IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

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 & CONSTITUTIONAL DEVELOPMENT	Third Respondent

---

JUDGMENT DELIVERED ON 16 MARCH 2009

ZONDI, J

Introduction

[1] On 21 February 2006 and pursuant to the provisions of the Promotion of Access to Information Act, 2 of 2002 ("the Act") the applicant approached the second respondent seeking access to certain information relating to Tender 82 for the design, development and implementation of a grant administration system. On 20 May 2006 the second respondent refused applicant access to the requested information citing various reasons. Thereafter the applicant lodged an appeal to

the first respondent against the second respondent's decision. The first respondent dismissed the applicant's appeal on 22 December 2006. The applicant brought the present application to this Court seeking an order setting aside the first respondent's decision and condoning its non-compliance with the provisions of the Act relating to time period within which to bring the application.

[2] The first and second respondents oppose the application and the relief sought by the applicant on the basis that the application is late and that the applicant is not entitled to the requested information.

[3] In the alternative the applicant seeks an order declaring section 78 of the Act to be inconsistent with the provisions of the Constitution and unconstitutional to the extent that it infringes his right of access to Court by imposing an unreasonable time limit on the period within which he may institute legal proceedings. The third respondent opposes the alternative relief sought by the applicant.

[4] The records to which access is sought are set out in Annexure "A" to the Notice of Motion. These are:

> *"1. All correspondence (including but not limited to, telefaxes, letters and emails) between the IT Lynx Consortium (and/or it's representatives) and the national Department of Social Development and/or the Minister of Social Development and/or their*

representatives) relating to the State Information and Technology Agency (SITA), tender no 0082/2001 ("Tender 82") for the design, development and implementation of a grant administration system and/or relating to the same grant administration system that the tender eventually envisaged.

2. All correspondence (including but not limited to, telefaxes, letters and emails) between companies, persons and other entities which may be associated with the IT Lynx Consortium, including but not limited to Net 1 Support Services, Net 1 UEPS Technologies, Aplitec, New Aplitec, IT Lynx Placements, Kokeletso Investment Holdings, Nokusa Consulting, Imvume Resources, Imvume Management, any of the companies in the Permit Group, Mr Serge Belament, Mr Obbey Mabena, Mr Sandi Majali (and/or their representatives), and the national Department of Social Developement (and/or the Minister of Social Development and/or their representatives) relating to Tender 82 for the design, development and implementation of a grant administration system and/or relating to the same grant administration system that the tender eventually envisaged. This includes but is not limited to correspondence which ensued both prior to, and after Tender 82 was initiated by SITA until the present date.

3. All records, including, but not limited to agendas, minutes, notes, memoranda and any other communication in writing, or in audio or video communication of/or relating to meetings and/or conversations between IT Lynx Consortium (and/or its representatives) and/or the entities or persons who may be associated with the IT Lynx Consortium as listed in paragraph 2 above and the Department of Social Development (and/or the Minister of Social Development and/or their representatives) relating to Tender 82 for the design, development and implementation of a grant administration system and/or relating to the same grant administration system that the tender eventually envisaged. This includes but is not limited to records which ensued both prior to, and after Tender 82 was initiated by SITA until the present date.

4. All correspondence (including, but not limited to telefaxes, letters and emails) between the Treasury/ Department of Finance and/or the Minister of Finance (and/or their representatives) and the Department of Social Development and/or the Minister of Social Development (and/or their representatives); relating to Tender 82 for the design, development and implementation of a grant administration system and/or relating to the same grant administration system that the tender eventually envisaged. This includes but is not limited to correspondence which ensued both

prior to, and after Tender 82 was initiated by SITA until the present date.

5. All records including, but not limited to agendas, minutes, notes, memoranda and any other communication in writing, or in audio or video communication of/or relating to meetings, and/or conversations between the Treasury/Department of Finance and/or the Minister of Finance (and/or their representatives) and the Department of Social Development and/or the Minister of Social Development (and/or their representatives); relating to Tender 82 for the design, development and implementation of a grant administration system and/or relating to the same grant administration system that the tender eventually envisaged. This includes but is not limited to records which ensued both prior to, and after Tender 82 was initiated by SITA until the present date."

