IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: 25/09

CPD Case No: 10013/07

In the matter between:

STEFAANS CONRAD BRÜMMER 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

APPLICANT'S WRITTEN ARGUMENT

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A. INTRODUCTION AND ISSUES PRESENTED

1. On 16 March 2009 His Lordship Mr Justice Zondi J in the Western Cape High Court, Cape Town ("the court *a quo"*) declared that the provisions of section 78(2) of the Promotion of Access to Information Act 2 of 2000 ("PAIA") were unconstitutional and referred this finding to this Court for confirmation in terms of section 167(5) of the Constitution.[1] The applicants support this finding of constitutional invalidity.

2. The court *a quo*, in paragraphs 1 and 2 of its order dismissed the applicant's application for condonation and application for access to information in terms of PAIA with costs. The applicant seeks leave to appeal directly to this Court against these orders.

3. The proceedings in this matter had their genesis in an application for access to information by the applicant, a journalist, from the first and second respondents in accordance with PAIA, with a related application for condonation for non-compliance with the 30 day period within which

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[1] The judgment of the court *a quo* is at Vol 6, pages 567-600 and the Order appears at Vol 7, page 601.

to bring such application. The application was brought on 25 July 2007 in circumstances in which:

(a) the application to the second respondent was made on 21 February 2006 and the decision refusing access to the information sought was given on 12 May 2006, that is, 80 days after the request had been made and 20 days after an agreed extension to deliver a decision within 60 days in accordance with PAIA; and

(b) the internal appeal to the first respondent which was filed on 9 June 2006 was effectively refused on 2 February 2007, that is, eight months after lodging the internal appeal in terms of PAIA;

(c) which meant that approximately 11 and a half months had elapsed prior to the respondents finally deciding to refuse access to the information sought.

4. The applicant applied to the court *a quo* for access to the information in accordance with section 78(2) of PAIA but sought condonation because the application was brought outside the stipulated 30 day period. The

applicant contended that the court had power to condone non-compliance with the statutory time period which the first and second respondents initially opposed then conceded. The court *a quo* assumed without deciding that it had the power to condone non-compliance with the 30 day time period.[2]

5. However, the court *a quo* held that the applicant had not demonstrated "good cause" for the grant of condonation and found that the delay of approximately 4 and a half months was insufficiently explained and in the circumstances could not be condoned.[3]

6. In the light of the arguments raised by the first and second respondents the applicant amended the relief sought claiming in the alternative that in the event that it was found that the court did not have jurisdiction to condone non-compliance with the 30 day period or that condonation could not on the facts be granted, then section 78(2) of PAIA was

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[2] Judgment, Vol 6, para 22, page 579.

[3] Judgment, Vol 6, paras 25-31, Vol 6, pages 581-584.

unconstitutional because it constituted an unreasonable time-limited ouster clause infringing, *inter alia*, his right of access to court.[4]

7. The court *a quo* considered and upheld the constitutional argument and held that section 78(2) was unconstitutional and was not a justifiable limitation in accordance with section 36 of the Constitution. Relying primarily on three decisions of this Court,[5] it found further that the fact that a court might condone non-compliance with the 30 day period did not ameliorate the position or the deleterious effects on the rights of access to court in section 34 of the Bill of Rights and the right of access to any information held by the state in section 32 of the Bill of Rights (read with PAIA).[6]

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4 Applicant's Replying Affidavit, Vol 3, paras 5.1-5.5, pages 240-242. The amended was duly effected: Vol 3, pages 258-260 and the third respondent joined consequent upon the amended relief sought.

5 *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), *Moise v Greater Germiston Transitional Local Council: Minster of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC) and *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC).

6 Judgment, Vol 6, paras 50-71, pages 590-599.

8. It is this finding of constitutional invalidity that is presently before this Court and the related application for leave to appeal directly to this Court against the orders in paragraphs 1 and 2 of the court *a quo*.

9. This written argument proceeds as follows:

(a) In **SECTION B** we deal with salient background facts and demonstrate briefly the factual matrix underlying the request for access to information. We note at the outset that our courts have held that it is not for the requester to motivate reasons[7] for access to "any information held by the state" but provide this brief background merely as context.

(b) In **SECTION C** we deal with applicable constitutional and legal principles which we submit are critical to an assessment of the issues presented.

(c) In **SECTION D** we deal with the application for leave to appeal directly to this Court against the orders in paragraph 1 and 2. We submit that the the

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[7] *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA), at paragraph 25: "As it is a requester does not have to motivate a request. It is for a public body or a third party to motivate refusal."

application for leave to appeal directly to this Court on these issues ought to succeed.

(d) In **SECTION E** we deal with the court *a quo's* finding that section 78(2) is unconstitutional and invalid. We submit that this finding is correct and ought to be confirmed. This is particularly so given the fact that despite their constitutional obligations to do so, emphasised by this Court, the respondents have not demonstrated any cogent bases for the need for the 30 day period, let alone the need for any court time-bar at all.

(e) In **SECTION F** we deal with the appeal against the orders refusing condonation and the application for access (and related costs orders) and submit that the appeal on these issues out to be upheld. We submit further that the appeal on these issues ought to succeed and ought to follow from a finding that section 78(2) is constitutionally invalid but that in the event that this finding is not confirmed that the appeal on these issues ought nevertheless to succeed.

(f) In **SECTION G** we make concluding submissions.

B. SALIENT BACKGROUND FACTS

(i) The Applicant's Interest in the Information

10. On 25 July 2007 the applicant launched an application for access to information in the court *a quo*. The application was as a result of the applicant's unsuccessful request for information in terms of PAIA to the second respondent, the Director-General (D-G) of the Department of Social Development, and subsequently, an internal appeal to the first respondent, the Minister of Social Development ("the Minister").

11. The applicant is a journalist and from 2004 to 2006 he researched, wrote and co-authored a number of articles published in the weekly Mail & Guardian newspaper which exposed the so-called "Oilgate" scandal[8] Some of these articles related to Imvume Management ("Imvume"), a company headed by Mr Sandi Majali ("Majali") who was regarded as having links to the African National Congress (ANC).

12. The applicant's investigations revealed that after receiving a R15 million oil condensate supply contract from the state oil company, the Petroleum, Oil and Gas Corporation of South Africa (PetroSA), Imvume donated R11-million to the ANC. As a result of this, Imvume ended up in

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[8] Vol 1 p47 – p59, "SCB2".

financial difficulty and was unable to pay its debts to foreign suppliers. These debts were then settled by PetroSA.

13. From the articles published it appeared that shortly after the receipt of the advance payment from PetroSA, Imvume had also effected payments, to a brother of the then Minister of Minerals and Energy, whose portfolio included control of PetroSA. In addition, it paid Hartkon, a construction company, an amount of R 65 000 in relation to renovations done at the private home of the first respondent, the Minister of Social Development, Zola Skewyiya ("the Minister").[9]

14. At that stage Majali's companies appeared to be engaged in ongoing contracts relating to social grants distribution, a function of government under the control, directly and indirectly, of the Minister as well as contracts which fell directly or indirectly under the control of the then Minister of Minerals and Energy. This gave rise to allegations of conflict of interest.[10]

15. The Minister responded by denying the allegations and stating *inter alia*, that his wife had arranged the loan from Majali . In addition, he said that

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9 Vol 1 pp 11 – 12 para 13.

10 Vol 1 p 12 para 14, pp 60 – 63 "SCB3".

he was not aware of Majali's companies' involvement in social grants distribution.[11]

(ii) Action launched over Tender 82

16. After the publication of these reports, during June 2005, the IT Lynx Consortium ("the consortium") launched an action in the Pretoria High Court (now referred to as the North Gauteng High Court) under case number 21290/05 against the State Information and Technology Agency (Pty) Ltd ("SITA") and the Minister. The basic complaint of the consortium which formed the subject matter of the action is that Tender no 0082/2001 ("Tender 82") was awarded to it, and that SITA and the Minister failed to implement such award. The consortium sought implementation of the award; alternatively, the cancellation of the contract resulting from the alleged award of the tender to it, and payment of damages amounting to almost R150 million plus interest and costs.[12]

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[11] Vol 1 p12 para 15; Second respondents answering affidavit, Vol 3, para 31, page 222 (in which the respondents admit the publications but deny that they contain true or correct facts), read with para 32, pages 222-223 in which the first respondent denies any conflict of interest, states that he had had no knowledge of Majali's shareholding and of his role in the consortium and that he had not been party to the adjudication of the tender.

