IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 25/09

In the matter between:

STEFAANS CONRAD BRUMMER	Applicant
and	
THE MINISTER OF SOCIAL DEVELOPMENT	First Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT OF SOCIAL DEVELOPMENT	Second Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
and	
THE HUMAN RIGHTS COMMISSION OF SOUTH AFRICA	Amicus Curiae

WRITTEN SUBMISSIONS OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION (AMICUS CURIAE)

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INTRODUCTION

1. This is an application for confirmation of an order of invalidity of section 78(2) of the Promotion of Access to Information Act 2 of 2000 ("PAIA"), as well as an application for leave to appeal, by the applicant, against the finding in the Court *a quo* in which that Court, first, dismissed the applicant's application for condonation in terms of section 78(2) of PAIA, and second, dismissed the applicant's appeal against the refusal of the first and second respondents to grant him access to the information requested. We refer to this application as "the main application" in these submissions.

2. The South African Human Rights Commission ("SAHRC") has sought admission as an *amicus curiae* in the main application ("the *amicus* application") in order to make submissions to this Court which, it submits, will be of relevance and assistance to this Court in deciding the main application.

3. These written submissions are divided into two parts:

    3.1. Part A sets out submissions which the SAHRC makes on the strength of the background information, gleaned from its monitoring role of the use and implementation of PAIA, which it has placed before this Court. These submissions have relevance both for the question that arises on confirmation – namely the constitutionality of the relevant provision in section 78(2) of

PAIA – and for the application for leave to appeal with respect to condonation of the applicant's failure to have complied with the time period stipulated in section 78(2).

3.2. Part B considers the failure of the Court *a quo*, as well as the first and second respondents, to consider the particular presence in the instant case of an important dimension, namely the cluster of rights surrounding section 16 of the Constitution:[1] the applicant's right to freedom of expression of the press and other media in section 16(1)(a) of the Constitution; the applicant's right and that of the public to receive or impart information or ideas in section 16(1)(b) of the Constitution; and the constitutional values of openness, responsiveness and accountability.

3.3. In Part B, we submit that the particular applicability of this dimension in the instant case ought to have featured in the assessment of the applicant's prospects of success, in particular with respect to whether the ground of refusal contemplated in section 39(1)(b)(iii)(*ee*) of PAIA applied on the facts, as well as the potential applicability of the provisions of section 46 of PAIA. We also address what appears to have been a misconception on the part of the court *a quo* concerning the provisions of section 11 of PAIA.

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[1] The Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

PART A

THE CONSTITUTIONAL MANDATE OF THE SAHRC

4. Section 181(1)(b) of the Constitution states that the SAHRC is created in order to '*strengthen constitutional democracy in the Republic*'.

5. The SAHRC has as its primary objectives promoting respect for human rights and a culture of human rights; promoting the protection, development, and attainment of human rights; and monitoring and assessing the observance of human rights in South Africa.[2]

6. The SAHRC has the powers, as regulated by national legislation, necessary to perform its functions, to investigate and report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; and to carry out research, educate and train on human rights.[3]

7. In addition to its general constitutional oversight role with respect to all rights in the Bill of Rights, PAIA assigns to the SAHRC a number of important tasks in connection with monitoring the implementation and compliance with that Act in the private and public sector. These include:

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2 Section 184(1) of the Constitution.

3 Section 184(2) of the Constitution.

7.1. monitoring the implementation of PAIA;[4]

7.2. educating members of the public, public entities and private bodies on access to information as a fundamental right;[5]

7.3. consulting with and receiving reports from members of the public and private bodies regarding difficulties they have encountered in attempting to exercise their PAIA rights;[6]

7.4. receiving mandatory manuals from public bodies which set out the function of that body, details of the records it possesses, and a description of how to request access to a record held by that body ("section 14 manuals");[7]

7.5. receiving annual reports from public bodies detailing the number and types of requests made to that body and refused ("section 32 reports");[8]

7.6. reporting annually on its findings with regard to the implementation and use of PAIA to the National Assembly;[9] and

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4 Section 83(2)(b) of PAIA.

5 Section 83(2) of PAIA.

6 Section 83(3)(f) of PAIA.

7 Section 14(1) of PAIA.

8 Section 32 of PAIA.

9 Section 84 of PAIA.

7.7. making recommendations regarding the development or amendment of PAIA, as well as the procedures used by members of the public to request information.[10]

8. Consequently, the SAHRC is in a unique position to make important submissions to this Court regarding the implementation and use of PAIA which are of relevance to the Court's task of considering whether to confirm the constitutional invalidity of section 78(2) of PAIA, as well as deciding the merits of the appeal. In the section below, we set out the key findings of the SAHRC in this regard, and in the following section, consider the relevance of these findings to the assessment of constitutional validity.

THE EXPERIENCE OF THE SAHRC IN MONITORING COMPLIANCE WITH PAIA

Difficulties indentified in the implementation of PAIA by public bodies

9. A number of problems have been identified by the SAHRC with the non-compliance by public bodies of their statutory duties under PAIA. In short, these relate to:

[10] Section 83(3)(a) of PAIA.

9.1. a regular and systemic failure to comply with the time periods set out in PAIA.[11] The third respondent, for instance, requires extensions for half of the requests it receives;[12]

9.2. a systemic failure on the part of the majority of public bodies to submit adequate section 32 reports on time, or at all, to the SAHRC.[13] The second respondent, for instance, has submitted an inaccurate report;[14] and

9.3. a regular failure on the part of a significant percentage of public bodies to publish section 14 manuals.[15]

10. The failure of most public bodies to produce and publish section 14 manuals is significant, as this is the document which is intended to be what the SAHRC describes as the 'roadmap' to requesting information from the relevant body.[16] The manual must contain details on how requesters are to make a request for information; the details of the organisation; a description of the categories of records which it holds; and '*a description of all remedies available in respect of an act or a failure to act by the body*'.[17]

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11 *Amicus* application, p 22, para 34.1.

12 *Amicus* application, p 24, para 34.4.

13 *Amicus* application, p 25, para 34.8; Annexure E, p 49–52; Annexure F, p 77–78.

14 *Amicus* application, p 26, para 34.9.

15 *Amicus* application, p 28, para 41.

16 *Amicus* application, p 27, para 38.

17 Section 14(1)(h) of PAIA.

11. Clearly the provision of section 14 manuals is a critical component in facilitating the ability of members of the public and institutions to exercise their PAIA rights. The Legislature has signalled the importance of this provision by making it an offence for an information officer of a public body to fail to provide a section 14 manual. Section 90(2) of PAIA provides that:

> '*An information officer who wilfully or in a grossly negligent manner fails to comply with the provisions of section 14 commits an offence and is liable on conviction to a fine, or to imprisonment for a period not exceeding two years.*'

12. The respondents too refer to the significance of the section 14 manuals in their written submissions, pointing out the essential role which they play in educating members of the public in the enforcement of their PAIA rights.[18]

13. It is notable, in this regard then, that the first respondent has not fulfilled this obligation as it has not filed a manual with the SAHRC.[19] The SAHRC was, however, not correct to submit that such a manual had not been published on the first respondent's website – it had, and appears in the papers as attachment AT2 to the applicant's replying affidavit to the third respondent's answering affidavit.[20] The SAHRC apologises for this incorrect statement.

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18 Respondents' written submissions, p 21, para 37.

19 *Amicus* application, p 28, para 40.

20 Record Vol 4, p 340–373.

14. This failure of the part of the first respondent is consistent with the broad failure by most public bodies to file manuals, and significantly undermines the ability of members of the public to exercise their PAIA rights.[21]

15. A number of reasons have been given for the poor show by public bodies in implementing PAIA. These reasons include a low level of awareness of the Act and how to implement it; inadequate budgetary allocation for implementation; a lack of senior management awareness and commitment;[22] a perception amongst public officials that PAIA is too complicated; and a reluctance on the part of many public officials to provide information where there is a perception that this may open up public bodies to litigation.[23]

Difficulties indentified in the ability of requesters to exercise their PAIA rights

16. The corresponding experience of private and institutional requesters, in attempting to exercise their PAIA rights, is that it is burdensome, expensive, confusingly procedure-driven, and time-consuming. For this reason, in practice, as the SAHRC has attested, applicants who litigate to enforce their PAIA rights are generally '*sophisticated requesters and interest groups*' with the result that '*[t]here have been*

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21 *Amicus* application, p 28, para 41.

