IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 25/09

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 & CONSTITUTIONAL DEVELOPMENT Third Respondent

In re

RESPONDENTS' SUBMISSIONS TO THE HUMAN RIGHTS COMMISSION'S APPLICATION FOR ADMISSION AS *AMICUS CURIAE*

APPLICANT'S SUBMISSIONS

INTRODUCTION

1. At the hearing of this application on Tuesday 26 May 2009 the respondents objected to the admission of the Human Rights Commission of South Africa ("HRC") as *amicus curiae.*

2. Following these objections, directions were issued by the Court regarding time periods for the filing of written submissions in response to the HRC's application.

3. The respondents were given a two-week period in which to make written submissions in order to cure any prejudice they felt the admission of the HRC would cause. The applicant was given a week thereafter to respond to the issues raised.

4. These submissions are in response to the relevant issues raised by both the HRC and the respondents. It is regretted that these submissions are approximately two days later than that Ordered by this Court but this arose due to the delivery of the respondents' submissions on 11 June 2009.

RESPONDENT'S OBJECTIONS TO THE ADMISSION OF THE HRC

5. As stated at the hearing the applicant does not oppose the admission of the HRC as an *amicus curiae*. It is submitted that its admission is in the interests of justice and that the submissions made by the HRC will and do contribute to a proper analysis of the legal and constitutional issues presented.

6. The respondents take issue with the HRC's late application and the explanation tendered for this.[1]

7. When the respondents first raised these objections at the hearing on the 26 May, the Court itself dealt with the issue thoroughly in its questions to the HRC on the reasons for the late application.

8. The reasons given by the HRC at the hearing were the same as those contained in their written application, namely, that in order to comply with the requirements of Rule 10 of this Court's Rules, it had to consider both the applicant's and respondent's written submissions before proceeding, and that the time periods for the filing of the applicant's and respondent's submissions presented a very truncated period.[2]

---

[1] Respondents' written submissions re HRC p 4 & 5, paras 6 & 7

[2] Founding affidavit of Thomas Madikwe Manthata, paras 19 & 20

9. The Court canvassed the opinion of both the applicant and the respondent to this *amicus* application, and the respondents' conceded in argument that any prejudice the respondents might endure as a result of the HRC's late application would be cured by allowing them time to make written submissions dealing with the issues raised by the HRC. This has happened.

10. This means that any potential prejudice to the respondents has been cured.

11. It is thus unclear why the respondents' written submissions belabour this point.

12. It is submitted that the Court ought only to have regard to the respondents' submissions on the merits of the HRC's application, as the respondents' objections to admission and related issues of prejudice were disposed of at the hearing.

THE HRC'S ROLE IN THIS MATTER

13. HRC's role is twofold in this particular matter – it enjoys both a constitutional mandate in terms of section 181(1)(b) and section 184 of the Constitution, and also has a specific role with regard to sections 32, 83 and 84 of PAIA. Accordingly, it is a constitutional body deeply entrenched in the implementation and working of PAIA.

14. The respondents assert that the HRC “enters the fray as though it were a party.” [3] However, it is submitted that the HRC’s constitutional mandate as well as its specific role with regard to PAIA places its interest in and contribution to this matter on an elevated footing to that ordinarily attained by an *amici*.

15. Given the HRC’s unique function with regard to both the Constitution and PAIA, it is in a pre-eminent position to assess the approach of the court *a quo* and to comment on the merits of the matter.

16. The HRC’s submissions are particularly relevant as quite apart from the constitutional issue regarding section 78 (2) of PAIA, this is also the first time that section 39(1)(b)(iii)(ee) has been considered by the courts. The interests of justice are surely met by the contribution of the HRC to an understanding of the interpretation of these sections, rather than by excluding altogether what are essentially submissions on the law.

17. Furthermore, the HRC has advanced submissions on the interpretation of section 11 of PAIA that have not been dealt with by any of the parties, [4] and that have a direct bearing on section 39(1)(b)(iii)(ee) as a ground of refusal. Again, we respectfully

---

[3] Respondent’s written submissions re HRC p 6 para 10

[4] HRC’s written submissions p 60, para 90 – p 64 para 101

submit that the interests of justice are promoted through a full rather than a limited ventilation of these important legal and constitutional matters.