Factual Background

[5] The applicant is employed by Mail & Guardian Media Ltd as an investigative journalist. The records to which he seeks access relate to the State Information and Technology Agency tender number 0082/2001 ("SITA tender 82") for the design, development and implementation of a grant administration system.

[6] It is common cause that in November 2001 the SITA advertised a tender for the new Information Technology System for the Department of Social Development. The closing date for the tender was 14 December 2001. IT Lynx Consortium ("IT Lynx"), (comprising IT Lynx Placements (Pty) Ltd, Koketso Investment Holdings (Pty) Ltd and Net 1 Support Services (Pty) Ltd) submitted its bid for the tender. The failure to award this tender has become the subject matter of litigation between IT Lynx, as the plaintiff on the one hand, and on the other hand, SITA, the first respondent herein and the Minister of Finance as the first, second and third respondents, respectively, in the Transvaal Provincial Division of the High Court.

[7] The basis of the claim by IT Lynx is that the SITA tender 82 was awarded to it and that the SITA and the first respondent have failed to implement the award. IT Lynx seeks the implementation of the award, alternatively the cancellation of the contract resulting from the alleged award of the tender to it and the payment of damages in the amount of R149 256 285-00 plus interest and costs. This claim by IT Lynx is defended by the first respondent and the matter is set down for trial on 23 September 2010.

[8] On 3 February 2006 the Mail and Guardian published an article suggesting that the payment of R65 000-00 in December 2003 by Mr Majali / Imvume to the first respondent's wife for renovations at the first respondent's house might have been an attempt by Mr Majali to influence the first respondent in regard to the tender for which Mr Majali's company was bidding.

[9] On 21 February 2006 the applicant applied to the second respondent for access to essentially all records reflecting interactions between the first respondent and/or the Department of Social Development and others relating to Tender 82 primarily for the purpose of reporting accurately and properly on the issue whether the first respondent had knowledge at the time that Mr Majali or Imvume had allegedly made the R65 000-00 payment to the first respondent's wife that Mr Majali or one of his companies was part of the IT Lynx Consortium that demanded the first respondent to implement the tender it believed it had been awarded. The second respondent did not determine the applicant's request within 30 days after receiving the request as required by the Act and the deadline was extended by agreement between the parties. The second respondent eventually denied the applicant's request for access to records on 12 May 2006, that is 20 days after the expiry of the extended period.

[10] On 9 June 2006 the applicant appealed to the first respondent against the decision of the second respondent. In a letter dated 22 December 2006 and faxed to the applicant on 2 February 2007 the first respondent informed the applicant that his internal appeal had been turned down. The letter reads:

> ***"RE: INTERNAL APPEAL: REQUEST FOR INFORMATION IN TERMS OF THE PROMOTION OF ACCESS TO INFORMATION ACT.***
>
> *1. I refer to your appeal lodged with the Director-General against his decision to refuse access to information you requested in your*

*letter dated 11 February 2006, in terms of the Promotion of Access to Information Act, 2 of 2000 ("**PAIA**").*

2. As required by law, the Director-General as the information Officer for the Department of Social Development notified me, the Executive Authority, of the appeal which I must consider and make a decision on.

3. In terms of section 76(3) of the Act I have notified third parties to whom the requested information relates and I need to study their representation, your appeal and the Director General's reasons for refusal to grant access before I arrive at a decision.

4. After studying the representations of the third parties, your appeal, as well as the Director General's reasons for refusal, I came to the conclusion that your request for access to the information should be refused in terms of section 39(1)(iii) of the Act.

5. Thus, the Department has reasonable grounds to expect that the disclosure of the records will lead to publications by the media, which could prejudice or impair the fairness of the trial or the impartiality of the adjudication of the IT Lynx claim under case number 21290/05.

6. As you are aware, you are entitled to lodge an application with a Court against the decision to turn down the internal appeal."

[11] On 25 July 2007 the applicant launched the present proceedings seeking relief as set out in the notice of motion. The application has been brought outside the time limit provided for in section 78 of the Act and to remedy the defect the applicant has brought condonation application.

