's "Heath" judgment, which banned judges from taking on what amounts to government work.

"Surely", Cachalia told Moerane, "there's a letter of appointment, there's a note, there's a minute. Government does not operate like a glorified spaza shop ... In the absence of any paper trail must we just accept that [Chikane and Fowler] are people of standing and they will never mislead, just like [then United States secretary of state] Colin Powell never misled the security council [over Saddam Hussein's possession of weapons of mass destruction]."

"It is unlikely they would just be called into the president's office and told 'off you go'," added Van Heerden.

"We have no affidavit from the former president and no affidavit from the former judges," Nugent added. "All we have is bald allegation."

Both Nugent and Cachalia expressed concern over the constitutional implications of the mission.

"I have great, great difficulty accepting that judges would turn themselves into diplomats," Nugent said.

Cachalia put it more strongly: "I'm troubled ... that this was an executive function being performed. If it is not distinguishable from [the Heath judgment] then it is unconstitutional and illegal ... I'd want to hear why it did not offend the separation of powers and, if it does, why would any legal protection attach itself to the report?"

Pressed to say whether the trip had been an executive or an independent one given his insistence that the two travelled as diplomats, Moerane said, "I don't want to give it a name. Give a dog a name, and you hang it."

"You gave the dog the name," Cachalia replied.

The judges also hammered Moerane about factual divergences between Chikane's and Fowler's versions of events.

Jeremy Gauntlett, counsel for the *M&G*, also pressed this point, "the two deponents drew their guns and shot one another", he told the court.

"In what shambolic state is the presidency that it puts up as its main affidavit [an account] by someone who says he started working there two years after the events in question?"

As the hearing closed Nugent reminded Moerane that in a democratic South Africa the government officials have to justify their decisions on the basis of facts.

"In the old days you used to get these affidavits that said 'I've locked up Mr Cachalia because it's in the public interest'. Boom. 'Court, I don't care what you think' ... The point is we've now moved beyond that."

Judgment on the matter was reserved.

Source: Mail & Guardian Online

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