THE PUBLIC INTEREST IN THE OUTCOME

18. It is incorrect for the Respondents to assert that the applicant abandoned his reliance on section 46 PAIA.[5] The public interest is not only at the heart of this application and has been so from its inception, but it is also the overarching context within which this matter must be considered.

19. A litigant is not required to repeat statements simply because these might be construed as abandoned. The founding affidavit unequivocally demonstrated the basis on which the applicant approached this Court. Quite apart from stating that this matter was being brought in the public interest in the applicant's founding affidavit[6] and heads of argument[7] in the court *a quo*, the applicant specifically invoked section 46 PAIA in his founding affidavit.[8]

---

[5] Respondents' written submissions re HRC p 6 para 10, p17 para 39 – 41

[6] Vol 1 p 9 para 7

[7] Vol 4 p 375 para 2

[8] Vol 1 p 44 para 113

20. Likewise, in argument in the court *a quo*, the public interest infiltrated every aspect of the applicant's submissions. For example, in arguing that the respondents' reliance on section 39 is a limitation of the right to information, the applicant submitted the limitation must be one that does not impede the objects of the Act, it must justify the limitation in that it forms "the greater objective to be achieved".[9] This is clearly a reference to s46 (b) that requires mandatory disclosure in the public interest if

> **"(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."**

21. When discussing the issue of condonation in the court *a quo*, the applicant mentioned factors considered by the courts in contemplation of the issue of prospects of success, where the court considered "a third factor, whether there is a public interest that the matter be heard and determined."[10]

22. Similarly, the applicant in argument made reference to this matter as public interest litigation in and of itself.[11]

---

[9] Transcript of hearing, Vol 6 p 470 lines 2 – 7

[10] Transcript of hearing Vol 6 p 494 lines17 – 19

[11] Transcript of hearing, Vol 6 p 502, lines 14-15

23. The applicant's interest in the matter is inextricably connected to the public interest and his role as an investigative journalist demonstrates this. It is also significant that he sought the assistance of a public interest organisation in launching his application to court. In any event, this Court has already repeatedly pronounced on the critical role that the media plays in society and it is not necessary to repeat those arguments here.

SECTION 39(1)(b)(III)(ee) OF PAIA

24. The respondents submit that the English and American cases upon which the HRC relies are not appropriate because the wording of section 39(1)(b)(iii)(ee) is different to the relevant provisions of FOIA.[12] We submit, the contrary. To the extent that there are obvious similarities in the comparative wording (at least in so far as "fair trial or impartial adjudication"), we submit that the submissions made by the HRC and comparative learning presented in those contexts are relevant and helpful.

25. We submit further that the HRC's emphasis on the need for the court to scrutinise the grounds for refusal, and for the party invoking refusal to prove that refusal was justified,[13] is both appropriate and highly relevant to the issues presented in this matter.

---

[12] Respondent's written submissions re HRC p 10 para 18.1 & p 12 para 24

[13] HRC's written submissions, p 34 para 57

26. In the same vein, the respondents contend that the test articulated in the *Midi Television* case postulated by the HRC is inappropriate as it deals with prior restraints on publication,[14] and also because there is no constitutional challenge to section 39(1)(b)(iii)(ee).

27. While it is correct that the constitutional validity of this section is not in question, it is trite that its applicability must still be assessed through the "prism of the Bill of Rights"[15], and this includes freedom of expression and inter-related rights of access to and to receive information. Although section 39(1)(b)(iii)(ee) does not *per se* impose a ban on publication, its invocation in this instance has the practical effect of withholding information in the public interest which might have led to timeous publication. This clearly imposes a limit on what the HRC referred to as "the cluster of rights" contained in section 16 of the Constitution.[16]

28. In their submissions, the respondents, with reliance on section 39(1)(b)(iii)(ee), seek to perpetuate a fiction relied upon in the court

---

[14] Respondent's written submissions p11 para 22

[15] Fraser v Absa Bank Ltd (National Director for Public Prosecutions as Amicus Curiae) 2007 (3) SA 484 (CC), at para 43; and Phumelela Gaming and Leisure Ltd v Grundlingh and Others 2007 (6) SA 350 (CC), at para 27. See also 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.