[12] Vol 1 p 13 para 16.

17. One of Majali's companies had an interest as an investor in one of the groupings comprising the consortium[13], and it appeared that at the time Majali was paying a contractor to effect improvements at the Minister's home, the Minister was being asked to perform his duties in a manner advantageous to the consortium .[14]

18. The matter in the North Gauteng High Court was initially set down for trial in 2007 but was postponed *sine die.* The pleadings in that court, as it existed at the time of the hearing of this matter were handed up to the court *a quo* by agreement between the parties. The pleadings indicated that although the matter was set down for trial on 23 February 2010, it was removed from the roll by order of Hartzenberg J dated 29 September 2008 and at the time of the hearing of this matter in the court *a quo* no trial date had been set. (The court *a quo* erred in concluding that the matter was set down for hearing on 23 September 2010).[15]

19. In order to report accurately and properly on the issue of Mojali's payments to renovate the Minister's home, which fell within the public domain[16], the applicant applied in terms of the PAIA for the following

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13 Vol 1 p13 para 16, pp 75 – 78 "SCB5".

14 Vol 1 p 14 para 18.1.

15 Vol 6 p 572 para 7.

16 Vol 1, para 20, page 15: "It was primarily to report accurately and properly on this issue, which clearly fell within the public domain, that I resolved to apply, as I was

documentation as detailed in Annexure A[17] to the applicant's Notice of Motion in the court.

20. The applicant's interest as a journalist in the documentation sought from the first and second respondents relate to whether the Minister had knowledge, at the time when Majali/Imvume paid Hartkon R65,000, that Majali/one of his companies was part of the consortium that demanded the implementation of Tender 82 in the belief that it has been awarded to them.[18]

21. The applicant's interest in the records sought does not lie in the actual award of tender or the adjudications by SITA or whether SITA had indeed made such an award to the consortium, this being the subject of the dispute in the North Gauteng High Court.[19]

22. Furthermore, the information sought by the applicant did not relate

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entitled to, under the PAIA for all records reflecting interactions between the Minister/Department and others relating to Tender 82, from the Department."

The respondents do not deny these allegations: Vol 3, para 38, page 225, accepting that the applicant was entitled to exercise his rights but state erroneously that this demonstrated that the applicant wanted to publish the content of the record, an allegation unsupported by any evidence and flatly contradictory to the applicant's assertion on this issue.

17 Vol 1 p 5 - 6.

18 Vol 1 p 15 para 19.

19 Vol 3, applicant's replying affidavit, p 243-244, paras 9.1 – 9.3.

specifically to the actual adjudication of Tender 82 which formed the subject of proceedings in the North Gauteng High Court.[20] The applicant did not seek correspondence from SITA as the tender administrator, nor did he seek correspondence internal to SITA as it adjudicated the tender, nor did he seek correspondence between SITA and the consortium or other bidders , nor did he seek correspondence between SITA and the Minister and/or his department. These constituted the bulk ,if not all of the documentation discovered in the North Gauteng High Court, according to the pleadings and the discovery affidavit of the state parties.

The Applicant, in a nut shell, requested communications between the Minister/ his department on the one hand and the consortium on the other ,and between the Minister / his department on the one hand and the Minster of Finance on the other.

23. The documentation sought by the applicant, therefore, was not coterminous with those documents required for the proceedings in the North Gauteng High Court, as the applicant sought records which would obviously have no bearing on any proceedings to take place in the North Gauteng High Court.

(iii) <u>Request for Access to Information</u>

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[20] Vol 3 p 243 para 8.

24. On 21 February 2006 the applicant submitted an access to information application to the D-G requesting the aforementioned documentation.[21] A response refusing such request was received on 12 May 2006, approximately 80 days later.[22] In refusing the request reliance was placed on sections 7(1), 36(1)(a), (b) and (C), 37(1)(a), 39(1)(b)(iii)(ee) and 44(1)(a) of PAIA.

(iv) The Internal Appeal

25. On 9 June 2006 the applicant filed a notice of internal appeal against the decision of the D-G.[23] After numerous excuses and delays as detailed in the founding affidavit, on 22 December 2006 the Minister refused the applicant's appeal. The applicant received a copy of the appeal decision on 2 February 2007, almost 8 months after lodging the appeal.[24]

26. As is apparent from the Notice of Appeal the first respondent dismissed the applicant's appeal solely on the basis of section 39(1)(b)(iii)(ee) which provides that the information officer of a public body may refuse a request for access to a record if *"the disclosure of the record could*

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21 Vol 1 p 15 para 21, pp 85 – 92 "SCB9".

22 Vol 1 p 18 para 30, vol 2 pp 105 – 107 "SCB15".

23 Vol 1 p 35 para 79, vol 2 p 108 – 118 "SCB16".

24 Vol 1 p 38 para 91, vol 3 pp 202 – 204 "SCB24".

reasonably be expected to prejudice or impair the fairness of a trial or the impartiality of an adjudication." The other six grounds of refusal (by the second respondent) were no longer relied upon.

(v) Proceedings in the Court a quo

27. The application to court was delivered on 25 July 2007 and the hearing in the court a quo took place on 19 November 2008. The applicant sought to have the decision of the first respondent set aside, and also sought condonation because the application was launched outside the 30 days contemplated by section 78(2) of PAIA.

28. The applicant also contended that the application could not be determined without a finding on the constitutionality of section 78 (2) as it was integral to the determination of condonation. It was argued that when the court had regard to condonation, it also had to consider the 30 day period provided for section 78(2) in the context of whether the applicant has shown good cause. [25]

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[25] Vol 5, transcript of argument p 485 lines 9 – p 486 line 15.

29. Judgment was handed down on 16 March 2009.[26] The application for condonation and access to records was dismissed, however, the provisions of section 78 (2) of PAIA were declared unconstitutional on all of the arguments advanced by the applicant.

(vi) Approach to this Court

30. On 3 April 2009 and for reasons set out in the affidavit in support of leave to appeal to this Court,[27] the applicant applied to this Court for leave to appeal directly to it in terms of Rule 19 of this Court's Rules.

31. On 14 April 2009 the Chief Justice gave directions that this matter is set down for hearing on Tuesday 26 May 2009.[28]

C. APPLICABLE CONSTITUTIONAL AND LEGAL PRINCIPLES

32. At the heart of this application is the interpretation of PAIA. We think it is important to draw attention at the outset to its constitutional and legislative history and related principles for its interpretation.

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[26] Vol 6 pp 567 – 600.

[27] Vol 7 pp 615 – 660.

[28] Vol 7 pp 695 – 696.

(i) Constitutional Genesis of PAIA

33. Chapter 5 of the Constitution of the Republic of South Africa, 1993 ("interim Constitution") provided for the adoption of a new constitutional text which had to comply with the Constitutional Principles set out in Schedule 4 thereto. Constitutional Principle IX of Schedule 4 required provision to be made *"for freedom of information so that there can be open and accountable administration at all levels of government"*.

34. The Constitutional Court held that Constitutional Principle IX did not envisage *"access to information merely for the exercise or protection of a right, but for a wider purpose, and to ensure that there is open and accountable administration at all levels of government"*. It is a right which is directed at promoting *"good governance"*.[29]

35. Those values of and obligations to provide transparent and accountable government now find expression, *inter alia*, in sections 1(d), 32 (read with PAIA), 39(1)(a), 41(c) and 195(f) and (g) of the Constitution.

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[29] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at paras 83 and 85.

36. Section 32 of the Constitution which is an entrenched right in the Bill of Rights expanded on the right contemplated in the interim Constitution and Constitutional Principle IX in that it provides for a right of access to information both in public and private hands beyond that contemplated in Constitutional Principle IX. It states:

> *"(1) Everyone has the right to have access to -*
>
> *(a) any information held by the State; and*
>
> *(b) any information that is held by another person that is required for the exercise or protection of any right.*
>
> *(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the State."*

37. It is to be noted that the legislation contemplated in section 32(2) is to give effect to the right of access to any information held by the State with measures to ease the process of such access on the State.

38. In addition, the obligation to provide information in respect of PAIA must be viewed in the context of section 7 (1) of the Constitution which provides as follows:

"*(1) This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.*"

39. Section 8(1) of the Constitution provides that the Bill of Rights "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

40. Section 32 is a novel provision with *"no corresponding antecedent in foreign constitutions, and is [therefore] . . . perhaps a fourth generation right"*. In addition it creates a positive right to information that is far more comprehensive than for instance Article 10 of the European Convention, which merely authorises the right to receive and impart information and ideas without interference from the public authority.[30]

41. The right of access to information is crucial to the exercise or protection of other rights guaranteed in the Constitution.[31]

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30 Devenish, Govender & Hulme, *Administrative Law and Justice in South Africa*, Butterworths, Durban, 2001, p 186-187.