[12] The first question is whether the applicant's failure to comply with the time period stipulated in the Act should be condoned and secondly whether the first respondent's decision to deny applicant access to the records should be set aside and finally whether the provisions of section 78(2) are unconstitutional. These questions need to be answered by reference to the relevant provisions of the Act.

The Law

[13] Section 32(1) of the Constitution confers upon every person the right of access to any information held by the State and this right is entrenched in the Bill of Rights. The Promotion of Access to Information Act was enacted to give effect to the provisions of section 32(2) of the Constitution. As its preamble declares its object is to give effect to the right in section 32 of the Constitution and subject to the provisions of section 36 to foster a culture of transparency and accountability *inter alia* in public bodies.

[14] The objects of the Act as set out in section 9 are, *inter alia* " *to promote transparency, accountability and effective governance of all public… 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 … bodies;

(ii) to understand the functions and operation of public bodies;

(iii) to effectively scrutinise decision-making by public bodies that affects their rights"

[15] In terms of section 11, access to a record of a public body must be given if the requester complies with the procedural requirements of the Act and access is not refused on any ground in chapter 4.

[16] Access to information may be refused in terms of section 39(1)(b)(iii)(ee) of the Act. It provides as follows:

" *(1) The information officer of a public body-*

(a) …

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

(i) …

(aa) ...

(bb) ...

(ii) ...

(aa) ...

(bb) ...

(iii) the disclosure of the record could reasonably be expected-

(aa) ...

(bb) ...

(cc) ...

(dd) ...

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

[17] It must be noted that the applicant does not have to motivate a request for information to a public body. In terms of section 81(3)(a) of the Act a public body bears the *onus* to justify its refusal to grant access to information. (**Transnet Ltd and Another v SA Metal Machinery Co. (Pty) Ltd** 2006(6) SA 285 (SCA) para 59)

Condonation

[18] The applicant made a request for access in terms of section 11 of the Act to the second respondent who initially refused the request. The applicant

thereafter lodged an internal appeal to the first respondent. The first respondent after consideration of the matter dismissed the internal appeal and advised the applicant of his decision by a letter dated 22 December 2006 and which was faxed to the applicant on 2 February 2007.

[19] In this regard section 77(4) and (5)(c) stipulates who must receive the notice and what the notice should state: It must be sent to the appellant, every third party to whom the requested information relates and the requester. The notice must inform the recipient that it may lodge an application with a court against the appeal decision within 60 days or if notice to a third party was required within 30 days after the notice is given. The recipient must also be informed of the procedure for lodging the application to court. He is entitled to be informed of the reasons for the decision and the provisions of the Act upon which the decision is based.

[20] It must be noted that it is not the inadequacy of the first respondent's notice of the appeal decision that is being attacked by the applicant. It is not the applicant's case that his failure to comply with the time periods specified in section 78(2) of the Act was due to the vagueness or inadequacy of the first respondent's notice of the appeal decision. What is being attacked is the correctness of the first respondent's decision. In the circumstances I will decide the application for condonation on the assumption that the notice of the appeal decision substantially complied with the requirements of section 77(5)(c) of the Act.

[21] The basis of the applicant's attack on the first respondent's decision is that it is without merit and not justifiable under the provisions of the Act, in that no details whatsoever have been given of the "reasonable grounds" on which the first respondent relies and that it has failed to set out the nature of the prejudice which it believes will impair the fairness of the civil trial or the impartiality of the adjudication.

[22] Section 78(2) of the Act provides that a requester that has been unsuccessful in an internal appeal may, within 30 days, apply to Court for appropriate relief in terms of section 82. I must point out at the outset that section 78(2) of the Act does not provide for condonation nor does it state that non-compliance with the time period cannot be condoned. I will assume that the Court has a discretion to condone non-compliance with any of the time limit provisions and that the section has not taken away the Court's discretion.