22 *Amicus* application, p 22, para 32.

23 *Amicus* application, p 21–22 , para 31.4; Annexure E, p 55–56.

very few matters litigated in terms of PAIA by individuals who have not been assisted or funded by civil society or the media.'[24]

17. Accordingly, for many requesters, the decision to appeal to courts where a request is refused is highly problematic. The SAHRC has, through carrying out its monitoring role of the implementation of PAIA, identified a number of factors which compound the difficulty of a requester's decision to exercise her rights in terms of section 34 of the Constitution to have her dispute resolved by a court. These include:

17.1. the complex procedural requirements associated with PAIA litigation[25] (the difficulty appears to be compounded by the failure of the Rules Board to finalise rules for the procedure to be followed when instituting section 78 appeals[26]);

17.2. the high cost of litigation in the High Court;

17.3. the length of time before judgment could be expected to be handed down;

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24 *Amicus* application, p 20, para 31.2; Annexure F, page 74.

25 *Amicus* application, p 25, para 34.6.2.

26 Section 79(1) of PAIA requres the Rules Board for Courts of Law, established in terms of section 2 of the Rules Board for Courts Law Act 107 of 1985, to makes rules with regard to the application in terms of section 78, before 28 February 2009. This provision was amended by the Judicial Matters Amendment Act 66 of 2008 from the previous wording, which stated that the rules would have to be enacted within four years of the commencement of that section in 9 March 2001.

17.4. the fact that most South Africans are not fully sufficiently rights conscious to assert their rights within formal rights assertion frameworks; and

17.5. cultural barriers to litigation as a viable vehicle for engagement with government.[27]

18. These difficulties are well illustrated by the South African History Archives Trust ("SAHA") in its application to be admitted as an *amicus curiae* in the main application. As SAHA attests, despite its extensive experience in making requests for information and taking the refusal of these requests on appeal to the High Court,[28] the difficulties it faces in launching such an appeal mean that it has never done so within the 30 day period prescribed in section 78(2) of PAIA.[29] This is the case with a sophisticated requester; the difficulties faced by an ordinary, individual litigant, unassisted, are naturally compounded.[30]

19. In the experience of the SAHRC, all these difficulties – both real and perceived – have the result that very few appeals proceed to court.[31] In the SAHRC's view, this has a chilling effect on parties choosing to exercise their PAIA rights through litigation in court. Moreover, in part, this contributes to the reality that most litigation

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27 *Amicus* application, p 20, para 31.3; Annexure E, p 48.

28 SAHA has made over 1000 requests for information from various government departments, and brought 11 applications in the High Court arising out of refusals of these requests: Application by SAHA to be admitted as an *amicus curiae*, founding affidavit, p 3–4, para 11.

29 Application by SAHA to be admitted as an *amicus curiae*, founding affidavit, p 3–4, para 11, read with p 7–8, para 23; and p 9, para 26.

30 Application by SAHA to be admitted as an *amicus curiae*, founding affidavit, p 8–9, paras 24–25.

31 *Amicus* application, p 24, para 34.6.1.

is, in practice, conducted by civil society and non-governmental organisations, and to the virtual absence of any PAIA litigation by individuals, let alone the poor, the unlawyered and the marginalised.[32] This also means that the matters which are ultimately litigated are often driven by their prospects of success and their suitability for development of the law, rather than by the wish of the individual to assert her rights.[33]

The relevance of these findings for the main application

20. The evidence which the SAHRC has put before this Court is relevant to the question of the constitutional validity of section 78(2) of PAIA, and also serves as context that may have been relevant to the condonation application that is the subject-matter of the application for leave to appeal. We develop these aspects below.

Unreasonableness of the limitation on the right of access to courts

21. A notable feature of the PAIA enforcement regime is that, unlike most comparative jurisdictions, South Africa does not have a separate body dedicated to dispute

[32] *Amicus* application p 20, para 31.3 and p 25, para 34.6.3.

[33] *Amicus* application p 21, para 31.3.6; Annexure E, p 48.

resolution and the enforcement of disputed requests.[34] Instead, at present, only the High Court is charged with fulfilling this role.[35] This means that the only way for requesters to enforce their right to have an access to information dispute resolved though a fair public hearing, as provided for in section 34 of the Constitution ("the section 34 right"), is through an application to the High Court.

22. The specific legislative scheme for enforcing the section 34 right in section 78(2) of PAIA, in prescribing a 30 day time frame in which such applications must be brought, limits an applicant's section 34 right.

23. The applicant in the main application sets out extensive argument and reliance on case law in his written submissions detailing this limitation of his section 34 right, and the argument that this limitation is not a justifiable limitation of this right in terms of section 36 of the Constitution.[36] The SAHRC associates itself with those arguments, and submits that section 78(2) is an unreasonable and unjustifiable limitation of the applicant's section 34 right and is, consequently, unconstitutional.

24. The evidence put before this Court by the SAHRC serves, in particular, to reinforce the applicant's argument that the 30 day period in section 78(2) is unreasonable in the socio-economic context of South Africa, where individuals struggle to enforce their rights. Because the procedural complexity entailed by court-centred

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34 *Amicus* application, p 19, para 31.1; Annexure E, p 41 and 47.

35 Section 78(2), read with section 79(2), of PAIA.

36 Applicant's written submissions, p 31–48, paras 63–102.

enforcement of PAIA rights serves to deter applications to court, a requirement that applications to court be launched within a short period after exhaustion of internal remedies can serve only to augment this deterrent effect and further to chill enforcement of PAIA rights. For the reasons set out above, the potential applicant faces a range of difficulties in complying with the 30 day period and this burden, it would appear, is experienced universally as unreasonable.

25. In this section, we wish to add one further, related point. This is that section 78(2), coupled with its limitation of the section 34 right of the Constitution, will frequently mean that the decision of the information officer or that of the decision-maker in the internal appeal will stand, and access to the information requested will be effectively refused, without the requester having the benefit of having the dispute decided by a court. Where the information in question was information that would have been useful or critical, not only to the requester for his or her purposes, but for the public's right to receive or impart information or ideas, the state of affairs caused by failure on the part of a requester to adhere to the time period in section 78(2) would then also entail a potentially severe limitation of the right of the requester and the public in section 16(1)(b) of the Constitution to '*receive or impart information or ideas*', in addition to the direct limitation of the right in section 32 of the Constitution of access to information. In any particular case, a range of other rights in the Bill of Rights may also be implicated, depending on the purpose and context of the request and the nature of the information requested.

26. The fact that section 78(2) of PAIA will not only limit the section 34 right, but will also have implications for other rights in the Bill of Rights is, we submit, a relevant consideration in deciding the reasonableness of the limitation. In analogous reasoning, this Court has held that when deciding whether discrimination was unfair for the purpose of section 9 of the Constitution, a relevant consideration is whether other rights were negatively affected:

> '*It suffices to say that the extent to which discrimination impacts on other rights will be a relevant consideration in the determination of whether the discrimination is fair*'.[37]

27. In our submission, the same reasoning should apply in this case: the fact that section 78(2) of PAIA implicates not only section 34 rights, but also section 16 and section 32 (and possibly other) rights in any given matter, is a relevant consideration in this Court's decision regarding the justifiability and reasonableness of the limitation of section 78(2) of PAIA on section 34 of the Constitution.

28. In Part B below, we consider the manner in which section 16 of the Constitution is implicated in this case independently of section 34.

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[37] *MEC for Education, KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 94.

Failure of public bodies properly to implement PAIA

29. The evidence provided by the SAHRC demonstrates that PAIA is, in reality, poorly implemented by public bodies, including the respondents, and in particular, that there is a gulf between stipulated time-frames and compliance with such time-frames. The fact of this gulf is relevant to this Court's consideration of the treatment accorded by the court *a quo* to the applicant's condonation application.