31 *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para 21.

42. At a general level, the right of access to information is entrenched, in the first instance, by the Constitution itself. At the very least section 32 of the Constitution creates, subject to certain procedural conditions, a right to information held by the State or another person.[32]

(ii) Interpretive Principles Applicable to PAIA

43. PAIA is the national legislation envisaged in section 32(2) of the Constitution.[33] It was enacted as indicated in its long title in order to give effect to access to information and promote the values of openness, transparency, accountability and good governance – principles foundational to the Constitution.[34] The preamble states one of its two objects as that of *"foster(ing) a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information"*.

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32 *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 23.

33 *Van Wyk, supra,* at para 3 (footnote 3); *see generally Mittalsteel South Africa Ltd (Formerly Iscor Ltd) v Hlatshwayo* 2007 (1) SA 66 (SCA).

34 *See also Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) at para 1; *Minister For Provincial and Local Government v Unrecognised Traditional Leaders***,** *Limpopo Province (Sekhukhunlealnd)* 2005 (2) SA 110 (SCA).

44. Section 9 includes in the objects of PAIA the promotion of -

> *"... transparency, accountability and effective governance of all public and private bodies by including, but not limited to, empowering and educating everyone -*
>
> *(i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;*
> *(ii) to understand the functions and operation of public bodies.*
> *(iii) to effectively scrutinise… decision-making by public bodies that affects their rights."*

45. Other objects of PAIA include establishing voluntary and mandatory mechanisms to enable persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible.[35]

46. Most importantly, any interpretation given to the provisions of PAIA must be consistent with the purpose sought to be achieved by it, read together with the objectives sought to be achieved by section 32 of the Constitution and other rights contained in the Bill of Rights and must be

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[35] Section 9 (d); *CCII Systems (Pty) Ltd v Fakie and Others NNO (Open Democracy Advice Centre as amicus curiae)* 2003 (2) SA 325 (T) at para 12.

read in a manner which conforms with the provisions of the Constitution.[36]

47. In other words, apart from the interpretational principles within PAIA, its sections must be interpreted through the related principle of interpretation encapsulated in section 39(2) of the Constitution, which requires all legislation to be interpreted consistently with the Bill of Rights.[37] In other words, this principle of interpretation requires all legislation to be interpreted through the "prism of the Bill of Rights", which is said to be a "mandatory constitutional canon of statutory interpretation".[38]

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[36] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) at para 85; *S v Dzukuda and Others; S v Dshilo* 2000 (4) SA 1078 (CC) at para 37; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001(1) SA 545 (CC) at paras 21- 23.

[38] F*raser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC), at paragraph 43; and *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2007 (6) SA 350 (CC), at paragraph 27. *See also,* as yet unreported judgment of this Court delivered on 7 May 2009: *Bertie van Zyl (Pty) Ltd and Others v Minister for Safety and Security and Others*, Case CCT 77/08; [2009] ZACC11, at paras 20-23 for an exposition on statutory interpretation principles consistent with the Constitution.

48. Section 2(1) of PAIA provides that when a provision is interpreted, every court must prefer any reasonable interpretation thereof that is consistent with the objects of PAIA over any alternative interpretation that is inconsistent with those objects.

49. Both private and public bodies are now under a duty to provide access to a requested record, or part of it, unless refusal of the request is permitted or required by one or more of the grounds listed in PAIA. Every request for access to information in terms of PAIA is an invocation of the section 32 right. PAIA provides the "when and how" an applicant can enforce his or her section 32 right and it also limits section 32 in order to, inter alia, protect privacy, commercial confidentiality and effective, efficient and good governance.

50. The *crux* of PAIA lies in Parts 2 and 3. Part 2 deals with access to information held by public bodies, whilst Part 3 applies to private bodies. Both Parts have the same structure: PAIA grants a right to request records in the possession or under the control of private or public bodies and then specifies the grounds on which access to requested records may or must be refused by a public or private body. PAIA applies in

relation to records of a public body or of a private body, regardless of when the record came into existence.[39]

51. Every request for access to information in terms of PAIA is an invocation of the section 32 right and both public and private bodies have an obligation to provide access to a requested record,[40] or part of it, if that requestor complies with all the procedural requirements and save where a refusal of a request is permitted or required by one or more of the grounds for refusal contemplated in Chapter 4 of Part 2 of PAIA.[41]

52. The applicant does not have to motivate a request for information to a public body such as the respondents[42] and as such the respondents bear the onus to justify their refusal to grant the applicant access to information.[43]

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39 Section 3 of PAIA.

40 A "record" is defined in relation to both a public and private body as meaning *"any recorded information –*

(a) regardless of form or medium;

(b) in the possession or under the control of that public or private body, respectively; and

(c) whether or not it was created by that public or private body, respectively."

41 Sections 11 and 50 of PAIA.

42 *Transnet Ltd v SA Metal Machinery, supra.*

43 Section 81(3)(a) of PAIA.

53. We submit that these principles form the blueprint against which the issues presented in this case must be assessed.

D. APPLICATION FOR LEAVE TO APPEAL DIRECTLY TO THIS COURT

54. Applications for leave to appeal to this Court are governed by section 167 (6) of the Constitution and Rule 19 of the Rules of this Court. It is settled law that this Court has a discretion to grant leave to appeal when the applicant raises a constitutional issue and when it is in the interests of justice.[44] The Court's determination of the "interests of justice" is conducted through a careful and balanced weighing up of all relevant factors.[45]

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[44] Constitution, section 167 (6); *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 at para [29]; *See: African Christian Democratic Party v The Electoral Commission and Others* 2006 (3) SA 305 (CC) paras [17]-[18]; *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) paras [29] – [30]; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* 2005 (4) SA 319 (CC) at para [19]; *Khumalo and Others v Holomisa* 2002 (5) SA 401 paras [6] – [10]; *S v Bierman* 2002 (5) SA 243 (CC) at paras [7] –[9]; *S v Boesak* 2001 (1) SA 912 (CC) at paras [10] - [12]; *Fraser v Naude and Others* 1999 (1) SA (1) (CC) at para [10]; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at paras [15] – [19].

[45] *Magajane*, *supra*, at para [29]; *Radio Pretoria*, *supra*, at para [19]

55. Section 167 (3) (b) of the Constitution confers on this Court the power to decide issues connected with decisions on constitutional matters. On this issue, this Court in *Gory v Kolver*[46] held:

> **"Whatever the precise meaning of the word 'connected' in the phrase 'issues connected with decisions on constitutional matters', it must include a relationship of dependence between a primary order on a constitutional matter and an ancillary order. What constitutes 'dependence' must be understood in a broad sense. There are important policy reasons for such an approach: if a party may not approach this Court for leave to appeal on these ancillary matters, this would give rise to a bifurcated appeal and confirmation procedure in which the appeal on the ancillary matters could not be resolved before this Court together with the confirmation application, but would have to be heard and resolved in separate proceedings before another court. This would obviously be a most undesirable state of affairs, undermining the achievement of finality for the parties and resulting in an unnecessary waste of judicial resources."**

56. The purpose of the applicant's application for direct leave to appeal is so

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[46] *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 para [47]. *See also*, *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (*No. 2)* 2007 (6) SA 477 (CC) at paras 103-105.

this Court can resolve, in general, and authoritatively as the highest court in the land on constitutional matters, the question of the interplay between sections 32, read with the PAIA, and section 34 of the Constitution in the context of the time periods relevant to the institution of court proceedings relating to access to information applications.

57. The case concerns the protection of the applicant's right of access to court, his ability to access information as contemplated in section 32 of the Constitution and the interpretation and application of provisions of the PAIA, which involves for the most part the direct application of the Constitution. As such it involves a number of important constitutional matters. Given the importance of these issues, the views of this Court are crucial.

58. The issues raised on appeal are also *"issues connected with a decision on a constitutional matter"* as contemplated in section 167(3)(b) of the Constitution in that they are incidental to and inextricably linked with the order of constitutional invalidity made in paragraph 3 of the order of the court *a quo* over which only this Court has jurisdiction. No purpose would be served by an appeal to the Supreme Court of Appeal as these issues do not involve the development of the common law. Any appeal to another court would only constitute a waste of time and costs and it must be borne in mind that throughout this litigation, the applicant has been

assisted by ODAC, a public interest non-governmental body with the rights of appearance in courts of law, and there will be a significant saving of time and money if this matter proceeds directly to this Court.