[23] Section 78(2) must be construed in the context of section 32(1)(a) read with sections 34, 36 and 39(2) of the Constitution. Section 34 of the Constitution guarantees everyone a right of access to Courts and which right may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. Section 78(2) of the Act must therefore be interpreted in such a way that it does not take away or interfere with an individual's right to approach Courts. A Court is obliged in terms of section 39(2) of the Constitution to promote "*the spirit, purport and objects of the Bill of Rights*" when interpreting any legislation. There is no indication in the

Act either expressly or implicitly to suggest that non-compliance with any of its provisions may not be condoned. I therefore find that non-compliance with the time period provided for in section 78(2) of the Act may be condoned on good cause shown.

[24] It is trite law that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all the facts; and in a manner that is fair to both sides. In this enquiry the relevant factors may include the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended application and the prospects of success. (**United Plant Hire (Pty) Ltd v Hills and Others** 1976(1) SA 717 (A) at 720 E-F) or whether it is in the interests of justice to grant condonation (**Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as *Amicus Curiae*)** 2008(2) SA 472 (CC) at 477 A-B; **S v Mercer** 2004(2) SA 598 (CC) para 4 and **Brummer v Gorfil Brothers Investments (Pty) Ltd and Others** 2000(2) SA 837 (CC) para 3). Applications for condonation should in general be brought as soon after the default as possible. In an application for condonation the applicant must give a full explanation for the delay which explanation must cover the entire period of delay. (**Van Wyk v Unitas Hospital**, supra, at 477E). This is so because the Court must decide whether the applicant has produced acceptable reasons for nullifying, in whole, or at least substantially, any culpability on his part which attaches to the delay in bringing the

application timeously (**Madinda v Minister of Safety and Security** 2008(4) SA 312(SCA) at 317C). With this prelude I now turn to facts.

[25] The applicant avers that he only became aware of the first respondent's decision on 2 February 2007 and as this averment has not been seriously challenged by the respondents I will accept his version in this regard and find that he received a notice of appeal decision on 2 February 2007. Therefore in terms of section 78(2) of the Act the applicant should have approached the Court on or about 2 March 2007.

[26] The provisions of section 77(4) and (5)(c) of the Act, however, provide for two different periods within which an appeal may be lodged against the decision of the Minister. There appears to be a conflict between the provisions of section 77(5)(c)(i) and section 78(2). Section 77(5)(c)(i) requires the notice informing the appellant or requester of the decision on internal appeal to state that the appellant or requester may lodge an application with a Court against the decision on internal appeal within 60 days or, if notice to a third party was required, within 30 days, after notice is given. On the other hand section 78(2) requires a person aggrieved by the decision on internal appeal to approach Court within 30 days for appropriate relief under section 82 of the Act.

[27] In my view section 78 is a self-contained provision which exhaustively governs applications for relief in terms of section 82. A requester who approaches a Court in terms of section 78 (2) for a relief under section 82 of the Act must do

so within 30 days after receiving the notice regarding the outcome of the internal appeal. But a requester who is aggrieved by the Minister's (relevant authority's) decision and who wishes to approach a court for relief falling outside the ambit of section 82 may do so within 60 days after receipt of the Minister's decision. My view is based on the fact that there is no reference to section 82 in section 77 (5)(c). In the present matter the appellant should have come to Court within 30 days after 2 February 2007 for relief under section 82 of the Act.

[28] The applicant was under no illusion about the period within which he should have approached the Court for an appropriate relief. There was no confusion as to the period during which he had to bring the application. In para 104 of his founding affidavit he avers that he became aware on 9 March 2007 that the Act specified a 30-day limit for an appeal to be lodged in this Court. Nowhere in his papers does he mention a 60 day period referred to in section 77(5)(c)(i).

Reasons for Delay

[29] As to the reasons for the delay the applicant explains as follows:

27.1 He had to first seek legal advice from his attorneys of record (ODAC) before embarking on Court litigation against the government.

27.2 For the purpose of obtaining legal advice from ODAC he emailed copies of the correspondence on 5 February 2007.

27.3 On 8 February 2007 he enquired about progress from his attorneys of record indicating to them that he intended to pursue the matter.

27.4 On 16 February 2007 he was requested by his attorneys of record to furnish them with further documentation which he did on 20 and 21 February 2007.

27.5 On 9 March 2007 he became aware through his attorneys of record that the Act specified a 30 day limit for an appeal to this Court and by that stage the 30 day limit had already expired.

