IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 25/09

CPD CASE NO: 10013/07

In the matter between:

STEFAANS CONRAD BRUMMER Applicant

and

THE MINISTER OF SOCIAL DEVELOPMENT First Respondent

DIRECTOR-GENERAL OF THE DEPARTMENT OF SOCIAL DEVELOPMENT Second Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Third Respondent

In re

APPLICATION BY HUMAN RIGHTS COMMISSION FOR ADMISSION AS *AMICUS CURIAE*

FIRST AND SECOND RESPONDENTS' ANSWERING AFFIDAVIT TO THE AFFIDAVIT FILED BY THE HUMAN RIGHTS COMMISSION

I, the undersigned,

VUSIMUZI MADONSELA

do hereby make oath and state that:

1. I am the Director-General in the Department of Social Development ("*the Department*"). I am authorised to depose to this affidavit on behalf of the Department and the first respondent, the former Minister of the Department. I have previously deposed to affidavits on behalf of the Department and the former Minister in the applications in the Court *a quo.*

2. The facts contained in this affidavit are to the best of my knowledge and belief true and correct and are, unless otherwise stated or as appears from the context, within my personal knowledge.

3. I am advised that the Human Rights Commission brought an application to be admitted as *amicus curiae* on 25 May 2009. As there was little time between that date and the hearing of the matter by this Court on 26 May 2009, the Court gave the respondents an opportunity to file affidavits to deal with matters raised by the Human Rights Commission in its application for admission as *amicus curiae.* This affidavit is intended to deal with certain of the matters raised by the Human Rights Commission. I

am advised that certain of the matters will be dealt with in written submissions as they constitute argument.

4. Any submissions of law that I make in this affidavit are made on the advice of the Department's legal advisors.

5. I comment upfront on behalf of the Department that it is of concern that a body such as the Human Rights Commission does not appear to have made a serious endeavour to present facts to the Court in a balanced and fair manner. I will demonstrate this by reference to what the Human Rights Commission has said of the Department and the Minister in its affidavits and written submissions. An *amicus curiae* with the responsibilities of the kind that the Human Rights Commission has must be seriously circumspect in relation to what it presents to the Court and what is said on its behalf in its written submissions – with the view only to assist the Court and not to enter the fray.

The matters addressed in this affidavit

6. There are four categories of matters of fact which I address in this affidavit.

    6.1. The first is the allegation that the Department has failed to comply with its obligations in terms of section 14 of the PAIA. I demonstrate that this is not entirely correct.

6.2. The second is an allegation by the Human Rights Commission (in its founding affidavit and written submissions) that the records to which access is sought will reveal evidence of a substantial contravention of, or failure to comply with, the law as contemplated in section 46(a)(i) of the PAIA. The Human Rights Commission (in its written submissions) places reliance on a report by the Public Protector on "an investigation into an allegation of misappropriation of public funds by the Petroleum Oil and Gas Corporation of South Africa, trading as PetroSA, and matters allegedly related thereto" which is dated 29 July 2005 ("*the Public Protector 2005 Report*"). The Human Rights Commission relies on an extract from the Public Protector 2005 Report which is quoted in the report of the Public Protector which is before this Court. [See Vol 2 pages 136 to 137]. The full Public Protector 2005 Report is not before this Court but I annex a copy as set out below.

6.3. The third is the allegation that the IT Lynx claim is dormant as the set down of the matter for trial is not being pursued with any vigour by the plaintiff.

6.4. In the fourth place I will deal with miscellaneous matters.

Compliance with obligations in terms of section 14 of the PAIA

7. I quote section 14 of the PAIA for the convenience of the Court:

> "**14. Manual on functions of, and index of records held by, public body**.—
>
> (1) Within six months after the commencement of this section or the coming into existence of a public body, the information officer of the public body concerned must compile in at least three official languages a manual containing—
>
> (a)a description of its structure and functions;
>
> (b)the postal and street address, phone and fax number and, if available, electronic mail address of the information officer of the body and of every deputy information officer of the body designated in terms of section 17 (1);
>
> (c)a description of the guide referred to in section 10, if available, and how to obtain access to it;
>
> (d)sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject;
>
> (e)the latest notice, in terms of section 15 (2), if any, regarding the categories of records of the body which are available without a person having to request access in terms of this Act;
>
> (f)a description of the services available to members of the public from the body and how to gain access to those services;
>
> (g)a description of any arrangement or provision for a person (other than a public body referred to in paragraph (a) or (b) (i) of the definition of "public body" in section 1) by consultation, making representations or otherwise, to participate in or influence—
>
> (i)the formulation of policy; or
>
> (ii)the exercise of powers or performance of duties,
>
> by the body;