[16] HRC's written submissions, re HRC p 4 para 3.2

a quo, namely that the applicant adopted "a stance inimical to the respondent's defence"[17] with regard to the IT Lynx claim.

29. The respondents assert further that the applicant has already formed "a view" that the "IT Lynx claim should be resolved in favour of IT Lynx and against the respondents."[18] This then, gives rise to their "apprehension" of what will result from the applicant's publication should he obtain access to the records he seeks.

30. In their development of this unfounded argument, the respondents are selective in emphasis about what was <u>actually</u> said by the applicant in his replying affidavit. It is submitted that the correct emphasis is that set out below:

> **In respect of the allegations contained in paragraph 21 it is not necessarily correct that the tender was not awarded, but withdrawn. IT Lynx was informed by way of a letter that it had been awarded the tender jointly with another entity. <u>Whether or not this constitutes "an award of the tender" is one of the issues which will have to be determined at the hearing of the IT Lynx claim, if it ever proceeds.</u> In this regard Part 8, paragraph 31 of the Public Protector report states that: "*The basis of the main claim is that part of the tender . . . was awarded by SITA to IT Lynx and that SITA has failed to implement the contractual agreement between it and IT Lynx.*"[19]**
>
> **(Emphasis added)**

[17] Respondent's written submissions, p14 para 30

[18] Respondent's written submissions, p 12 – 13 paras 26 - 27

[19] Vol 3 p 242 para 8.4, applicant's replying affidavit

31. The applicant is in fact saying exactly what the Public Protector said in his report.

32. Secondly, the respondents misinterpret what was actually said by the applicant and where his interests really lie. In his founding affidavit, the applicant states:

> **"Accordingly, the issue remained whether the Minister had knowledge at the time when Majale/Imvume had made the R65 000 payment that Majali/one of his companies was part of the consortium that demanded he implement the tender it believed it had been awarded.**
>
> **It was primarily to report accurately and properly on the issue, which clearly fell within the public domain, that I resolved to apply, as I was entitled to, under the PAIA for all records reflecting interactions between the Minister/Department and others relating to Tender 82 from the Department. These are detailed in Annexure A to the Notice of Motion."[20]**
>
> **(Emphasis added)**

33. Further, in the applicant's replying affidavit, he states:

> **"As apparent from my founding affidavit my interest is not in indiscriminate publication, but to report accurately on the much more limited issue of whether, at the time Mr Majali made the R65 000**

---

[20] Vol 1 p 15 paras 19 – 20, applicant's founding affidavit

> **payment in furtherance of the renovations at the Minister's home, the Minister knew of Mr Majali's involvement in the IT Lynx consortium."[21]**

34. The applicant's record of reporting annexed to his founding affidavit demonstrates his true interest in the matter and does not indicate any slant. The first time the IT Lynx claim was mentioned is in the article annexed as SCB 6,[22] a reading of which makes it clear that the applicant had not formed any "view" about the way the IT Lynx claim should be resolved.

35. Despite the respondents' persistence with unfounded "apprehension", their reliance on section 39(1)(b)(iii)(ee) amounts to no more than an unfounded suspicion that the applicant will report on a matter that is, in any event, *sub judicae*, and that he will therefore wantonly break the law, despite his assurances that he would not do this,[23] and without any evidence to support these claims and assertions.