30. Of course, the extent to which record-holders habitually ignore or fail to be able to comply with time-frames is not directly determinative of the question to what extent a time-frame placed on an applicant to approach the courts is appropriate, nor to what extent it is appropriate to excuse an applicant for not complying with a time-frame. But it remains an important part of the context of this application for leave to appeal, which deals with condonation of such a failure, that applicants appear almost invariably to deal with counterparties in PAIA requests for whom time-frame compliance appears (from the perspective of the applicant) to be a matter of trivial importance. Such applicants may be brought under the impression by such treatment of their applications that the process of enforcing PAIA rights is something counted in months, not days, and that adherence to statutory time-frames is not an important aspect of such a process.[38] In the instant case, as highlighted by the applicant with respect to the interaction between him and the first and second respondents leading up to the eventual refusal of his request and his internal appeal,

[38] *Amicus* application, p 23, para 34.2.

this particular applicant was certainly treated to a demonstration of the apparent principle that, as far as the public bodies with which the applicant interacted in his request were concerned, adherence to statutory time-frames was a very low priority, if it held any value at all. The SAHRC submits that this could well have featured in the Court's assessment of the appropriateness of condoning the applicant's own failure to adhere to a time period.

31. Furthermore, the constitutionality of the 30 day period in section 78(2) ought to be considered against a background of systemic failure on the part of those on the other side of the obligation to adhere to time periods. This casts a peculiar focus on the fairness of an insistence on enforcement of such a provision against applicants. What this may entail, as a matter of practical reality, is a lopsided arbitrariness in the daily reality of the extent to which statutory timeframes play a decisive role in the enforcement of PAIA rights.

32. The experience of the SAHRC is that the perception of procedural complexity and confusion with respect to PAIA rights and obligations plays a part in fostering an attitude that non-compliance is justifiable, as complete compliance is regarded as in any event too burdensome and too difficult to understand. This creates the danger that important procedural requirements may be swamped in a perceived fog of procedural complexity and in the process suffer by association. This phenomenon impedes the fostering of an attitude of respect for the importance of the rights

entrenched in PAIA.[39] What these realities suggest is not that anarchy ought to be condoned in relation to procedural requirements of PAIA, but that, where the appropriateness of a particular procedural requirement that has a limiting effect on the enforcement of rights comes under scrutiny, its status must be carefully considered with respect to the question whether it adds to respect for enforcement of PAIA rights, or compounds the problem entailed by a perceived procedural overkill in the statutory framework, which in turn hampers respect for the rights sought to be advanced in this way. The SAHRC submits that the 30 day requirement in section 78(2) is insufficiently justifiable in the total context of the procedural difficulties PAIA appears to have spawned in practice, and that its presence detracts from, rather than fosters, respect for the enforcement of PAIA rights.

33. There is another respect in which the general failure on the part of public bodies to adhere to PAIA requirements is relevant in the instant case. The instant case deals with a ground of refusal, namely that contained in section 39(1)(b)(iii)(*ee*), that requires, and is premised upon, a fine fact-sensitive assessment to be performed by the responsible person on behalf of the record-holder, to determine whether access would, for example, impair the fairness of proceedings, in circumstances where the level of compliance and awareness among public entities of PAIA obligations is unfortunately in a pitiful state.[40] The court *a quo* appears to have accorded the respondents a great degree of uncritical deference with respect to the unelaborated assessment on their part that the fairness of the proceedings in the litigation to which

[39] *Amicus* application, p 24, para 34.3.

[40] *Amicus* application, p 27, para 37.

the information was said to relate could be imperilled by access. In a reality where PAIA compliance and PAIA awareness (including commitment to the ends served by PAIA) are not matters of priority among public bodies, special scrutiny on the part of the courts of *ad hoc* assessments in terms of the various grounds of refusal stipulated in PAIA, instead of uncritical deference, is appropriate. The application of section 39(1)(b)(iii)(*ee*) is further considered in Part B below.

PART B

INTRODUCTION

34. At the core the SAHRC's submissions on this aspect of the case is the contention that both the first and second respondents and the court *a quo* failed to approach the question whether the applicant should be granted access to the records with adequate appreciation of the fact that denying him access would affect not only his right as an investigative journalist to receive information relevant to his investigations (in accordance with section 16(1)(a) and (b) of the Constitution) but also the public's right to receive information of potential breaches of the law by government officials (in accordance with section 16(1)(b) of the Constitution).

35. This deficiency led the court *a quo*:

    35.1. to fail to consider all relevant factors in arriving at its conclusion that the applicant had minimal prospects of success in his application; and

    35.2. to fail to consider the application of section 46 of PAIA to the case at hand.

36. The structure of this section of the written submissions is as follows:

36.1. First, we canvass the nature of a court's power when it receives an application in terms of section 78 of PAIA and consider how the test for condonation relates to the task of a court in section 78 proceedings.

36.2. Secondly, we set out, in summary form, the two fundamental respects in which we submit the court *a quo* erred in approaching the question whether the applicant enjoyed prospects of success.

36.3. Thirdly, we address each of these errors in turn.

COURTS' POWERS UNDER SECTION 78 AND 82 OF PAIA

37. The Supreme Court of Appeal has determined[41] that when a court is faced with an application in terms of section 78 of PAIA, it approaches the question whether the applicant should have been granted access to the records requested 'anew'.[42] The powers of a court in such circumstances are much more extensive than the powers it exercises when faced with a review under the Promotion of Administrative Justice Act 3 of 2000.[43] The court is not, according to the Supreme Court of Appeal, confined to the information that was present to the information officer concerned. Instead, the parties before it may present evidence and travel well beyond the

41 *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) ("*SA Metal*").

42 *SA Metal* at para 26.

43 *SA Metal* at para 24.

information that was present to the information officer in seeking to advance their respective cases for access or refusal.[44]

38. This articulation of the courts' power must inform the analysis of the court *a quo's* decision not to condone the applicant's delay in launching his application under section 78 of PAIA. Bound up in this finding, on the part of the court *a quo*, was the court's assessment that the applicant's prospects of success in the application were slim.[45] The court a *quo's* determination of the merits of the applicant's case for access was, therefore, filtered through the prism of a consideration of his prospects of success in the application because the court *a quo* was faced, first and foremost, with an application for condonation.[46]

39. As to the question whether the applicant had prospects of success, the court *a quo* ought therefore to have considered such prospects in the light of the assessment of the refusal of access by the court 'anew', after having interrogated the respective cases advanced by the applicant for access and the respondents for refusing access.

40. The court *a quo* did not, therefore, act as a reviewing court, in terms of which it should accord deference to the assessments performed by the information officers

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44 *SA Metal* at para 25.

45 Record Vol 6, p 589, para 48.

46 For the test applicable to applications for condonation see: *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720 E–F; *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) at para 7; *Van Wyk Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477 A–B.

concerned, and interfere with such assessments only in the event that these were held to be reviewable. In terms of its powers under sections 78 and 82 of PAIA, the court *a quo* was required to determine afresh whether access to the records ought to be granted to the applicant.[47]

41. In the light of this feature of the court *a quo's* power, these written submissions focus on the deficiencies in the court *a quo's* assessment of the applicant's prospects of success. It should be noted, however, that the points made in these submissions regarding the inadequacies in the court *a quo's* reasoning and approach apply also in many respects to the decision-making by the first and second respondents in this case.

42. It may be pointed out at this stage that the SAHRC does not adopt a view, or make submissions to this Court, on the question whether the applicant had adequately explained the reasons for failing to comply with the time periods and whether the court *a quo* ought to have come to any particular finding with respect to that aspect of the application for condonation. Nor does the SAHRC specifically urge for any particular finding on the outcome of the application for condonation on the facts. The SAHRC does submit that, when it came to that part of the condonation

[47] It should be noted that we approach this section of the written submissions on the assumption that the Supreme Court of Appeal correctly characterised the courts' powers under section 78 of PAIA in its decision in *SA Metal*. However, even if this Court takes a different view and regards the courts' powers as more limited in a section 78 application, our arguments that the court a quo perpetrated two fundamental errors in its decision on this aspect of the case remain unaffected because, as we show below, all the information necessary to come to the correct conclusion on this aspect of the case was placed before the information officers concerned by the applicant.

assessment that considered the applicant's prospects of success, the court *a quo* erred in the respects set out in these submissions.

SUMMARY OF ERRORS

43. We submit that the court *a quo* erred in two fundamental respects in concluding that the applicant's prospects of success in the application for access were slim.

43.1. First, the court *a quo* applied the incorrect test to section 39(1)(b)(iii)(*ee*) of PAIA.

43.1.1. In this regard, we submit that the court *a quo's* approach was deficient in three respects:

43.1.1.1. it failed to appreciate that the high standard which our law sets for prior restraints on publication for the purposes of preserving the administration of justice ought to have informed the interpretation of section 39(1)(b)(iii)(*ee*);

43.1.1.2. it failed to acknowledge that, in order to bring a record within the ambit of section 39(1)(b)(iii)(*ee*), it must be shown that

the trial or adjudication is meaningfully pending or truly imminent; and

43.1.1.3. it regarded it as sufficient to establish probable prejudice or unfairness that the records in question were relevant to, or would be relied upon in, litigation.