27.6 Counsel had to be obtained to launch this application but the one who was willing to do so on contingency basis was not immediately available to prepare his application. Counsel was only able to attend to his application during May and June 2007. The application was finally launched on 25 July 2007, that is, some 4½ months after the cut off date.

[30] From these facts it is clear that the delay is long and the explanation given therefor is not satisfactory. There is no explanation as to why it took applicant's attorneys more than a month to discover that the Act imposed a 30 day limit for an

application to be launched in this court and to have alerted the applicant of the relevant provisions of the Act.

[31] When the applicant brought the matter to their attention and for advice his appeal to this Court was in no way threatened by the 30 days limit. At that stage urgency was not an issue. It is the subsequent inexplicable delay which led to urgency. In my view that urgency was self-created. Even when the applicant realised that the matter had become urgent, he did not treat it with sufficient degree of urgency it deserved. He waited for counsel, who was not immediately available, to prepare the papers. Applications for condonation should in general be brought as soon after the default as possible. The applicant must produce acceptable reasons for the Court to nullify any culpability on his part which attaches to the delay. In my view the applicant's condonation application is utterly lacking in this regard.

Prospects of Success

[32] I turn to consider the applicant's prospects of success as, in my view, the applicant's delay should not be fatal if the prospects of success in the main application are reasonable. The applicant contends that condonation should be granted because access is an important right.

[33] In terms of section 81(3)(a) of the Act the *onus* is on the respondents to justify their refusal to grant the applicant access to documentation.

[34] The first respondent's refusal of access to information is based on the grounds of factors set out in section 39(1)(b)(iii)(ee) of the Act. It alleges that a disclosure of information would compromise the IT Lynx Consortium litigation which is pending in the Pretoria High Court. In particular in para 16 of its answering affidavit it avers:

> *"...the Department has reasonable grounds to expect that the disclosure of the records will lead to publications by the media, which could prejudice or impair the fairness of the trial or impartiality of the adjudication of the IT Lynx claim under case number 21290/05"*

Contents of the Court file relating to the civil claim pending before the Pretoria High Court were made available to this Court at the hearing hereof and a large amount of documentation have been discovered.

[35] *Mr Moerane,* who together with *Mr Maenetje*, appeared for the respondents, submitted that section 39(1)(b)(iii)(ee) gives an information officer a discretion to refuse a request. He argued that the section does not set a high threshold. He submitted that the section requires the information officer to form a view that the record could reasonably be expected to produce any of the results in sub para (ee). He pointed out that all that is required is that the disclosure of the record could reasonably be expected to "prejudice" or "impair". It does not have to be expected to do both.

[36] Referring to the Oxford English Dictionary *Mr Moerane* submitted that the words "*prejudice*" and "*impair*" as used in the section contemplate different degrees of harmful consequences to the fairness of a trial or the impartiality of an adjudication with the word "impair" setting a lower threshold of harm than "prejudice". I disagree.

[37] The results specified in subpara (ee) are consequences that could be expected as probable if disclosure of a record was made. It must be shown that the disclosure could reasonably be expected to produce results which will prejudice or impair the fairness of a trial or the impartiality of an adjudication. The consequences resulting from the disclosure are the same. There are no different degrees of harmful consequences.

[38] *Mr Moerane* submitted that there are reasonable grounds to believe that prejudice or impairment to the fairness of the trial in the IT Lynx matter and/or the adjudication of the issues between the parties could be expected as probable given the fact that the applicant will publish certain articles in the newspaper on the records to which he seeks access and that nothing will stop the applicant from publishing the matter that would prejudice the first respondent in his defence against the IT Lynx claim.

[39] *Mr Moerane's* submission raises two issues. The first one relates to the nature of the test to be applied in determining the question whether *"the disclosure of the record could reasonably be expected to prejudice or impair the*

fairness of a trial or the impartiality of an adjudication". The second one relates to the relevance of the requester's reason for the information.