CONCLUDING SUBMISSIONS

36. The respondents submit that the reasonableness of the 30 day time period in s78 (2) of PAIA should be assessed against the 15 day

---

[21] Vol 3 p 249 para 17, applicant's replying affidavit

[22] Vol 1 pp 79 – 81, annexure SCB 6

[23] Volume 1 p 29 para 62, applicant's founding affidavit

period in which to bring an appeal to this Court under rule 18.[24] This contention, however, disregards the fact that by the time an appeal is made to this Court, or for that matter to the High Court or the Supreme Court of Appeal, the appellant will already have legal counsel in place who will be well versed with the issues. This is of course not the case when launching a court application for the first time, particularly one in terms of a lengthy, complicated and often confusing statute such as PAIA.

37. The respondents, in their answering affidavit to the HRC, object to submissions made with regard to the report of the Public Protector that was annexed to the applicant's founding affidavit.[25] The respondents then, in an effort to enable the court to "assess the allegation in its proper and full context",[26] annex "MI" which is a report of the Public Protector dated 2005 and a different one relied on by both the applicant and the HRC which is Report No: 3/2006.

38. It is submitted that this first report submitted by the respondents related to the Oilgate scandal, and that the quotations relied on by the respondents are themselves quoted out of context.

39. In any event, this first report by the Public Protector was taken on review in November 2007, case no 2263/06 in the North Gauteng

[24] Respondents' written submissions re HRC, p 8 para 14.3

[25] Respondents' answering affidavit to HRC p 11 paras 25 – 26

[26] Respondents' answering affidavit to HRC p 12 para 27

High Court. The applicant was one of the applicants in this review application, and judgment in the matter is still pending.

40. The respondents allege that it came to their attention on 27 May 2009, the day after the hearing in this court, that the IT Lynx matter was enrolled (albeit erroneously by the registrar) in the North Gauteng High Court for trial on 25 August 2009, and that this indicates that the IT Lynx matter is not dormant.[27] However, despite the applicant's best efforts, they could find absolutely no evidence of any re-enrolment of the matter.[28] It is therefore submitted that the IT Lynx matter has not been re-enrolled since it was struck from the roll on 29 September 2008, and indeed remains dormant.

41. The respondents' affidavit alleges that for the purposes of Tender 82, "the Department was the client of the SITA" and that "SITA was responsible for soliciting bids and evaluating tenders".[29]

42. The subtext of this allegation is that the applicant somehow included SITA as the department's agent in his request, as the respondents case from the beginning has been that the applicant's <u>real</u> interest is in the award of the tender.

---

27 Respondents' answering affidavit to HRC p 16 paras 36 – 38

28 Affidavit of Michelle Desai, filed with these submissions

29 Respondents' answering affidavit to HRC p 18 para 39.4

43. However, the applicant's request in Annexure A to his founding affidavit[30] is detailed, and does not include any communication involving SITA. The applicant did not ask for any communication between SITA and IT Lynx which has been discovered and which is relevant to the IT Lynx claim. Had this claim been the applicant's real interest, he would have requested these communications from the outset.

44. The documents discovered in the IT Lynx matter all involve SITA, as is evident from the discovery affidavit handed up at the hearing on 26 May 2009. From this discovery affidavit it is obvious that what the applicant is seeking is different to that which is relevant to the IT Lynx claim.

45. The respondents state that the records in paragraph 4 and 5 of Annexure A relating to interactions between the Minister of Finance or National Treasury and the Minister of Social Development are relevant to the IT Lynx claim.[31] It is submitted that the relevance or otherwise of these records to the IT Lynx claim are in fact not known. They may well be relevant and they might also not be. However, these records were not discovered by the respondents, who were obliged to discover all relevant documents in terms of the rules of discovery. On their own version, then, these documents/records are <u>not</u> relevant to the IT Lynx claim.

---

[30] Vol 1 pp 5 – 6

[31] Respondents' answering affidavit to HRC p 18 para 39.6

Andrea A Gabriel

Ellen Fitz-Patrick

Applicant's Counsel

Chambers, Durban and Cape Town
18 June 2009

TABLE OF AUTHORITIES

Fraser v Absa Bank Ltd (National Director for Public Prosecutions as Amicus Curiae) 2007 (3) SA 484 (CC), at para 43

Phumelela Gaming and Leisure Ltd v Grundlingh and Others 2007 (6) SA 350 (CC), at para 27

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.