43.2. Secondly, the court *a quo* wholly failed to consider the relevance of section 46 of PAIA.

43.2.1. In this regard, we submit that:

43.2.1.1. this omission is, in itself, fatal to the court *a quo's* decision in this case; and

43.2.1.2. on a proper application of section 46 to the facts of this case, it is clear that the court *a quo* should have concluded that the applicant ought to be granted access to the records.

44. Each of these fundamental errors is addressed in turn in the sections which follow.

Section 39(1)(b)(iii)(*ee*) of PAIA

45. It may be noted that, to date, this important basis for refusing a request for access to information has not received judicial attention. It is accordingly helpful, in our submission, to consider the approach that has been adopted in our courts (and elsewhere) with respect to the proper assessment of potential clashes between the right to impart or to receive information (particularly when central to the functions of government), on the one hand and, on the other hand, the right to fair and impartial adjudication of disputes.

46. Our law sets a high standard which must be overcome in order to justify prior restraints on publication in the interests of preserving the administration of justice.

47. In the case of *Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape)*,[48] the Supreme Court of Appeal, relying on a wealth of foreign authority, held that:

> '*before a ban on publication will be considered [there must be] a demonstrable relationship between the publication and the prejudice that it might cause to the administration of justice; substantial prejudice if it occurs; and a real risk that the prejudice will occur*.'[49]

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48 2007 (5) SA 540 (SCA) ("*Midi-Television*").

49 *Midi-Television* at para 16 referring, with approval, to the decisions in *Attorney-General v British Broadcasting Corporation* (1981) AC 303 (CA) at 362; *Attorney-General v Times Newspapers Ltd* (1974) AC 273 (HL); *Dagenais v Canadian Broadcasting Corporation* (1995) 25 CRR (2d) 1 at 47; *Hinch and Macquire Broadcasting Holdings Ltd v Attorney General for the State of Victoria* (1987) 164 CLR 15.

48. The Supreme Court of Appeal held further that mere conjecture or speculation that prejudice might occur will not be enough.

> '*Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information*.'[50]

49. We submit that the test articulated in *Midi-Television* for prior restraints is relevant to the proper interpretation of section 39(1)(b)(iii)(*ee*) in this case.

49.1. Although this case does not *per se* deal with a prior restraint injunction, it nonetheless deals with a decision to deny an investigative journalist access to records which he seeks for professional purposes, specifically related to an intention to publish accurate facts concerning matters of manifest public interest directly concerned with the propriety of conduct at high governmental level.[51] The effect of denying the applicant's request in this case is, therefore, to restrain his publication, and to avoid the public's becoming aware of, and debating, these matters.

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50 *Midi-Television* at para 19.

51 It is common cause between the parties in the main application that this was the purpose for which the applicant sought access to the records.

See: Record Vol 1, p 15, para 20;

Record Vol 3, p 225, para 38.2.

49.2. The decision thus has a direct impact on no fewer than three constitutionally entrenched rights:

49.2.1. the freedom of the press (section 16(1)(a) of the Constitution);

49.2.2. the freedom of the applicant to receive and impart information (section 16(1)(b) of the Constitution); and

49.2.3. the public's right to receive information (section 16(1)(b) of the Constitution).

49.3. The test articulated in *Midi-Television* for prior restraints effectively places an onus on the party seeking the injunction to satisfy the court that there is a real risk that substantial prejudice to the administration of justice will occur and that such prejudice outweighs the disadvantages associated with curtailing the free flow of information.

49.4. PAIA has its own internal onus provision. Section 81(3)(a) provides that the burden of establishing that a refusal of access complies with the provisions of the Act rests on the party claiming that it so complies. By placing this onus on the party seeking to deny access, the Legislature has shown its appreciation

of the fact that denials of access to information constitute limitations to the right entrenched in section 32 of the Constitution.[52]

49.5. There is, therefore, a logical symbiosis to the test articulated by the courts in prior restraint cases and the test prescribed by the Legislature in section 81 of PAIA. The onus in both cases works to safeguard constitutional rights from unjustified interference.

49.6. What the prior restraint cases add to the section 81 onus is the recognition that the onus should be more difficult to discharge, or should, if discharged, in appropriate cases yield to the public interest in terms of section 46, in a case where section 39(1)(b)(iii)(*ee*) is applied to a journalist seeking access to records for investigative purposes, with the declared intention of being placed in a position to report accurately on allegations of grave misconduct at high governmental level.

49.7. Given, therefore, that denying access to the applicant in this case served to limit not only his rights under section 32 of the Constitution, but also his rights, and those of the public, under section 16, it was, we submit, incumbent upon the court *a quo* to reflect this reality in its interpretation and application of section 39(1)(b)(iii)(*ee*) of PAIA.[53]

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52 I Currie and J Klaaren *The Promotion of Access to Information Act Commentary* (2002) at 105.

53 *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at para 16 where O'Regan J held, in the context of the application of the rule of court relating to security for costs, that '*[v]ery often the interpretation and application of the Rule will require consideration of the provisions of the*

50. A proper appreciation of the relationship between section 39(1)(b)(iii)(*ee*) of PAIA and section 16 of the Constitution produces, we submit, a more stringent test for ultimately refusing access than that applied by the court *a quo.*

*The proper test under section 39(1)(b)(iii)(*ee*)*

51. In their commentary on PAIA, Professors Currie and Klaaren note that the language of section 39(1)(b)(iii)(*ee*) appears to draw directly from the language of exemption 7(B) of the United States Freedom of Information Act of 1966 ("FOIA") which protects from disclosure '*records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication*'.[54]

52. Given the direct link between section 39(1)(b)(iii)(*ee*) and the FOIA, it is useful, for the purposes of determining the proper interpretation of section 39(1)(b)(iii)(*ee*) of PAIA, to consider the United States case law on the interpretation of section 7(B) of the FOIA.

Constitution, as s 39(2) of the Constitution instructs. A court that fails to adequately consider the relevant constitutional provisions will not have properly applied the Rules at all.'

54 I Currie and J Klaaren *The Promotion of Access to Information Act Commentary* (2002) at 167.

53. The United States Supreme Court has held that the FOIA's 'basic policy' is in favour of disclosure[55] and therefore the FOIA is to be interpreted to require disclosure unless the agency can prove that the requested document falls into one of the statute's exceptions.[56]

54. The United States case law on section 7(B) of the FOIA establishes the following:

54.1. First, the party seeking to rely on section 7(B) to prohibit disclosure must establish two requirements:

54.1.1. that a trial or adjudication is pending or truly imminent; and

54.1.2. that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings.[57]

54.2. Secondly, the burden placed on the party seeking to justify non-disclosure cannot be met by mere conclusory statements; the party must show how

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55 *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978) at 220.

56 *Department of Air Force v. Rose*, 425 U.S. 352, 361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976).

57 *Washington Post Co. v. U.S. Dept. of Justice* 863 F.2d 96, 101 (D.C.Cir.1988) ("*Washington Post Co*") at 102.

release of the particular material would have the adverse consequence that the Act seeks to guard against.[58]

55. As Currie and Klaaren point out, the second part of the test under section 7(B) of the FOIA is more stringent than that under section 39(1)(b)(iii)(*ee*) of PAIA because under the United States legislation it is necessary to establish that disclosure '*would deprive'* a person of a right to a fair trial or an impartial adjudication, whereas section 39(1)(b)(iii)(*ee*) of PAIA requires only that it be shown that disclosure '*could reasonably be expected to prejudice or impair*'.

56. Our courts have considered the meaning of '*reasonably be expected to*' as this phrase appears in various sections of PAIA. The Supreme Court of Appeal has concluded, in this regard, that proof of a probability is necessary, in other words, proof of '*consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation*'.[59]

57. We do not take issue with this characterisation of the standard of probability applicable to section 39(1)(b)(iii)(*ee*) of PAIA and therefore accept that to the extent that section 7(B) of the FOIA sets the standard higher, the comparative jurisprudence on this aspect of the section, to the extent that it deals with the applicable standard, is of limited relevance to the case at hand. Nevertheless, despite the higher standard, the emphasis in these cases on a need for the court to

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58 *Washington Post Co* at 101.