[40] It must be shown that the results following from the disclosure of the record are consequences that could be expected as probable if reasonable grounds exist for that expectation. (**SA Machinery Co (Pty) Ltd**, supra at 299C)

[41] In my view when access to information is denied on the grounds of factors set out in section 39(1)(b)(iii)(ee) a public body refusing access must show the existence of reasonable grounds to expect that prejudice or fairness of a trial or the impartiality of an adjudication will result if access to information was allowed. There must be a foundation for a finding that there is an expectation of an adverse consequence.

[42] At the heart of the dispute between the parties in the Pretoria High Court civil litigation is the question whether a tender was awarded by SITA to IT Lynx. The first respondent, who is cited as a second defendant in the civil litigation, denies that the tender was ever allocated to IT Lynx. In its plea it avers that during June 2002 it instructed SITA to withhold the award of the tender until negotiations with the National Treasury were finalised.

[43] It was submitted by *Ms Bawa* that the first respondent's reliance on section 39(1)(b)(iii)(ee) is misconceived. She pointed out that the applicant's request for documents and interest is not the same as what necessarily form the subject

matter of the Pretoria High Court proceedings which concerns whether or not the tender was awarded by SITA to IT Lynx. She submitted that the applicant does not seek any documentation regarding the adjudication of the tender, nor any correspondence between SITA and IT Lynx.

[44] The applicant's contention that the information he seeks does not relate to SITA's documentation is, however, inconsistent with his request as set out in annexure "A" to the notice of motion. When one has regard to the applicant's request for records as set out in annexure "A" it is clear that he uses the same descriptive phrase to identify the records to which he seeks access and there is no doubt that the records to which access is sought relate to matters which directly or indirectly have a bearing on the issues forming the subject matter of a civil litigation between the first respondent and IT Lynx in the Pretoria High Court. The information requested by the applicant relates to Tender 82 for the design, development and implementation of a grant administration system.

[45] There is no doubt that the right of access to information is crucial to exercise or protection of the rights guaranteed in the Constitution. The issue on which the applicant intends to report will no doubt highlight the importance of promoting good governance and transparency. Members of the Cabinet are accountable to Parliament for the exercise of their powers and the performance of their functions. They may not act in a way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests.

[46] At the same time the fairness of a trial or the impartiality of adjudication is part of the judicial process. There is no doubt in my mind that the integrity of the judicial process is an essential component of the rule of law and the integrity of the judicial process may be severely compromised if a record, which a party to litigation intends to use to prove his claim or disprove the other party's claim, was made available to a third party before the trial is finalised. A disclosure might create a huge risk of prejudice to the administration of justice.

[47] In my view a public body will be entitled to refuse access to a record in circumstances where it is able to show the existence of reasonable grounds to expect that prejudice or fairness of a trial or the impartiality of an adjudication will result if access to information was allowed. It does not have to prove that the results which are expected will as a matter of fact certainty occur. Proof of probability is sufficient and in my view the first respondent has met the required standard.

[48] In the light of this approach I am therefore not satisfied that the applicant has shown that he has reasonable prospects of success on the main application. In the circumstances the applicant's application for condonation must fail.

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

applicant may publish the information should he receive it, the reason for the refusal is not sustainable.

Constitutionality Argument

[50] In para 6 of the amended notice of motion the applicant seeks an order declaring unconstitutional and invalid the provisions of section 78(2) which limit the time period within which to approach a Court. Such a declaration becomes relevant only in the event that "this Court finds that it does not have jurisdiction to grant condonation of the applicant's non-compliance with the time periods prescribed in section 78..." In other words in terms of the relief sought by the applicant in his amended notice of motion the constitutional issue would not arise if I found that the Court has a discretion to condone non-compliance and the matter would be determined on the basis of whether or not the applicant had made out a case for condonation. This was the position adopted by the applicant before the hearing of this application.

[51] At the hearing hereof *Mr Moerane* did not persist with the argument that a court does not have a discretion to condone non-compliance with the time periods prescribed in section 78(2) of the Act. He made the necessary concession.

[52] In response to *Mr Moerane's* concession, *Ms Bawa*, who together with *Ms Fitz-Patrick* appeared for the applicant, sought to amend para 6 of the amended notice of motion to the effect that should the Court find that there was a delay and

that there is no reasonable explanation therefor, it should declare section 78 of the Act to be inconsistent with the provisions of the Constitution and unconstitutional to the extent that it imposes an unreasonable time limit to the period within which the applicant may institute legal proceedings. It was on this basis that the parties argued the matter regarding the constitutionality of the provisions of section 78(2) of the Act.