59. The relief sought in this application is of a general nature and will affect not only the applicant, but many other ordinary people requiring access to information. This Court's findings will provide clarity to the time periods governing the institution of applications for access to information in terms of the PAIA, particularly given the blurring created by section 77(5)(c), read with section 78(2).

60. In addition, section 39(1)(b)(iii)(eee) of PAIA has not yet been considered by a court of law and finality on its meaning and ambit would only serve the interests of justice.

61. Since PAIA came into effect, the lower courts have taken the approach that they have the power to condone non-compliance with the time limits, without it having been authoritatively determined whether this is constitutionally permissible, and whether the granting or refusal of condonation impacts on the constitutionality of the time-limited ouster clauses contained in the PAIA.

62. In the circumstances it is submitted that it is in the public interest and in the interests of justice that this Court grants the Applicant leave to appeal

directly to this Court. We return to the merits of the appeal against paragraphs 1 and 2 of the order of the court *a quo* in **SECTION F**.

E. CONFIRMATION OF THE ORDER OF CONSTITUTIONAL INVALIDITY: SECTION 78(2)

(i) Rights Violations

63. Section 78 is headed *Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies.*

Section 78(2) provides:

"(2) A requester-

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;

(b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75 (2);

(c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1-

(i) to refuse a request for access; or

(ii) taken in terms of section 22, 26 (1) or 29 (3); or

(d) aggrieved by a decision of the head of a private body-

(i) to refuse a request for access; or

(ii) taken in terms of section 54, 57 (1) or 60,

may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.

(emphasis added)

64. In The Bill of Rights Handbook, Currie and De Waal[47] state that:

> **"Once a dispute can be resolved by law, section 34 generates a right of access to a court or, where appropriate, another tribunal or forum. The purpose of the right is to provide protection against actions by the State and other persons to deny access to the courts and other forums. The prime example of such a denial of access is the use of so-called 'ouster clauses.' But s 34 does more than merely outlaw ouster clauses. A range of subtler restrictions on access to courts will also fall foul of the section."[48]**

65. This Court has held that section 34 is one of the founding provisions of the

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47 Currie & De Waal, *Bill of Rights Handbook*, Juta 2005, p 708.

Constitution[49] and guarantees that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land.[50] Furthermore, that the right of access to court is of "cardinal importance", "foundational to the stability of an orderly society" and "a bulwark against vigilantism, and the chaos and anarchy which are consequential".[51] It is thus critical for the adjudication of judicial disputes and, when regard is had to the nature of the right in terms of section 36(1)(a) of the Constitution, there can be no dispute that this right is by nature a right that requires active protection.[52]

66. This Court has previously considered challenges to statutory provisions which affect a prospective litigant's access to court and has held that any provision which regulates access to court *per se* limits the right of access to court.[53]

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49 *De Beer v North-Central Local Council and Others* 2002 (1) SA 429 (CC) at para [11].

50 *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) at para [16].

51 *Chief Lesapo, supra*.

52 *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC) at para [17].

53 *See generally: Beinash, supra*; *Chief Lesapo*, *supra*, *First National Bank of SA Ltd v Land and Agricultural Bank of SA* 2000 (3) SA 626 (CC); *Moise, supra*; *Engelbrecht, supra; and Mohlomi, supra*, at paragraph 12.

67. In Mohlomi[54] the Court held that each limitation must be scrutinised to see whether its own particular range and terms are compatible with the right of access to court. The Court formulated the test as follows:

> **"What counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity eo exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line. In anybody's book, I suppose, seven years would be a period more than ample during which to set proceedings in motion, but seven days a preposterously short time. Both extremes are obviously hypothetical. But I postulate them in order to illustrate that the inquiry turns wholly on estimations of degree."**

68. Section 78(2) of the PAIA creates a distinction between litigants reviewing decisions[55] in relation to access to information applications, and other litigants, for example, those reviewing administrative decisions. Other

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54 *Mohlomi*, *supra,* at para [12].

55 Currie & Klaaren in *The Promotion of Access to Information Act Commentary* 2002, p203 say that: "In our view . . . the 'applications to court' described in ss 78 – 82 of the AIA are best considered to permit a form of statutory judicial *review* of information decisions."

litigants are in effect afforded a longer period of time under provisions of the Promotion of Administrative Justice Act of 2000 (PAJA), where proceedings for judicial review may be brought within 180 days of the decisions or reasons for such decisions.

69. The same distinction is drawn with litigants who pursue “debts” against the state where, in terms of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 20002, the applicable prescriptive period applies subject only to a notice to the state within 6 months from which the debt became due (with a provision for condonation for the late giving of such notice).

70. It is difficult to conceive of a rational basis for this distinction when one has regard to the constitutional obligation on government to provide access to any information held by the state in consonance with the constitutional commitment to open, transparent and accountable government.

71. This is particularly so given that the SCA in *SA Metal Machinery*, *supra*, held that court applications in terms of PAIA are not species of limited review:

> "**A court application under the act is not the kind of limited review provided for, for example under the Promotion of Administrative Justice Act … It is much more extensive. It is a**

> **civil proceeding like any motion matter, in the course of which both sides (and third party, if appropriate) are at liberty to present evidence to support their respective cases for access and refusal. As the present matter serves to illustrate, the parties' respective cases in such an application will no doubt inmost instances travel beyond the limited material before the information officer. That conclusion is reinforced by the Legislature's having catered for the presentation of evidence and the resolution of disputes of fact by reference to an *onus* of proof. Those provisions would have been unnecessary if the suggested limitation applied. Moreover, it is unlikely that a Court, acting under s 82, would be sufficiently informed so as to be in a position to make a just and equitable order were the limitation to apply."** (at para 24.)

72. It is trite that every rights challenge in South African constitutional law involves a two-stage enquiry:[56]

(a) Whether there is a violation of a right or rights; and

(b) Whether such violation is justified under the limitation clause.

73. It is also trite that the onus in (a) is on the party asserting the unconstitutionality of the impugned statute/action; and the onus in (b) is

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[56] *Moise*, *supra*, at para [7].

on the party seeking to uphold the constitutionality of such statute/ action.[57]

74. In light of the decisions of this Court that provisions which regulate access to court *per se* infringes the right of access to court, it is submitted that section 78(2), containing an unreasonable and unexplained time-limited ouster clause, violates section 34 of the Constitution.

75. In this regard it cannot be denied that section 78(2) of the PAIA, by allowing only a period of 30 days within which to launch an application, does not afford an aggrieved party with a real and fair opportunity to institute legal proceedings in a court of law especially if one considers that for a lay litigant to seek recourse in a court is not a simple matter, nor does it provide a speedier resolution of a dispute unless the matter is of an urgent nature. In addition, and without legal aid being readily available in public interest matters, litigation without assistance it is a costly matter, not lightly undertaken.

76. In the premises the 30 day limit does not afford a claimant an adequate and fair opportunity to seek judicial redress and as such constitutes a clear infringement of the right.

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57 *Moise*, *supra*, at para [19].

(ii) The violations of rights have not and cannot be justified in accordance with section 36 of the Constitution

77. All rights are subject to limitation, provided that there is compliance with the limitation clause.

78. The requirement of section 36 that limitations of rights should be reasonable and justifiable involves a three-part enquiry:

(a) First, the evaluation of the reasons for the law that limits rights.

(b) Second, the determination of whether there is a rational relationship between these reasons and the limitation.

(c) Third, the determination of whether there is an acceptable degree of proportionality between the benefits to be obtained by the limitation and the harm that it entails.

79. It is also trite that what is reasonable and justifiable as far as the limitation on a fundamental right is concerned will depend on the circumstances of each case and that the State parties must be able to defend its conduct by rational argument and establish justification clearly and convincingly.

80. Since section 78(2) undisputedly limits the right of access to the Courts, it can pass constitutional muster only if the respondents can show that it complies with the provisions of the limitation clause (section 36 of the Constitution).

81. However, given the cardinal importance of the right of access to courts, powerful reasons would be required for its limitation to be reasonable and justifiable.

82. We submit that this is all the more so given the unique purpose of the constitutional commitment to access to any information held by the state in furtherance of the manifold constitutional aims of open, transparent and accountable government.