59 *SA Metal* at paras 31 and 42.

scrutinise the invocation of the grounds for refusal and on the need for the party invoking refusal to prove a case that refusal was properly established, remains important and apposite, as does the important insight that the court should not be content with assertion as a substitute for proof.[60] In addition, and irrespective of the standard for withholding disclosure applicable in the FOIA, these cases are relevant for their concern with the degree to which the litigation said to be imperilled is actively pending and imminent.

The requirement that the litigation be 'active'

58. In the cases of *Playboy Enterprises, Inc. v. U.S. Dept. of Justice*[61] and *Dow Jones Co., Inc. v. F.E.R.C.*,[62] two United States District Courts concluded that disclosure of requested documents should be permitted as there was no trial or adjudication pending or truly imminent. In the former case, the defendant itself was not proceeding against the party to whom the requested information related.[63] In the latter case, the court held that mere investigations which were being conducted by

60 This is also in line with the important discussion of the application of other grounds of refusal (section 37 and section 42(1)(b)) found in the judgment in *CCII Systems (Pty) Ltd v Fakie and Others NNO (Open Democracy Advice Centre as Amicus Curiae)* 2003 (2) SA 325 (T).

61 516 F.Supp. 233 (D.D.C.1981) ("*Playboy Enterprises*").

62 219 F.R.D. 167, (C.D.Cal. Sep 16, 2003) ("*Dow Jones*").

63 *Playboy Enterprises* at 246.

the defendant and the Attorney-General did not qualify as a 'trial or adjudication' that is 'pending or truly imminent'.[64]

59. The United States law's requirement that the proceedings in question be pending or truly imminent is reinforced by the English Court of Appeal's judgment in the famous case of *Attorney-General v Times Newspapers Ltd*[65] which arose out of the thalidomide scandal in the United Kingdom.

59.1. The thalidomide cases concerned a sedative which had been developed and sold by Distillers Co. (Biochemicals) Ltd ("Distillers"). The product was available on prescription and was consumed by many pregnant women having been said to be safe for them. However, soon there were cases of babies being born with terrible deformities. The matter attracted some publicity and the question arose whether Distillers were legally liable to pay damages in respect of these deformed children. Distillers denied liability and the first action against them was begun in 1962. Further publicity resulted in some 70 actions having been raised before 1968.

59.2. The editor of "The Sunday Times" took a keen interest in the matter and on September 24, 1972, the newspaper published a long and powerful article. After publication of the article, Distillers approached the Attorney-General and claimed that the publication constituted contempt of court. Although the

64 *Dow Jones* at 175.

65 *Attorney-General v Times Newspapers Ltd* [1973] Q.B. 710 ("*Times Newspapers*").

Attorney-General declined to pursue the matter in the courts, he nonetheless engaged with the editor in relation to the article.

59.3. Thereafter, the editor proposed to publish a further article. As a result of communications between him and the Attorney-General regarding the article of September 24, he sent the material for the further article to the Attorney-General and, this time, the Attorney-General took the view that he should intervene. By a writ of October 12, 1972, he claimed an injunction against the Sunday Times restraining it from publishing the proposed article.

59.4. Although the Divisional Court granted the injunction, this was reversed on appeal before the Court of Appeal.

59.5. In upholding the appeal, Lord Denning held that because the litigation in the matter remained dormant as a result of settlement discussions on the matter, the injunction ought to be lifted. His reasoning on this point is instructive:

> '*It is undoubted law that, when litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action.*
>
> *...*
>
> *I would emphasise that it applies only "when litigation is pending and is actively in suit before the court." To which I would add that there must appear to be "a real and substantial danger of prejudice" to the trial of the case or to the settlement of it and when considering the question, it must always be remembered that besides the interest of the parties in a fair trial or a fair settlement of the case there is another important interest to be*

considered. It is the interest of the public in matters of national concern, and the freedom of the press to make fair comment on such matters. The one interest must be balanced against the other. There may be cases where the subject matter is such that the public interest counterbalances the private interest of the parties. In such cases the public interest prevails. Fair comment is to be allowed.

...

It is active litigation which is protected by the law of contempt, not the absence of it.'[66]

59.6. Although the House of Lords reversed the Court of Appeal's decision on appeal and restored the injunction,[67] none of the Law Lords disturbed the salutary principle established by Lord Denning in the Court of Appeal that where cases are 'dormant', the interest in preserving the administration of justice is unlikely to justify a prior restraint on publication. All of the Lords differed from the Court of Appeal on the assessment whether, as a matter of fact, the case was dormant.[68]

60. In the present case, a serious question arises as to whether the IT Lynx litigation is 'active' in the sense employed by Lord Denning in the *Times Newspapers* decision, or at least concerning the extent to which the litigation is *meaningfully* active and imminent.

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66 *Times Newspapers* (CA decision) 739–740.

67 *Attorney-General v Times Newspapers Ltd.* [1974] A.C. 273.

68 *Sunday Times* (HL decision) per Lord Reid at 301; per Lord Morris at 306; per Lord Diplock at 310; per Lord Simon at 317; per Lord Cross at 323.

60.1. The litigation was instituted on 29 June 2005.[69]

60.2. It was set down for trial in 2007 but was postponed *sine die*.[70]

60.3. Thereafter, the matter was again set down for trial but on 29 September 2008, was struck from the roll.[71]

61. When the court *a quo* came to decide the case, it was under the mistaken impression that the trial was set down for 23 September 2010.[72]

62. In fact, as the written submissions of the applicant make clear, the matter was struck from the roll in September 2008 and therefore when the court *a quo* came to hear the case at the end of 2008, the IT Lynx litigation had been pending for over three and a half years and no further steps had been taken, since the matter was struck from the roll, to re-enroll the matter.

63. This factor, ought, we submit, to have informed the court *a quo's* assessment of whether the litigation alleged to be prejudiced by the disclosure of the records sought by the applicant was 'active' in the relevant sense.

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69 Record Vol 2, p 168, para 30.

70 Applicant's written submissions, para 18.

71 Applicant's written submissions at para 18. The applicant's written submissions indicate that the pleadings in the IT Lynx litigation were handed up to the court a quo at the hearing of the matter. This is reflected in the transcript of the proceedings included in the Record.

See Record Vol, 5, p 484.

72 Record Vol 6, p 572, para 7.

64. It is important to highlight that we do not purport to suggest, in this regard, that a trial delay of over three years in our judicial system necessarily renders the litigation dormant. Instead, we submit that when a court comes to determine whether access to records sought for journalistic purposes ought to be denied on the basis of section 39(1)(b)(iii)(*ee*) of PAIA, it ought to consider indicia of the extent to which the parties appear to be intent on pursuing the litigation, the extent to which the litigation appears to be imminent, and the length of time that the litigation has been pending, so that there might be a significant contemporaneity of the revelation of the information in question and the conduct of the court proceedings. The less likely such a contemporaneity, the less likely any realisation of any potential harm. Also, if there is evidence to suggest that the parties may not be intent on pursuing the litigation, this ought to be factored into the analysis.

65. In the present case, it appears that it was the court *a quo's* erroneous assumption that the trial date had been set for September 2010 that prevented any meaningful consideration of this requirement of section 39(1)(b)(iii)(*ee*).

The link between disclosure and the administration of justice

66. It is clear not only from our own domestic case law on prior restraints and the courts' interpretation, with respect to other grounds of refusal, of the requirement of

'*reasonably be expected to*' in PAIA, but also from the United States jurisprudence on section 7(B) of the FOIA, that mere speculation and conjecture are insufficient to justify refusing access to a record under section 39(1)(b)(iii)(*ee*) of PAIA.

67. In the present case, the court *a quo* determined that the respondents had discharged their burden of showing that the disclosure of the records would probably prejudice or impair the fairness or impartiality of the IT Lynx litigation.[73]

68. The court *a quo* had two principal bases for this conclusion:

    68.1. First, according to the court *a quo* '*the integrity of the judicial process may be severely compromised if a record, which a party to litigation intends to use to prove his claim or disprove the other party's claim was made available to a third party before the trial is finalised*'.[74]

    68.2. Secondly, the records to which the applicant sought access '*relate to matters which directly or indirectly have a bearing on the issues forming the subject matter of a [sic] civil litigation between the first respondent and IT Lynx in the Pretoria High Court*'.[75]

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73 Record Vol 6, p 589, paras 46–48.