> (h)a description of all remedies available in respect of an act or a failure to act by the body; and
>
> (i)such other information as may be prescribed.
>
> (2) A public body must, if necessary, update and publish its manual referred to in subsection (1) at intervals of not more than one year.
>
> (3) Each manual must be made available as prescribed.
>
> (4) (a) If the functions of two or more public bodies are closely connected, the Minister may on request or of his or her own accord determine that the two or more bodies compile one manual only.
>
> (b) The public bodies in question must share the cost of the compilation and making available of such manual as the Minister determines.
>
> (5) For security, administrative or financial reasons, the Minister may, on request or of his or her own accord by notice in the Gazette, exempt any public body or category of public bodies from any provision of this section for such period as the Minister thinks fit."
>
> (Emphasis added)

8. The alleged non-compliance by the Department with its obligations in terms of section 14 of the PAIA is addressed in paragraphs 23.1.3 and 38 to 41. The HRC states in paragraph 40:

> "It is notable, in this regard, that the first respondent has not fulfilled this obligation as it has not filed a manual with the SAHRC; nor is its manual available on its website."

9. The allegation by the HRC is not entirely true.

10. In 2004 the Department, with the assistance of the Human Rights Commission, developed its first manual in terms of section 14 of the PAIA.

The manual was submitted to the HRC in 2005. The Department was the first of all government departments to submit a manual in terms of section 14 of the PAIA to the Human Rights Commission.

11. The 2004 manual was updated (with no major changes) in 2005. This manual was published on the Department website.

12. The manual was further updated (with no major changes) during 2006. This manual was published on the Department website (www.socdev.gov.za) during 2006.

13. There were no further updates or changes to the 2006 manual during 2007 and 2008. The manual remained on the Department website during 2007, 2008 and 2009. It is currently published on the Department new website www.dsd.gov.za. This manual is included in the record at Vol 4 page 340.

14. In paragraph 13 of its written submissions, the HRC regrets the inaccuracy of its allegations only in so far as it relates to the publication of the manual on the Department's website. It says nothing about the fact that the Department submitted a manual to it in 2005.

15. The manual is published in six languages, i.e. English, isiZulu, isiXhosa, SePedi, tshiVenda and seTswana. It is also published in audio visual tape format and in Braille.

16. The average cost of publishing the manual in a single language is about R23 000,00. For publication in three languages is about R60 000,00 to R70 000,00.

17. As stated above, the Department did not update the manual during 2007, 2008 and 2009 as there has not been a need for this. No substantial changes have occurred regarding the matters contained in the manual, such as the type of information that the Department has at its disposal. Due to this no new manual was republished on the Department website or submitted again to the HRC.

18. The Department has acted in line with the provisions of section 14(2) of the PAIA which only requires a public body to update and publish its manual if necessary. If not necessary, the same manual submitted to the HRC remains published on the public body's website.

19. The Department is currently in the process of reviewing its manual. Once completed, this manual will be published on the Department website and a soft copy will be submitted to the Human Rights Commission. This is expected to happen at the end of June 2009.

20. In the circumstances, there is no truth in the allegations by the HRC that the Department has failed to comply with its obligations in terms of section 14 of the PAIA in that:

20.1. it has failed to submit a manual as required by the section; and

20.2. it has failed to publish its manual on its website.

21. The HRC ought to have presented the full facts to the Court in a balanced and fair manner.

22. The Department therefore submits that the HRC's allegations regarding the Department's failure to comply with its obligations should be rejected. Such allegations cannot form a context in which to consider the constitutional validity of the time period in section 78(2) of the PAIA. Requesters are able to access the Department's manual on its website.

23. I point out also that the Department complies with its obligations to grant access to records where there are no grounds justifying a refusal and has submitted reports to the HRC as required by section 32 of the PAIA. In this case the Department believes that there is a valid ground for refusing

access. I address certain aspects of this below as they arise from the HRC's submissions.

The allegations of corruption – section 46 of the PAIA

24. It is important to highlight the following:

24.1. The applicant raised section 46 in its founding affidavit. [Vol 1 page 44 paragraph 113].

24.2. The first and second respondents replied to it in their answering affidavit. [Vol 3 page 228(e)].

24.3. The applicant replied and promised to submit further legal argument at the hearing of the matter in the Court *a quo*. [Vol 3 page 253 paragraph 27].

24.4. In his heads of argument in the High Court the applicant did not persist with the section 46 contention. He did not submit further argument as promised in his replying affidavit. [Vol 4 pages 374-400; Vol 5 pages 401 to 407]. For this reason, the Court *a quo* did not deal with section 46 nor did the respondents address it in their written submissions.

24.5. In this Court (both in his application and in the written submissions) the applicant does not present argument on section 46.

24.6. The effect is that the HRC, which is not a party to the litigation, has decided to enter the fray and pick up the contention on section 46 on behalf of the applicant. This is not the role of an *amicus curiae*. More disturbingly, however, it does so on a selective and out of context reading of the facts.