83. It bears noting that this Court has emphasised the need for government to place relevant material before the Court to justify limitations on constitutional rights. In *Moise, supra*, the obligation was described as follows:

> "**[19] It is also no longer doubted that, once a limitation has been found to exist, the burden of justification under s 36(1) rests on the party asserting that the limitation is saved by the application of the provisions of the section. The weighing up**

> **exercise is ultimately concerned with the proportional assessment of competing interests but, to the extent that justification rests on factual and/or policy considerations, the party contending for justification must put such material before the Court. It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has an opportunity - indeed an obligation - to do so. The obligation includes not only the submission of legal argument but the placing before Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary *onus*, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment. Indeed, this is such a case."** (Para 19. Our emphasis.)

84. It is not apparent *ex facie* the provisions of PAIA in its entirety what purpose the limitation of 30 days seeks to achieve or its importance in the context of the objectives as set out in section 9. On the contrary, the primary objective sought to be achieved by PAIA is to give effect to the constitutional right of access to any information held by the State and section 78(2) constitutes an egregious impediment thereto.

85. The third respondent, the Minister of Justice and Constitutional Development, despite having been joined specifically for this purpose, provides no meaningful defence of or evidence in support of the time limit

in section 78(2) of PAIA, simply contending that the 30 day time period is reasonable as by that stage an internal appeal process would have been completed and an applicant would not require extensive time to bring a court application.[58]

86. However, the existence and/or adjudication of an internal appeal in most cases by the political functionary of the very Department that refused the request for records does not mean that it would necessarily follow that the time required for the launching of a court application would be significantly reduced. This must of necessity differ from case to case. In the present matter, the court *a quo* correctly accepted that it is not a basis to contend that the provision is reasonable in the context of this case where the D-G took nearly 3 months to consider the request and the Minister took almost 8 months to determine the internal appeal.[59]

87. The third respondent contends in bald terms that the purpose of section 78(2) of the PAIA as contended by the respondents is to prevent *"unnecessary administrative and financial burdens on public bodies"* which *"should be entitled to dispose of records in accordance with departmental and archival policies and procedures"*[60]. Yet this is

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58 Third Respondent's Answering Affidavit, Vol 3 pp 296 – 297 para 19.

59 Judgment, court a quo, Vol 6 pp 592 para 56.

60 Third Respondent's Answering Affidavit, Vol 3 pp 297 – 298 para 21.1.

unsupported by any shred of evidence or argument demonstrating that this was the purpose for which section 78(2) of PAIA was introduced. More pertinently, in this matter, given that on the respondents' versions these records are intended for use in pending litigation on a yet-to-be determined date and have therefore been preserved, there can be no complaint of an unnecessary administrative and financial burden.

88. These bald assertions ring all the more hollow when one considers the provisions of the National Archives and Record Service of South Africa Act 43 of 1996 which impose obligations on national and provincial governments (in the absence of equivalent provincial legislation) to keep and archive public records with enduring value when they have been in existence for 20 years at which point they become available for public access or sooner with the permission of the National Archivist.

89. This Act appears to have had equivalent predecessor legislation from as far back as 1962 (as is apparent from section 19- repeal of laws).

90. This Act creates a branch of the public service called the National Archives and Records Service of South Africa and the objectives of the Act speak to the need to preserve public and non-public records with enduring value for use by the public and the State and the need to make such records accessible to the public. The Act criminalises any person

who wilfully damages any public or non-public record in the control of a governmental body or who otherwise than in accordance with the Act or other law "removes, destroys or erases such record".[61]

91. It is thus entirely unclear what the third respondent intends to convey by the suggestion that the time limit is needed to prevent unnecessary burdens on government. We submit that the contrary is more likely true. The fact that government exists as government in a representative capacity on behalf of the people it serves, carries two inter-related obligations:

(a) Government must be accountable to its citizens. It is as well to bear in mind the words of this Court in *Doctors for Life*[62] and *Matatiele (No.2)*[63] to the effect that the constitutional commitment to open, transparent and accountable government is grounded squarely in our model of democracy which is representative and participatory. In addition, this Court held in

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61 "Record" is defined as "recorded information regardless of form or medium"; "public record" is defined as "… a record created or received by a governmental body in pursuance of its activities"; and "non-public record" is defined as …"a record created or received by a private individual or a body in terms of this Act or a provincial law pertaining to records or archives."

62 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC), generally at specifically at paras 122 and 145-146.

63 *Matatiele Municipality and Others v President of the Republic of South Africa and Others (No. 2)* 2007 (6) SA 477 (CC), at paras 40 and 55.

Matatiele Municipality and Others v President of the Republic of South Africa and Others 2006 (5) SA 47 that government's lack of candour in providing reasons to the Court for its decision to move the municipality to the Eastern Cape had not facilitated the work of the Court which resulted in further directions being issued for government to present more information on these issues in keeping with "the constitutional values of accountability, responsiveness and openness." Sachs J located this need for candour squarely in the rule of law when he held at para 110:

> **"As this case demonstrates, far from the foundational values of rule of law and of accountable government existing in discrete categories they overlap with each other. Openness of government promotes both the rationality that the rule of law requires and the accountability that our multi-party democracy demands. In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness."**

To this jurisprudential principle we would add not just the legitimacy of laws but also the legitimate and proper implementation of laws.

(b) **Government, as the nation's representative and institutional memory, has a duty to keep records on how it governs**. This means that to achieve the aims of openness, transparency and accountability, key facets of rule of law, government must of necessity document and record how it goes about the business of governance so that its actions may be

examined, assessed and called to account if necessary. In this regard, it is significant that PAIA applies to all records held by the state whether existing before or after the commencement of the Act.

92. In the present matter this is the potential consequence, even in the absence of any complaint of prejudice on the part of the respondents, and in circumstances where, despite the lapse of time, the documentation and records sought exist and have been preserved and there is no evidence to indicate that the delay in applying to court was excessive, wilful or deliberate or prejudicial to the respondents.

93. Against this background it is submitted that the limitation imposed by section 78(2) is too restrictive for the purpose it is alleged to have been designed to achieve, particularly if one has regard to the nature and importance of the rights it infringes. In the circumstances it is submitted that the time provided by section 78(2) of the PAIA for the institution of legal proceedings does not provide "an adequate and fair opportunity to seek judicial redress …" consistent with the rights to access to court and to information held by the state[64] and consequently cannot pass muster under section 36 of the Constitution.

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64 *Mohlomi*, *supra*, at para 14.

94. Against this background it is submitted that the limitation imposed by section 78(2) is too restrictive for the purpose it is alleged to have been designed to achieve, particularly if one has regard to the importance of section 32 and PAIA to the constitutional commitment to open, transparent and accountable government.

95. In the circumstances it is submitted that the time provided by section 78(2) of the PAIA for the institution of legal proceedings does not provide "an adequate and fair opportunity to seek judicial redress …" consistent with the rights to access to court and to information held by the state[65] and consequently cannot pass muster under section 36 of the Constitution.

(iii) The time bar is irrational and arbitrary

96. We accordingly submit that the respondents have failed dismally to offer any rational justification for the 30 day period in section 78(2) of PAIA. The respondents have failed to place any evidence before the court to indicate a causal relationship between section 78(2) and the purpose it was alleged to serve.[66] In the absence of any rational basis for this period, the inescapable inference is that there is none. The time bar is

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65 *Mohlomi*, *supra*, at para 14.

66 *Engelbrecht, supra*, at para 42.

accordingly irrational and consequentially arbitrary. We dealt previously with the inexplicable distinctions this time period draws between litigants who pursue other public law or private law remedies against the state.

(iv) The socio-economic realities of our country worsen the effect of the time bar

97. We submit further that the rights infringements are exacerbated by the socio-economic realities of our country that ordinary litigants face potentially mammoth obstacles to access legal assistance and to engage the courts timeously for relief. This limitation would thus have the predictable consequence that it would impede persons from invoking the right of access to information in a manner contrary to the very objectives which the PAIA seeks to achieve.[67]

(v) Unconstitutionality of section 78 is not cured by the ability to relax its operation

98. It is submitted that the court *a quo* correctly applied the principles enunciated in *Moise*[68] when it held that on the supposition that the time

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67 The difficulties confronting ordinary South Africans in seeking access to courts was pertinently described at paragraph 41 of the judgment in *Mohlomi, supra*.

68 at para 14.

period in section 78 could be condoned, this was not in and of itself an answer to the material impediment in section 78(2).