[53] *Ms Bawa* submitted that the period of 30 days provided for in section 78 does not afford an aggrieved party with a real and fair opportunity to institute legal proceedings in a Court of law particularly given the fact 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. She argued that the provisions of section 78 amount to an unreasonable time-limited ouster clause and constitute an infringement of the right of access to courts.

[54] In support of her contention, *Ms Bawa* referred the Court to the case of **Mohlomi v Minister of Defence** 1997(1) SA 124 (CC). In para 12 the Court formulated the test of whether there is an infringement 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 to 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 enquiry turns wholly on estimations of degree."

[55] To counter this argument the third respondent submitted that the thirty day time period is reasonable in that by the time that an application to Court is made by an applicant, an internal appeal process would have been exhausted and that an applicant wishing to take the matter further would not require extensive time to prepare an application to Court.

[56] In his reply the applicant responded by contending that the suggestion that the 30 day time period is reasonable and that to prepare an application of this nature would not be time consuming is misconceived given that it took the second respondent almost three months to consider the application and the first respondent almost eight months to determine an internal appeal.

[57] Section 78(1) and (2) of the Act provides as follows:

" (1) A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or

third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.

(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."

[58] In my view a challenge to section 78(2) of the Act must be approached by reference to sections 32, 34 and 36 of the Constitution. In other words the question is whether section 78(2) of the Act infringes sections 32 and 34 of the

Constitution and if so: whether such infringement is reasonable and justifiable in terms of section 36 of the Constitution.

[59] In terms of section 32 of the Constitution everyone has the right of access to any information held by the State. The Act is the legislation demanded by section 32(2) of the Constitution. In terms of section 34 of the Constitution everyone has a right of access to Courts in order to have his or her justiciable claim decided. This is so because "untrammelled access to the Courts is a fundamental right of every individual in an open and democratic society based on human dignity, equality and freedom. In the absence of such right the justificiability of the rights enshrined in the Bill of Rights would be defective; and absent true justificiability, individual rights may become illusory". (**Moise** v **Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as *Amicus Curiae*)** 2001(4) SA 491 (CC) in para 23).

[60] The 30 day limit provided for in section 78(2) of the Act will only be unfair if it so inadequate or restrictive as to unduly deprive the majority of the people wishing to access the State–held information of the right of access to the Court if they are denied access to the records held by the State.

[61] As correctly pointed out by Kondile AJ in **Engelbrecht v Road Accident Fund and Another** 2007(6) SA 96 (CC) in para 30:

"The period of time within which to comply with a requirement... prior to the exercise of the right, will be unfair if it is so inadequate or restrictive as to unduly deprive the majority of claimants of the right of access to the Courts, on the one end of the spectrum, or if it is indefinite and prolongs uncertainty because it depends on the subjective knowledge of the provisions of the regulation on the part of the claimant, on the other."

[62] There is no doubt that section 78(2) of the Act constitutes a limitation to the right of access to court protected in section 34 of the Act in as much as it stipulates the time period within which a person, whose section 32 rights have been violated, may approach a Court to vindicate those rights. The question is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required by section 36 of the Constitution. (**Chief Lesapo v North West Agricultural Bank and Another** 2000 (1) SA 409 (CC)).

[63] In undertaking that enquiry all the relevant factors have to be taken into account which will include the following:

(a) the nature and importance of the right that is limited;

(b) the purpose for which the right is limited and the importance of that purpose to an open and democratic society based on freedom , dignity and equality;

(c) the nature and extent of the limitation;

(d) the efficacy of the limitation of the relation between the limitation and its purpose; and

(e) whether the desired needs could be achieved through other means less damaging to the right in question.