74 Record Vol 6, p 589, para 46.

75 Record Vol 6, p 588, para 44.

69. In their written submissions before this court, the respondents reiterate this type of reasoning in their attempt to justify the non-disclosure of the records to the applicant. According to the respondents, section 39(1)(b)(iii)(*ee*) of PAIA seeks to safeguard the ability of an adjudicator to determine the issues between the parties with impartiality and without being '*tainted by the prior disclosure of records or any act associated with such a disclosure – such as publication in the media*'.[76]

70. It is noteworthy that neither the respondents nor the court *a quo* offers any authority in support of these characterisations of the mischief sought to be prevented by section 39(1)(b)(iii)(*ee*) of PAIA.

71. We submit that this interpretation of section 39(1)(b)(iii)(*ee*) of PAIA offered by the court *a quo* and by the respondents is incorrect, and that there is also substantial foreign authority which provides guidance on the proper meaning to be attributed to section 39(1)(b)(iii)(*ee*).

United Kingdom

71.1. As set out above, the United Kingdom courts in the *Times Newspapers* decisions were required to consider whether the Sunday Times should be interdicted from publishing a further article on the thalidomide cases on the

[76] Respondents' written submissions, para 104.5.

ground that such publication would interfere with the proper administration of justice.

71.2. A number of key principles can be elicited from the speeches of the Law Lords.[77]

71.2.1. In so far as publication may place pressure on a litigant, Lord Reid held as follows:

> '*where the only matter to be considered is pressure put on a litigant, fair and temperate criticism is legitimate, but anything which goes beyond that may well involve contempt of court. But in a case involving witnesses, jury or magistrates, other considerations are involved: there even fair and temperate criticism might be likely to affect the minds of some of them so as to involve contempt. But it can be assumed that it would not affect the mind of a professional judge*.'[78]

71.2.2. On the question of pre-judgment of issues, the Lords agreed that issues ought not to be prejudged in the media in a manner likely to affect the mind of those who may later be witnesses or jurors.[79] Trial

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[77] It should be noted that the case eventually found its way to the European Court of Human Rights where a majority of 11 to 9 judges held that the House of Lords' decision '*did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention*' – *The Sunday Times v the United Kingdom* (1979-80) 2 EHRR 245 at para 67.

[78] *Times Newspapers* at 297–298.

[79] *Times Newspapers* at 300 per Lord Reid.

by newspaper is, accordingly, incompatible with the proper administration of justice.[80]

71.2.3. Lord Diplock identified three principles sought to be achieved by the due administration of justice:

> '*The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court*.'[81]

71.2.4. Furthermore, where publication would expose one of the parties to public and prejudicial discussion of their case such that it may inhibit their recourse to the courts, the administration of justice is brought into disrepute.[82]

71.3. The common thread to the Lords' speeches in the *Sunday Times* decision is the requirement that there be some appreciable impact on the functioning of

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80 *Times Newspapers* at 310 per Lord Diplock.

81 *Times Newspapers* at 309 per Lord Diplock.

82 *Times Newspapers* at 313 per Lord Diplock.

the courts or undue pressure on the litigants which affects their ability properly to present their case in order for there to be a contempt of court. It is important to isolate the common denominator in the nature of the potential harm that the Lords were addressing – it is the danger that the very issues to be addressed in the forum of the trial would in fact be 'tried' in the press – i.e. that the trial as the appropriate and determinative forum of the issues between the parties to the litigation would in some sense meaningfully be supplanted by a 'trial by newspaper'. As appears further below, the absence of any plausible suggestion that this would be such a case did not receive appropriate attention in the court *a quo*.

The United States

71.4. The United States courts' approach pre-trial publication bans with caution. According to the United States Supreme Court, pre-trial publicity, even if it is pervasive and concentrated, cannot be regarded as leading automatically and in every kind of case to an unfair trial.[83]

71.5. The United States approach to pre-trial publication bans is also substantially informed by the fact that jury trials are the norm in the United States system. Thus, whether unfairness will result from pre-trial publication depends on a

[83] *Nebraska Press Association et al v Stuart* 427 U.S. 539 ("*Nebraska Press Association*") at 554.

range of factors including the measures a judge takes or fails to take to mitigate the effects of pre-trial publicity. In such a system, a judge will have a range of options available to him or her to guard against any unfairness that may be thought to arise from pre-trial publication. These include:

71.5.1. change of trial venue to a place less exposed to the publicity;

71.5.2. postponement of the trial to allow public attention to subside;

71.5.3. searching questioning of prospective jurors to screen out those with fixed opinions as to guilt or innocence;

71.5.4. the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court; and

71.5.5. sequestration of jurors.[84]

71.6. Two important principles can be discerned from the United States cases.

71.6.1. First, given the prominent position which the First Amendment occupies in the United States constitutional scheme, a pre-trial

[84] *Nebraska Press Association* at 563.

publication ban will be granted only in circumstances where an established link between publication and unfairness in the trial is established.

71.6.2. Secondly, before granting a pre-publication ban, courts are required to consider the range of less restrictive means available to them to guard against any potential unfairness in the trial.

71.7. Furthermore, as was also the case in the *Times Newspapers* matter, the United States cases require the threatened publication to be sufficiently directly engaged with the very issues that are before the court to render meaningful the complaint that such publication might affect the fairness of the trial itself or the impartiality of its adjudication. Again, the concern is with supplanting, either wholly or in part, the courts as the proper forum of the relevant kind of dispute resolution on controversial issues with the press.

Application to section 39(1)(b)(iii)(*ee*) of PAIA

72. We submit that when the insights from these cases are used to inform the proper interpretation of section 39(1)(b)(iii)(*ee*) of PAIA, the following three principles emerge:

72.1. First, the section appears to be concerned with two different potential consequences of disclosure: the impact on the parties' ability to conduct their cases fairly and without hindrance and the impact on the court's ability to decide the case impartially.

72.2. Secondly, in order for disclosure to be likely to have an adverse impact either on the parties' ability to conduct the proceedings without impediment or the court's ability to decide the case without undue influence, it is insufficient to show simply that the disclosure *relates* to evidence that may be led in those proceedings. It is necessary, instead, to establish that such disclosure, and the publication which follows it, will likely give rise either to a usurpation of the functions of the court or prejudicial discussion of the merits of one of the party's cases.

72.3. Thirdly, in a system, such as ours, where juries are not the triers of fact, the prospect of disclosure negatively influencing the impartiality of the trial judge is significantly diminished. Judges are well-trained in the art of deciding cases without fear, favour or prejudice. In this respect, they are schooled to acquire skills which enable them to divorce the factual determinations which they are required to make in the courtroom from the discussion which take place outside the courtroom. [85]

[85] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) at para 40 where this Court held that 'Courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare Judges for the often difficult task of fairly

73. When one applies these principles to the facts of the present case, it becomes clear, we submit, that the necessary link between disclosure and any adverse effects on the IT Lynx litigation has simply not been established.

73.1. In the IT Lynx litigation, the IT Lynx Consortium ("the consortium") contends that the State Information Technology Agency ("SITA") had awarded a tender to it to replace the Department of Social Development's existing IT system but had failed to implement the tender.[86]

73.2. The defendant in the litigation is the Minister of Social Development ("the Minister").[87]

73.3. The Minister's defence to the consortium's claim amounts to a denial that the tender was ever awarded to the plaintiff. In his plea, the Minister avers that he instructed SITA, in June 2002, to withhold the award of the tender until negotiations with the National Treasury were finalised.[88]

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determining where the truth may lie in a welter of contradictory evidence.'

See further, *R v S (RD)* (1997) 118 CCC (3d) 353 at para 32 and 117; *United States v Morgan* 313 US 409 (1941) at 421.

86 Record Vol 2, p 168, para 31.

87 Record Vol 6, p 587, para 42.

88 Record Vol 6, p 587, para 42.

74. It is clear, therefore, that the question underpinning the IT Lynx litigation is whether the tender was ever awarded to IT Lynx.

75. The applicant has, on numerous occasions, indicated the purpose for which he seeks access to the records and the nature of the publication which will likely follow upon access.