99. It is submitted that the court *a quo* correctly held that even a power to condone the time period in section 78(2) "does not lessen the deleterious effect which [the time limit] has on his ability to approach the Court" for appropriate relief and "… what is important is the adequacy of the opportunity and not what he may do in order to retrieve the lost opportunity."[69]

(vi) The Order of Constitutional Invalidity must be Confirmed

100. In the light of the foregoing, we submit that the order of constitutional invalidity of the court a *quo* must be confirmed.

101. In the absence of any evidence to the contrary, and as was the position in *Moise* and *Engelbrecht*, *supra*, the effect of the respondents' lack of justification for the time period in section 78(2) means that it cannot be rescued or temporarily saved.

102. In the result, we submit that paragraph 3 of the order of the court *a quo* ought to be confirmed.

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[69] Judgment, Vol 6, para 70, page 599.

F. THE APPEAL AGAINST ORDERS 1 AND 2

(i) The court a quo did not act fairly to the parties in the exercise of its discretion

103. If this Court finds that section 78 (2) of PAIA is not inconsistent with the provisions of the Constitution, we proceed in this section on the assumption that the court *a quo* had the inherent power to condone non-compliance with the time period contained in section 78(2). This is in accordance with the concession made by the respondents and the arguments advanced by the applicant in the court *a quo*.

104. At the outset it is submitted, with reference to the aforementioned consideration of the provisions of section 77(5), read with section 77(4) of the PAIA, that the court *a quo* materially erred in the exercise of its judicial discretion in deciding the application for condonation on the assumption that the Minister's appeal notice substantially complied with the requirements of section 77(5)(c)[70] when there was a blatant non-compliance with the peremptory requirement which would have informed the applicant in terms of the time period applicable to court applications. At the very least it should have been a factor which the court *a quo* had

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[70] Judgment Vol 6 p 578 para 20.

to take into account in the exercise of its judicial discretion. In failing to do so from inception of the exercise of its discretion it did not act fairly to the parties before it and in fact did not properly exercise its judicial discretion.

105. The applicant provided a full explanation for the delay in launching his application.[71] In the interest of fairness to the parties this explanation must be considered against the backdrop that the D-G delayed 2 ½ months in providing reasons for refusing the applicant's request and the Minister took more than 6 months in deciding the appeal. This can only be indicative of the complexity of the matter or the fact that it pertains to new matters of law.

106. The court *a quo* correctly held that the applicant only became aware of the Minister's decision on 2 February 2007 and that although the decision was dated 22 December 2006, it only reached the applicant by 2 February 2007.[72]

107. Even though the court *a quo* accepted that the applicant only became aware of the 30 day time limit after it had expired, it failed to attribute this to the Minister's failure to comply with the peremptory requirements contained in section 77 of the PAIA which compelled him to inform the

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[71] Vol 1 p 40 para 97 – p 42 para 108.

[72] Vol 6 p 581 para 25.

applicant of the 30-day period. Instead the court *a quo* sought to attribute this failure to ODAC drawing a negative inference from the failure of an explanation as to why it had taken the "applicant's attorneys more than a month to discover the Act imposed a 30 day limit"[73] and its failure to alert the applicant thereof.

108. This is not consistent with the explanation given in the applicant's affidavit. The applicant indicated that after he obtained the Minister's decision he sought legal assistance and approached ODAC, a non-governmental organisation engaged in public interest litigation unit for assistance. He did so aware that court litigation would be both costly and time-consuming and could be protracted if against Government.[74]

109. Documentation was provided to ODAC on 5 February 2007 in order for it to ascertain whether they would assist the applicant as the attorney of record in a court application.[75]

110. The applicant decided on 8 February 2007 that he would pursue the matter further through the courts and informed ODAC of his decision. By 16 February 2007 the applicant's attorney at ODAC indicated that

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73 Vol 6 p 583 para 30.

74 Vol 1 p 40 paras 98 – 99.

75 Vol 1 p 40 para 100.

although ODAC "in principle" would assist, further information was required. This was provided on 20 and 21 February 2007. [76]

111. On 9 March 2007 the Applicant became aware that PAIA specified a 30-day limit for an appeal to the Honourable Court to be lodged and that such had already expired.[77]

112. The court *a quo* was thus not correct in drawing an inference from the founding affidavit that the applicant had been represented by ODAC for the better part of February 2007 during which time it had inexplicably delayed as the applicant's attorney, and had failed to inform him of the 30 day period thus self-creating urgency.[78] Had this construction been raised in the answering papers, the applicant would have sought to clarify this factual misconception in reply.

113. Moreover, the court *a quo* appears to infer that the applicant should have acted with greater urgency and not have waited for counsel to prepare papers.[79] It appears that the court *a quo* expected him to launch the application himself and to do so despite the deficiency of the Minister's notice in not detailing the procedure for filing such application. Despite

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76 Vol 1 p 41 paras 102 – 103.

77 Vol 1 p 41 para 104.

78 Vol 6 p 584 para 31.

79 Vol 6 p 584 para 31.

setting out the basis why no application was launched in February 2007, and informing the court *a quo* that it was a question of the costs involved in launching of the application that resulted in the engagement of counsel acting on contingency only being able to deal with the matter during May or June 2007, the court *a quo* erroneously characterised this delay as being *"inexplicable"* and devoid of any acceptable reasons for a court *"to nullify"* any culpability on the part of the applicant.[80] In reaching this conclusion the court *a quo* failed to consider that the applicant made it clear that the delays in the launching of this application were largely beyond his control, given that matter was complex in nature and required careful consideration by the legal representatives whose services he had managed to procure.

114. None of the explanations furnished as the grounds for the delay was specifically challenged or denied by the respondents in their answering affidavit. Instead the opposition was premised on the court *a quo* not having the power to grant condonation in the first instance[81] and a bald allegation that the explanation given by the applicant for the his delay was not reasonable given that by July 2007 several decisions had already been handed down which dealt with the provision of PAIA.

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80 Vol 6 p 584 para 31.

81 Vol 3 p 217 para 10 Respondents' Answering Affidavit.

115. It is submitted that the reason for the delay in the launch of the application was explained in detail in the founding papers and met the requirements for good cause shown. These were not placed in issue nor did the respondents indicate that the delay was excessive, wilful or deliberate or complained of any prejudice as a consequence of the delay.

(ii) Sections 77(5) read with section 78(2) of the PAIA

116. Section 77(5)(c) read with section 77(4) of PAIA compels an appeal authority after making a decision on an internal appeal to give notice of the decision to the appellant and in the notice to advise the appellant that an application may be lodged with a court against the decision on internal appeal –

(a) within 60 days or;

(b) if notice to a third party is required by subsection 4(a)(ii),within 30 days; after notice is given.

117. The notice must also provide the procedure to be followed for the lodging of the appeal of the application.

118. This is a peremptory requirement with which the first respondent failed

entirely in his notice to the applicant to comply with in that it made no mention of any time period at all.[82] Despite such non-compliance the court *a quo* assumed for purposes of determining the application for condonation that the notice of the appeal decision substantially complied with the requirements of section 77(5)(c) of the PAIA.[83] It is respectfully submitted that the court *a quo* erred in doing so. On the contrary the court *a quo* should in its consideration of the application have taken into account the fact that the Minister had failed to comply with his statutory obligations provided for in section 77 of the PAIA by failing to inform the applicant of the period within which an application to court should be launched.

119. Although it was never the applicant's case that he had been confused by the different provisions as correctly pointed by the court *a quo*[84] , the applicant in terms stated in his founding affidavit that he first became aware of the 30-day time period when he was alerted thereto on 9 March 2007, seven days after the expiration of the 30-day period from when he was provided with a notice of internal appeal, that such appeal had to be lodged within 30 days by ODAC.[85] Obviously had it been stated in the

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82 Annexure SCB24 Vol 3 pp 201 - 204.

83 Judgment Vol 6 p 578 para 20.

84 Judgment Vol 6 p582 para 28.

85 Applicant's Founding Affidavit Vol 1 p41 para 104.

Notice of Appeal he would have been aware thereof on receipt of the Notice.

120. In the absence of a proper notice as contemplated by section 77 the majority of requesters would probably be unaware of the requirement of 30 days and only find out thereof after receiving legal advice.