[64] Of course a correct approach in undertaking a limitation exercise is to be found in **National Coalition for Gay and Lesbian Equality and Another** v **Minister of Justice and Others** 1999(1) SA 6 (CC) where the following is said in para 35:

> *"[35] The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose."*

[65] In justifying the limitation embodied in section 78, the third respondent submitted that the 30 day time period is reasonable in that it seeks to balance the

right of access to information against the duty of public bodies to ensure effective, efficient and good governance. It argued that absence of the strict time periods imposed by the Act could contribute to unnecessary administrative and financial burdens on public bodies. It pointed out that public bodies should be entitled to dispose of records in accordance with their policies and procedures and that a delay of a couple of months before an application to Court is brought in terms of section 78(2) would have the risk of imposing such unnecessary administrative and financial burdens.

[66] I disagree with the third respondent's contention more so having regard to the reasons furnished by the first respondent for not releasing the requested information to the applicant. The first respondent cited the existence of a pending civil litigation between it and IT Lynx as a reason for not releasing information to the applicant. It contended that it intends using the information in defending the IT Lynx claim. The information was requested by the applicant in February 2006 and it has not been suggested by the first respondent that it has been exposed to unnecessary administrative and financial burdens by having to keep the requested information. The first respondent acquired part of the requested information during 2001. It is still keeping it for use in September 2010 and it has not been suggested by it that it has been exposed to unnecessary administrative and financial burden by having to keep it. It goes to show that the 30 day limit referred to in section 78 (2) does not have an effect on the needs which the third respondent seeks to achieve.

[67] In my view the rights which are truncated by section 78(2) of the Act are more important than the administrative and financial burdens which the third respondent seeks to protect through the medium of section 78(2). The ends which it seeks to achieve, in my view, can be achieved by adopting means which are less restrictive for instance by extending the time period within which an application may be brought to court in terms of section 78(2).

[68] It was also argued by the third respondent that the limitation does not take away an aggrieved party's right of access to information but it simply requires an applicant to act swiftly in seeking to enforce his rights. What counts in my view is the adequacy of the opportunity which section 78(2) affords an applicant who seeks to challenge the first respondent's decision to refuse information.

[69] A litigant wishing to challenge the first respondent's decision may have to overcome financial and/or geographical hurdles before being able to approach a Court for a relief under section 82 of the Act. He may be without funds to finance litigation or may be residing in an area which is remotely located from the seat of a Court. It may thus become necessary for him to approach his family members or for that matter, Legal Aid Board for necessary assistance. If these attempts fail it may become necessary for him to realise some of his assets in order to raise funds for litigation. These are the hurdles which an ordinary litigant may have to meet before being able to approach a Court for an appropriate relief. The 30 day period provided for in section 78(2) of the Act is, in my view, grossly inadequate to

enable an ordinary applicant to overcome the hurdles and challenges I have referred to.

[70] The fact that an applicant may apply for condonation in the event of his failure to bring the application within 30 days does not lessen the deleterious effect which 30 day time limit has on his ability to approach the Court for an appropriate relief under section 82 of the Act. What is important is the adequacy of the opportunity and not what he may do in order to retrieve the lost opportunity.

[71] In my view the third respondent has failed to show that section 78(2) is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In the circumstances I find that section 78(2) of the Act, in so far as it requires a litigant to bring an application to Court within 30 days, is inconsistent with the Constitution and is unconstitutional.

The Costs

[72] The first and second respondents have been successful in their defence and there is no reason why they should not be awarded costs. However, the applicant has been successful in challenging the constitutionality of section 78(2) of the Act. He is therefore entitled to costs as against the third respondent.

The Order

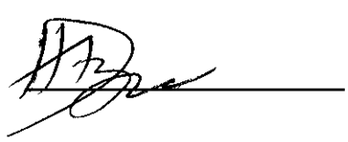
1. The applicant's application for condonation and access to records is dismissed with costs.

2. The applicant is ordered to pay the first and second respondents' costs including costs consequent upon employment of two counsel.

3. The provisions of section 78(2) of Promotion of Access of Information Act 2 of 2000 are declared unconstitutional.

4. The finding in para 3 above is referred to the Constitutional Court for confirmation in terms of the provisions of section 167(5) of the Constitution of 1996.

5. The third respondent is ordered to pay applicant's costs including costs of two counsel.



ZONDI, J