75.1. The applicant is concerned to establish whether the Minister had knowledge of a personal loan of R 65 000.00 made by a Mr Majali ("Majali"), who had an interest in the consortium, to the Minister's wife in December 2003 for the purposes of paying for certain renovations to the Minister's home.[89]

75.2. In the applicant's view, if evidence of this knowledge can be found, it will raise questions about potential conflicts of interest on the part of the Minister and breaches of the Minister's oath of office and obligations under the Executive Members' Ethics Act 82 of 1998.[90]

75.3. The applicant's interest in the records does not relate in any way to the question whether the tender was awarded to the consortium. Instead, it relates to whether, just short of a year and a half after the Minister allegedly

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89 Record Vol 1, p 15, para 19.

90 Record Vol 1, p 30, para 65;
Vol 1, p 36, para 85.

instructed SITA to withhold the award of the tender, the Minister was aware that Majali had an interest in the consortium.[91]

76. We submit that the facts set out above make it plain that there was no evidence before the court to suggest that permitting the applicant access to the records could have a negative impact on either the first and second respondents' ability to conduct their defence in the IT Lynx litigation or the court's ability to decide the issues in that litigation impartially.

77. In order for disclosure to the applicant to be capable of having either of these consequences it must be established that the purpose for which he seeks access and the publication which is likely to follow such access bear some relationship to the issues in dispute in the litigation.

78. As set out above, however, the issues at stake in the litigation revolve around the questions whether the tender was awarded to the consortium or whether the Minister issued an instruction to SITA in June 2002 to hold off on awarding the tender. By contrast, the applicant's interest in accessing the records relates to events in December 2003 and the question whether the Minister knew, *at that time*, that Majali had an interest in the consortium. In the light of these facts, permitting the applicant access to the records is unlikely to have any impact whatsoever on the IT Lynx litigation.

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[91] Record Vol 3, p 243, para 9.1;
Vol 3, p 248(A), para 12.2.

79. On this basis, alone, we submit, this Court ought to find that the requirements for non-disclosure under section 39(1)(b)(iii)(*ee*) of PAIA were not met in this case. However, even if this Court holds that the records fell within the ambit of section 39(1)(b)(iii)(*ee*), the decision of the court *a quo* was nonetheless vitiated for its wholesale failure to consider the application of section 46 of PAIA.

Section 46 of PAIA

80. Section 46 of PAIA provides what has been termed a '*mandatory public interest override*'.[92] It reads, in relevant part, as follows:

> '*Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section ... 39(1) ... (b) if—*
> *(a) the disclosure of the record would reveal evidence of—*
> *(i) a substantial contravention of, or failure to comply with, the law; or*
> *(ii) an imminent and serious public safety or environmental risk; and*
> *(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question*.'

81. The requirements of section 46 are mandatory: where access to a record is denied under, for example, section 39(1)(b)(iii)(*ee*), an information officer must nonetheless grant access to the record where a) disclosure of the record would reveal evidence

92 I Currie and J Klaaren *The Promotion of Access to Information Act Commentary* (2002) at 108.

of a substantial breach of the law and b) the public interest in disclosure clearly outweighs the harm contemplated in the section.

82. It follows from this, we submit, that in every case where there is a refusal of access on the grounds of one of the sections of the Act listed under section 46, it is incumbent upon the information officer concerned (and, in any event, upon the court later confronted with an application under section 78 of PAIA) to consider whether section 46 applies to the case. This is so particularly where an applicant specifically raises public interest grounds for seeking access, as is clearly the case in the main application.

83. In this case, both the court *a quo* and the first and second respondents wholly failed to consider the impact of section 46 on the question whether access to the records ought to be granted to the applicant.

83.1. The judgment of the court *a quo* makes no reference to section 46.[93]

83.2. The respondents repeatedly contend that the only relevant issue is whether the Minister was entitled to rely on section 39(1)(b)(iii)(*ee*) of PAIA in refusing access.[94]

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93 Record Vol 6, pp 584–590, paras 32–49.

94 Respondents' written submissions, paras 23 and 102.

84. This stance is adopted by both the court *a quo* and the respondents despite the fact that the applicant expressly invoked the relevance of section 46 to the adjudication of his request.

84.1. In his internal appeal, the applicant made direct reference to the provisions of section 46 and set out how, in his view, the section ought to be applied in his case.[95]

84.2. In his founding affidavit to his application in the court *a quo*,[96] and in his replying affidavit to the answer served by the first and second respondents,[97] the applicant specifically invoked reliance on section 46.

84.3. Indeed, it may be noted that the applicant founded his *locus standi* expressly as follows:

> '*I bring this application acting in my own interest, in the interests of journalists as a class and in the public interest as contemplated in section 38 of the Constitution*'.[98]

85. We submit, therefore, that the court *a quo's* failure to consider the application of section 46 is fatal to its determination on the prospects of success on the merits of the applicant's case. Had the court *a quo* engaged in a proper analysis of section

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95 Record Vol 2, p 114, paras 8.1–8.4.

96 Record Vol 1, p 44-45, paras 113 and 114.

97 Record Vol 3, p 253, para 27.

98 Record Vol 1, p 9, para 7.

46, it would have determined that access to the records ought to be granted to the applicant.

85.1. There were three jurisdictional facts which were required to have been established in order for section 46 of PAIA to be applicable to the applicant's request for access.

85.1.1. First, there must have been a refusal of access under one of the listed sections of the Act. In this case, that requirement was satisfied because the Minister refused the applicant's request for access on the basis of section 39(1)(b)(iii)(*ee*) of PAIA.

85.1.2. Secondly, it must have been established that disclosure of the records would provide evidence of a substantial contravention of, or failure to comply with, the law. In this case, there was ample evidence[99] that disclosure of the record would likely establish contraventions of:

[99] This evidence is substantially provided by the applicant in his founding and replying affidavits. The references to the relevant parts of these affidavits is as follows:

Record Vol 1, pp 14–15, paras 18.1–20.

Record Vol 3, pp 243–248(A), paras 9–12.4.

85.1.2.1. sections 96(1) and (2) of the Constitution;[100]

85.1.2.2. the Executive Members Ethics Act 82 of 1998 and the Executive Ethics Code;[101] and

85.1.2.3. the Corruption Act, 1992 or the Prevention and Combating of Corrupt Activities Act, 2004.[102]

85.1.3. Thirdly, the public interest in disclosure must have outweighed the harm contemplated in section 39(1)(b)(iii)(*ee*), that is, the potential harm to the administration of justice. In this case, the public interest

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100 Section 96 of the Constitution provides as follows:

'(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—

(a) undertake any other paid work;

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.'

101 Indeed, this contravention had, in fact, already been found to have occurred by the Public Protector in his 'Report on an Investigation into an Allegation of a Breach of the Executive Ethics Code by the Minister of Social Development, Dr Z Skweyiya' dated 26 October 2006.

See Record Vol 2, p 132.

102 The Public Protector's 'Report on an investigation into an allegation of misappropriation of funds by the Pertrolium, Oil and Gas Corporation of South Africa, trading as PetroSA and matters incidental thereto' dates 29 July 2005 concluded that there were strong suggestions that the Minister had engaged in corrupt practices in contravention of the provisions of the Corruption Act, 1992 and the Prevention and Combating of Corrupt Activities Act, 2004.

See Record Vol 2, 136.

in disclosure links directly to the applicant's and the public's rights under section 16 of the Constitution.

The right to freedom of expression

86. Freedom of the press and media – expressly protected by section 16(1)(a) of the Constitution – is inextricably connected with the right of the public (and with them journalists) to receive information and ideas (protected in section 16(1)(b) of the Constitution). It is an aspect of the right to freedom of expression that has received specific emphasis in the judgments of our highest courts:

86.1. In *Khumalo and Others v Holomisa*,[103] this Court stated as follows:

> '*The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected*.'[104]

86.2. In *National Media Ltd and others v Bogoshi*,[105] the Supreme Court of Appeal held that:

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103 2002 (5) SA 401 (CC).

104 *Khumalo* at para 22.

105 1998 (4) SA 1196 (SCA).

> *'[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion …. The press and the rest of the media provide the means by which useful, and sometimes vital, information about the daily affairs of the nation is conveyed to its citizens*.'[106]

86.3. Our courts have also considered the particular role which the media plays in holding the wielders of public power to account. In the case of *Mthembi-Mahanyele v Mail & Guardian Ltd*,[107] the Supreme Court of Appeal held that:

> '*The State, and its representatives, by virtue of the duties imposed upon them by the Constitution, are accountable to the public. The public has the right to know what the officials of the State do in discharge of their duties. And the public is entitled to call on such officials, or members of Government, to explain their conduct. When they fail to do so, without justification, they must bear the criticism and comment that their conduct attracts*.'[108] (emphasis added)

86.4. In one of its most recent judgments on freedom of expression issues, this Court has reaffirmed the '*systemic requirement of openness*' in our constitutional scheme from which the media's right to gain access to, observe and report on, the administration of justice is said to flow.[109]

86.5. The significance of the media's right to receive and impart information to the public has also been recognised in foreign jurisdictions. One prominent

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106 *Bogoshi* at 1209 H–I.