121. The respondents, however, persisted with the contention that an applicant had 60 days – as contemplated in section 77(5)(c)(i) of PAIA and not 30 days as required by section 78 of PAIA – within which to approach a Court after being notified of a dismissal of an appeal and the reasons for such decision, and that this period was more than ample for the launching of an application.[86] In other words that the Applicant had until 3 April 2007 within which to launch his application yet only did so by 25 July 2007 (a delay of some 31/2 months). Further that these provisions had been overlooked by the applicant in relation to his constitutional attack.[87]

122. In response the applicant pointed out that the 30 day limit is particularly egregious in light of the two different time periods for the launching of court applications provided for in section 77(5) of PAIA and as such there

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86 Respondent's Heads of Argument Vol 5 p 420 para 25.

87 Respondent's Heads of Argument Vol 5 p 420 para 26.

could not be a basis, on a reading of PAIA itself, that the 30 day requirement constituted the least restrictive means of achieving the purpose of PAIA as envisaged in the limitation enquiry.[88] In other words it would not save section 78(2) of the PAIA from unconstitutionality.

123. It was in this context that the Applicant raised the apparent different time periods contemplated by section 77(5)(c)(i) and section 78(2) which *ex facie* conflicted with each other.[89] The former contemplates a notice to an appellant advising that an application to court should be launched within 60 days and the latter compels such application to be launched within 30 days.

124. The court *a quo*, in an attempt to explain the inconsistency in the time periods provided for in section 77(5)(c)(i) and section 78(2) respectively, held that whilst section 78 exhaustively governed applications for relief in terms of section 82 of the PAIA thus compelling the institution of court proceedings within 30 days of receipt of a notice of appeal, a requester, though aggrieved by the appeal authority's decision yet sought relief outside the ambit of section 82, may do so within 60 days after receipt of the appeal decision.[90] It is respectfully submitted that the court *a quo*

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88 Applicant's Heads of Argument Vol 5 p 404 para 60.

89 Applicant's Heads of Argument Vol 5 p 404 para 61.

90 Judgment Vol 6 pp 581 – 582 para 27.

erred in seeking to draw this somewhat artificial distinction in order to justify the inconsistency created by the provision of different time periods provided for in the PAIA.

125. This interpretation is not borne out by Chapter 2 of PAIA, which sets out the procedure to be followed in relation to applications to court for the judicial review of decisions made under PAIA and contemplates that it be invoked once an internal appeal is exhausted. It is also not supported by section 77(5)(b) which merely sets out the peremptory requirements to be contained in a notice of appeal and is not an empowering provision permitting the institution of legal proceedings within period of 30 days for some litigants and 60 days for others.

126. In light of this, the class of persons informed by notice that they had 60 days within which to launch a court application and who did so after 30 days would fall foul of section 78(2) of the PAIA. In this regard it is submitted that section 77(4) read with subsection (5) does no more than detail the information which an appeal authority is obliged to furnish an appellant after deciding an appeal and as such the court *a quo* erred in characterising it any differently.

(iii) The court *a quo's* findings on the merits and in relation to prospects of success

127. The court *a quo* correctly concluded that even though it was not satisfied with the applicant's explanation for his delay, this alone was not fatal to his application.[91]

128. However it is submitted that the court *a quo* materially misdirected itself in proceeding only to consider the issue of prospects of success –but in so doing materially misconceived the applicant's prospect of success.

129. It is respectfully submitted that the approach of the court *a quo* in exercising its discretion was not consistent. Although it accepted that in applications for condonation in order to determine whether there was "good cause" to grant condonation it had to exercise a judicial discretion upon a consideration of all the facts and circumstances of a case in a manner that is fair to both sides,[92] it failed to do precisely that.

130. In concluding that condonation should not be granted the court *a quo* confined itself solely to the sufficiency of the explanation and extent of the delay on the part of the applicant and the applicant's prospects of

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91 Vol 6 p 584 para 32.

92 Vol 6 p 580 para 24.

success on the merits.

131. While it is accepted that good prospects of success would compensate for any deficiencies in an explanation for the delay, the court *a quo* should also have given consideration to other factors relevant to the exercise of its discretion and assessed the circumstances in a balanced fashion.

132. In adopting the approach which it did, the court *a quo* failed to have regard to the nature and importance of the relief sought; that the questions to be resolved in the case were of paramount importance; the effect of the delay on the administration of justice and other litigants; the extent to which the court may have been inconvenienced; the nature of the default; the *bona fides* of the applicant and any contribution by other persons or parties to the delay and the applicant's responsibility therefor. Nor did it consider that the respondents did not complain of prejudice caused by the delay or that the respondents would not suffer any potential prejudice should the condonation be granted.

133. The court *a quo* erred in concluding that the period of delay of approximately 4½ months was too long, given that there was no prejudice and that in the ordinary course review applications as provided for in the Promotion of Administrative Justice Act can be launched within a period of 180 days or within three years for “debts” due by the state.

134. This Court has held that the broad test for granting condonation for late applications is whether it is in the interests of justice to do so and if the matter raises fundamental questions the resolution of which is of paramount importance not only to the immediate parties, but also serve the broader community and public interest then the request for condonation should be granted. This assessment depends on the facts and circumstances of each case.

135. In considering an application for condonation for leave to appeal, this Court held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration, is not the only factor in the determination of the interests of justice.[93]

136. The explanation furnished by the applicant for the delay was not so unreasonable that it would be contrary to the interests of justice in the circumstances of this case to grant such condonation particularly given that:

(a) The nature of the relief sought relates to the enforcement of a constitutional right and the determination of constitutional issues.

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93 *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* (2000) (2) SA 837 (CC) para [3]. *See also*, the recent and as yet unreported decision of this Court in *Bertie van Zyl (Pty) Ltd and Others*, *supra*, at paragraphs 13-14 read with the authorities at footnote 8.

(b) The extent and cause of the delay is but one factor to be considered and in light of this Court having condoned a delay in the lodging of an application for leave to appeal just under a year late having had regard to the procurement of legal assistance as the explanation advanced for the delay, the absence of apparent prejudice to and opposition by the State, as well as the fact that reasonable prospects of success do exist.

(c) The delay did not negatively affect the administration of justice and other litigants, nor did it cause any prejudice to the Respondents.[94]

(d) Even if the reasons for the delay are not wholly satisfactory it would not serve the interests of justice in this case to be overly technical, particularly given that no one is prejudiced by this application.[95]

137. In *Veldman v Director Of Public Prosecutions*,[96] this Court considered all the factors including the reasonableness of the explanation for the delay. It held that the applicant failed to comply with the time limits set out in the Rules regarding appeals from the SCA to this Court and that even though the explanation tendered, if viewed in isolation, might not seem sufficient, the prospects of success in this matter and the fact that the respondent did not oppose the application for condonation tilted the

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94 *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC).

95 *Wallach v High Court of South Africa, Witwatersrand Local Division* 2003 (5) SA 273 (CC).

96 2007 (3) SA 210 (CC).

scales in the applicant's favour. Moreover, the matter was of particular importance to the applicant in circumstances in which, overall, it had not been shown that the delay caused any prejudice. For these reasons, considered collectively, the application for condonation was granted.

138. In considering the Applicant's prospects of success it must be borne in mind that section 39(1)(b)(iii)(ee) of the PAIA is the only ground relied upon by the Minister to justify the refusal of the Applicant's request for access to information.

(iv) Section 39(1)(b)(iii)(ee)

139. Section 39(1)(b)(iii)(ee) of PAIA provides:

"The information officer of a public body--

(a) …

(b) may refuse a request for access to a record of the body if--

(i) …

(ii) …

(iii) the disclosure of records could reasonably be expected –

(aa) …

(bb) …

(cc) …

(dd) …

(ee) to prejudice or impair the fairness of a trial or the impartiality of an adjudication."

140. A restrictive approach must be adopted to the interpretation of section 39(1)(b)(iii)(ee) of PAIA insofar as constitutes a limitation on the right of access to information read with ss 36 and 39(2) of the Constitution.

141. Moreover section 39(1)(b)(iii)(ee) of PAIA posits an objective test - in other words a type of fact or state of affairs must exist in an objective sense before there can be a refusal to disclose and a court is entitled to enquire as to the objective existence thereof to which end the court *a quo* should have considered both the categorisation of the records sought as well as the assessment of the adverse consequences of the disclosure of that information.

142. This Court would thus have to determine whether in fact the likelihood of harm exists or whether in fact there is good reason to expect a harmful consequence – an onus which was borne by the respondents and which had not been discharged in this application.