107 2004 (6) SA 329 (SCA).

108 *Mthembi-Mahanyele* at para 66.

109 *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at para 40.

decision is the ruling of the House of Lords in *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd*,[110] where the House held as follows:

> '*In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society … The majority cannot participate in the public life of their society … if they are not alerted to and informed about matters which call or may call for consideration in action. It is very largely through the media … that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring*.'[111] (emphasis added)

86.6. The United States Supreme Court has long-recognised that speech critical of the exercise of the power by public officials lies at the core of the First Amendment. In the case of *Landmark Communications Inc v Virginia*,[112] the Supreme Court held that:

> '*Admittedly, the [government] has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free*'.[113]

86.7. The European Court of Human Rights has also interpreted Article 10(2) of the Convention as placing political speech at the core of freedom of the

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110 [2000] 2 All ER 913 (HL).

111 *McCartan Turkington Breen* at 922.

112 435 US 829 (1978). See further *Gentile v State Bar of Nevada* 501 U.S. 1030 at 1034.

113 *Landmark Commuications* at 832.

press[114] and has recognised that the press plays the critical role of 'public watchdog'.[115] For this reason, the Court has long recognised that there is little scope under Article 10(2) of the Convention for restrictions on political speech or debates on questions of public interest.[116]

87. In the present case, the public interest served by the disclosure of the records relates to the possible exposure of unlawful conduct on the part of a senior public official. Given the manifest interest which the public has in receiving information of this nature and the concomitant duty on the part of media to provide the public with information which is crucial to the development of a democratic culture, the public interest in disclosure in the present case is substantial.

88. Just as our law places an onerous burden on parties seeking to justify a prior restraint on the basis of considerations of the administration of justice, so too, we submit, should the courts approach the test in the second part of section 46 of PAIA by setting a high bar to be overcome by the party seeking to prevent disclosure on the basis of administration of justice considerations. On such an approach, where it is established that disclosure of the record in question will likely provide evidence of breaches of the law, only the most compelling reasons ought to justify non-disclosure of the information.

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114 *Lingens v Austria* (1986) 8 EHRR 407 at para 42. Subsequently affirmed in *Oberschlick v Austria* (1991) 19 EHRR 389 at para 59.

115 *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843 at para 63; *Grinberg v Russia* (2006) 43 EHRR 45 at para 24.

116 See *Sürek v Turkey* (No.1) App. No.26682/95, at para 61 cited with approval in *Grinberg v Russia* (2006) 43 EHRR 45 at para 25.

89. In this case, as set out above, the possible implications of disclosure for the fairness of the IT Lynx litigation are minimal at best. In the face of this tenuous link between disclosure of the requested records and a negative impact on the litigation, we submit that the public interest in receiving information of the potential abuse of power by a government official clearly outweighs any deleterious effect which that disclosure may have on the litigation.

THE OSTENSIBLE IRRELEVANCE OF MOTIVE AND SECTION 11 OF PAIA

90. It remains to deal with what we submit was an important error in the approach adopted by the court *a quo* that appears to have informed its neglect of the potential application of section 46.

91. It should be noted that the respondents invoked the use to which the applicant intended to put the information, if access were granted to him, as the governing factor in refusing access,[117] and in arguing that access was properly refused.

92. The court *a quo*, for its part, however, adopted the following reasoning in this regard:

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[117] See the following explanation offered as the reason for rejecting the applicant's internal appeal in terms of section 39(1)(b)(iii)(*ee*): "*Thus, the Department has reasonable grounds to expect that the disclosure of the records will lead to publications by the media, which could prejudice or impair the fairness of the trial or the impartiality of the adjudication of the IT Lynx claim under case number 21290/05*." (Record Vol 3, p 204, para 5).

'*With regard to the second issue arising out of Mr Moerane's contention, it must be pointed out that a requester's motive for the request of information is irrelevant in deciding whether or not to grant access to the records. To the extent that the first respondent sought to justify its refusal on the ground that the applicant may publish the information should he receive it, the reason for the refusal is not sustainable*.'[118]

93. This reasoning appears to have been unfair on both the respondents and the applicant.

94. It seems undeniable, for instance, that the motive for the request for information is often highly relevant for an assessment whether any particular ground for refusal may be present. After all, any meaningful assessment under section 39(1)(b)(iii)(*ee*) would be practically impossible if the use to which the information would be put once made available cannot feature in such assessment.

95. It seems that the court *a quo* may well have been driven to this reasoning by the provisions of section 11 of PAIA. At first blush, the provisions of section 11(3)(a) and (b) may seem to support such reasoning. This, however, is submitted to be incorrect, and it is important for the proper application of section 39(1)(b)(iii)(*ee*), and of course section 46, to consider this.

[118] Judgment Record Vol 6, p 589-590, para [49].

96. In this regard, it is important to view section 11 as a whole. It reads:

> '***11 Right of access to records of public bodies***
> *(1) A requester must be given access to a record of a public body if –*
> *(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and*
> *(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.*
> *(2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.*
> *(3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by –*
> *(a) any reasons the requester gives for requesting access; or*
> *(b) the information officer's belief as to what the requester's reasons are for requesting access*.'

97. It is clear that the 'right' that is 'not affected by' the factors listed in section 11(3)(a) and (b), is the absolute right granted in section 11(1) to a requester to have access as long as –

97.1. the procedural requirements have been met; and

97.2. there is no ground of refusal made out.

98. This therefore does not mean –

98.1. that no ground of refusal may entail motive or purpose as a proper factor (in fact, some grounds, such as section 39(1)(b)(iii)(*ee*) must of necessity consider such as an important factor); or

98.2. that in appropriate circumstances the applicant's reasons for seeking access, or the information officer's belief as to what the reasons are, cannot feature in a decision to grant access (in terms of section 46) despite the presence of a ground of refusal.

99. All that section 11(3) lays down is that, once there is an absolute right established in terms of section 11(1) (which includes having survived any potential applicability of a ground of refusal), then such right is not 'affected by' motives and purposes beyond the role such motives or purposes might have played in the application of a ground of refusal. Furthermore, this section certainly does not purport to lay down that an applicant's motive or purpose cannot assist him in gaining access under section 46 despite the presence of a ground of refusal; in any event it expressly reserves the application of other provisions in PAIA that may rely on motive or purpose ("*subject to this Act*").

100. It appears that the court *a quo's* belief that purpose could play no legitimate role at any stage of the consideration informed its approach to scrutinising the assessment that had been performed under section 39(1)(b)(iii)(*ee*). This belief may well have fuelled the theoretical and largely speculative conclusion arrived at by the court, namely that once the information requested apparently related to information relevant to court proceedings, this triggered the probability required by section 39(1)(b)(iii)(*ee*), irrespective of the facts relating to precisely what the requester

would do with the information and how precisely this, in the circumstances of this case, could conceivably 'probably' entail the dangers identified in section 39(1)(b)(iii)(*ee*). Furthermore, this notion appears also to have informed the decision not to consider the applicant's public interest purpose as potentially decisive of the application on its merits.

101. These are important misdirections in the context of this application.

CONCLUSION

102. The two fundamental errors which, we submit, compromised the court *a quo's* decision in this matter flow from a failure to appreciate that this case is, at its core, concerned with freedom of expression issues.

103. This is a case in which a journalist sought access to records held by a public body which, he believed, may well expose evidence of breaches of the law by a senior government official. Both he and the respondents were conscious of the fact that he sought access for the purpose of possible later publication of matters of profound public interest and importance. This factual matrix ought, we submit, to have informed the court *a quo's* application of the test in section 39(1)(b)(iii)(*ee*) of PAIA and to have guided the court to determine whether the requirements of section 46 of PAIA had been met.

104. Applying the proper approach to the application of both sections 39(1)(b)(iii)(*ee*) and 46 of PAIA would result, we submit, in a conclusion that access to the records ought to be granted to the applicant.

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24 May 2009

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