143. The Minister in invoking section 39(1)(b)(iii)(ee) of PAIA, as the basis to refuse the applicant's request, did so after having regard to the request, representations made by third parties and the D-G's reasons for refusal of the request. The respondents did not take the court *a quo* into its confidence as to the identity or nature of the representations made by third parties. (In this regard it is pointed out the definition for third party

would in respect of a record of a public body exclude the requester and a public body such as SITA.)

144. The Minister, however, adopted (almost verbatim) the reasons furnished by the D-G in relying on section 39(1)(b)(iii)(ee) of PAIA stating:

> "… *[T]he 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.*" (emphasis added)[97]

145. Whilst the court *a quo* was correct in concluding that in discharging their onus the respondents had to show that the probable consequences of a disclosure of a record could reasonably be expected to produce results which will prejudice or impair the fairness of the trial or the impartiality of its adjudication,[98] it erred in failing to find that the respondents had not discharged this burden.

146. No details are provided on affidavit of what constituted the *"reasonable grounds"* for the aforementioned expectation, nor is the Court taken into

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97 Vol 3 pp 201 – 204 "SCB24".

98 Vol 6 p 587 para 41.

confidence in respect of the anticipated prejudice which the respondents foresaw impairing the fairness of the civil trial.

147. In oral argument the only “reasonable grounds” on which the respondents sought to rely as a basis for an apprehension that harmful consequences would be probably with regard to the fairness of the trial or the adjudication of the issues between the parties is the declared intention of the applicant to report on information reflected in the records . No causal link or foundation is shown to demonstrate that the disclosure of the records sought will lead to publication which would either:

(a) Prejudice or impair the fairness of the trial; or

148. The impartiality of the adjudication.

149. In this regard the respondents contended that the fairness of the trial related both to the position and role of the judge – the ability of the judge to determine the issues between the parties with impartiality, without being tainted by the prior disclosure of records or any act associated with such a disclosure as well as to the parties’ respective abilities to fairly present their case without being compromised by the disclosure of records.

150. No other *"reasonable grounds"* were provided for the respondents concluding that the judge presiding would be influenced by articles which the applicant would write. The respondents relied on these contentions as a basis for their *"reasonable belief"* without even knowing when (or if) the trial would commence or who the judge presiding would be then, in all likelihood at least two years hence.

151. In this regard it is pointed out that the respondents failed to establish their case for refusal of access to documentation under section 39(1)(b)(iii)(ee) i.e. failed to discharge an onus showing that a likelihood or reasonable expectation of probable harm exists or good reasons existed to expect a harmful consequence be it in the form of prejudice or impairment.

152. As such there was no impediment to the granting of the applicant's right of access to documents. Looked at objectively, articulate and acceptable reasons must exist for the expectation and the Minister cannot rely on grounds merely speculative, imaginable or theoretically possible.

153. In this regard it is respectfully submitted that the court *a quo* erred in concluding that the applicant failed to show reasonable prospects of success and misdirected itself on the merits of the application and applied incorrect facts and wrong principles of law in finding that:

(a) the applicant's request for records by virtue of the use of the descriptive phrase *"design, development and implementation of a grant administration system"* meant that it undoubtedly related directly or indirectly to records which have a bearing on the subject matter of the litigation pending in the North Gauteng High Court, namely, whether or not SITA awarded Tender 82 to the consortium;

(b) the integrity of the judicial process would be severely compromised if a record, which a party to litigation intended to use to prove or disprove a claim was made available to a third party before the finalisation of a trial and that such disclosure created a risk of prejudice to the administration of justice;

(c) the respondents had provided *"proof of probability"* that access to the records will result in prejudice or impairment the fairness of the trail; or the *"impartiality of the adjudication"* and on that basis could refuse access to such records.

154. Whilst the respondents initially contended that all the documents in relation to which the applicant sought access had been discovered in the North Gauteng High Court, in response to a query at the hearing of the

matter from the court *a quo* whether the first respondent had discovered all the documents to which the applicant sought access, or only some of the documents, senior counsel for the respondents submitted that the discovered documentation included some of the documents but that there was *"no way"* that the first respondent could have discovered all the documents sought including records of conversations, etc given the vastness of the documentation requested.

155. Accordingly, it is apparent that there was no exact overlap between the discovered documentation and the records requested by the applicant particularly given that the discovered documentation is not vast in number. As all documents relevant to the trial had to be discovered in terms of the rules relating to discovery, the inference can be drawn that the Department has retained in its possession documentation not discovered but which form part of the applicant's request. In respect hereof the respondents would not be entitled to invoke section 39(1)(b)(iii)(ee) of the PAIA and for that reason alone the court *a quo* erred in concluding that the applicant had no prospects of success on the merits.

156. To the extent that the Department discovered records sought by the applicant relevant to any future pending proceedings in the North Gauteng High Court such documentation is already in the possession of

the plaintiff (or could relatively easily be so obtained through the discovery process) and there is no case made out that the disclosure thereof to a third party would prejudice the defendants in that court or what the exact nature of such prejudice would be or how the integrity of the judicial process would be tainted particularly given that court proceedings are protected by the common law *sub judice* rule, a factor simply ignored by the court *a quo* in the circumstances of a case unlikely to proceed to court before 2011.

157. As to the court *a quo* finding that the respondents had provided *"proof of probability"* that access to the records will result in prejudice or impairment the fairness of the trail; or the *"impartiality of the adjudication"* in reaching this conclusion the court *a quo* failed to have regard to dicta and meaning attributed to the phrase "reasonably be expected to" as determined by the SCA.[99]

158. In *SA Metal Machinery*, *supra*, the SCA expounded further on the meaning of the phrase "reasonably be expected to." It held:

> **"[31] … However, the party resisting disclosure does not have to prove a certainty but a probability. Proof of a probability (or**

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99 *Minister For Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland), supra*.

> **more accurately, proof of a likely result on a balance of probability) is something litigants and courts are concerned with every day all over the world. If the reviewer's problems were real rather than imagined, countless damages claimants could never succeed in proving probable harm …".**

159. The SCA then considered the observations of *Currie and Klaaren*,[100] disagreed with those observations and posited the test as follows:

> **"[42] If follows that the difference between (b)["likely"] and (c)["could reasonably be expected"] is to be measured not by degrees of probability. Both involve a result that is probably, objectively considered. The difference, in my view, is to be measured rather by degrees of expectation. In (b), that which is likely is something which is indeed expected. This necessarily includes, at least that which *would* reasonably be expected. By contrast, (c) speaks of that would '*could* reasonably be expected'. <u>The results specified in (c) are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation</u>."** (Our emphasis)

160. In formulating this test, the SCA did not only rely on the linguistic reasons set out above but on a second reason, that is, "context":

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100 *Supra, at* 102-103, at para 38.

> "[43] **The second reason is context. In line with the Canadian statute and the Canadian cases, I consider that consideration of the long title, preamble, objects and content of the relevant sections of the Act, read with the Constitution, demonstrate the government information must be available to the public as a matter of right. That is the basic rule. To cater for third parties' rights to privacy there are exceptions to the rule. They are limited and specific…"** (Our emphasis.)

161. We submit that the test postulated by the SCA and its reasoning are equally applicable to the interpretation of the similar phrase in section 39(1)(b)(iii)(eee) and to the limited exceptions detracting from the basic rule of access to information.

162. We submit that the court *a quo* erred in this regard, that is, in finding that the respondents had provided proof of probability that the fairness of the trial would be impaired or prejudiced and that it would affect the impartiality of the trial. No evidence meeting the test posited by the SCA above was provided by the respondents.

163. In the result, we submit that the court *a quo* erred in concluding that the applicant's application for condonation and access to information ought to be dismissed with costs.

164. In particular, it is difficult to determine the basis of the costs order in the light of a well established jurisprudential principlesw established by this Court that litigants raising genuine and substantial constitutional issues ought not to be penalised with costs, especially were there can be and is no suggestion that the litigation is vexatious. That we would submit is the position in this case.

G. CONCLUDING SUBMISSIONS

165. In the circumstances, the applicants submit that the rule of law and demands of justice are such that the immensely important constitutional issues raised by the present matter ought to reach this Court by the grant of leave to appeal directly to it.

166. The applicant submits that it has demonstrated the required reasonable prospects of success in this appeal, should leave to appeal be granted. The applicant has also demonstrated that the issues raised by the present case are unquestionably constitutional matters of substance.

167. For these reasons we respectfully submit that the application for leave to appeal directly to this Court and for confirmation of the order of constitutional invalidity be granted and that the appeal in respect of order

1 and 2 be upheld, with costs, including those consequent upon the employment of two counsel

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12 May 2009

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