25. In paragraph 85.1.2 of its written submissions (which takes up and develops the argument in paragraph 23.3 of its founding affidavit), the Human Rights Commission submits that section 46(a)(i) of the PAIA would be satisfied on the evidence contained in the applicants' affidavits. It relies on an extract from the report of the Public Protector (in Vol 2 pages 136 to 137 of the record) which is before the Court. In footnote 102 it says the following:

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

26. The underlined portion puts a wrong slant on the correct facts.

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27. To enable the Court to assess the allegation in its proper and full context, I annex a full copy of the Public Protector 2005 Report as annexure "**M1**". The report contains an executive summary which sets out the issues for investigation. At page 7 of the report a summary is given of what the Public Protector found in his investigations. None of the findings summarised in this section of the report supports the allegation made in footnote 102 of the Human Rights Commission's written submissions.

28. At page 29 paragraph 5.5.4 of the report the Public Protector states the following:

> "5.5.4 <u>The payment by Invume of R65 000 to Hartkon Construction</u>
>
> It is alleged that this payment related to renovations made to the private residence of the Minister of Social Development. As both Invume and Hartkon Construction are private bodies and as the alleged payment did not relate to state affairs or public money, the Public Protector cannot investigate this allegation, for the same reasons advanced in paragraph 5.5.2."

29. The proper context in which to assess the truthfulness and accuracy of the allegation in footnote 102 of the Human Rights Commission's written submissions is the following (and I quote extensively from the report), which show the contention not to be true or supported by the contents of the report:

"5.5.7 <u>The suspicions raised of an improper relationship between Imvume and Dr Skweyiya, the Minister of Social Development</u>

5.5.7.1 The complaint of the Freedom Front Plus in this regard is clearly founded only on suspicions raised by the *Mail and Guardian*, which were apparently based on the following:

(a) A payment of R65 000 by Imvume to Hartkon Construction, (which was renovating the Minister's private residence) allegedly made the day after the controversial advance payment by PetroSA was received;

(b) Confirmation by the Minister's wife of such a payment, explained by her as a loan which has already been paid;

(c) Confirmation by the attorneys acting on behalf of Imvume and Mr Majali of the loan granted to Ms Mazibuko-Skweyiya;

(d) Documentation allegedly indicating that Mr Majali was an agent for Cash Paymaster Services (the company that distributes social grants on behalf of some provincial governments) in 2003; and

(e) Documentation allegedly indicating that Mr Majali 'was working on grandiose plans to build a financial services group under the Permit banner. Imvume, Net 1 UEPS and government bodies would have been among the stakeholders. One of Permit's main functions would have been grants distribution. Even though grants distribution was a provincial function, Majali would still have had to gain from securing influence with Skweyiya as national minister. At the time, Skweyiya was drawing up policies that led to the creation of the Social Security Agency, which is taking over the function from the provinces'.

5.5.7.2 The said suspicions cast in regard to Dr Skweyiya appear to suggest that Imvume paid an amount of R65 000 to the construction company renovating his house in order to ensure that the Minister would in future use his influence to secure business for Imvume, or one of its sister companies, from the Department of Social Welfare or the Social Security Agency. It therefore clearly points to a corrupt act as contemplated by the provisions of the Corruption Act, 1992 or the Prevention and Combating of Corrupt Activities Act, 2004.

5.5.7.3 As indicated above, the affairs and conduct of private entities, such as Imvume and Hartkon fall outside of the ambit of the jurisdiction of the Public Protector, except if the conduct complained of or under suspicion relate to state affairs, improper enrichment or acts of corruption in respect of public money.

5.5.7.4 The payment in question clearly did not relate to state affairs as it was made from one private entity to another and involved renovation of a private residence.

5.5.7.5 Money paid from Imvume's funds, irrespective of its origin, constitutes private and not public money. For as far as the suggested impropriety could constitute a corrupt relationship between the Minister and Imvume, it did not relate to public money. The suggestion of corruption therefore also falls outside of the jurisdiction of the Public Protector to investigate.

5.5.7.6 There is no substantive allegation or indication that the Minister performed any official action or omission that could have favoured Imvume in any way. The suggested corrupt intent clearly speculates in respect of <u>future events that might or might not occur</u>, which obviously cannot be investigated.

5.5.7.7 Section 6(4)(c)(i) of the Public Protector Act, 1994 provides that the Public Protector shall be competent, at any time, prior to, during or after an investigation, if he or she is of the opinion that the facts disclose the commission of an offence by any person, bring the matter to the relevant authority charged with prosecutions.

5.5.7.8 The information at the disposal of the Office of the Public Protector and that could be considered and verified in terms of its jurisdiction does not disclose the commission of any offence, but merely comprise suspicions and speculations that have not been substantiated. No substantive reason could therefore be found to refer this matter to the National Prosecuting Authority at the time of the investigation referred to in this report."

30. The HRC also alleges in its written submissions (paragraph 85.1.2.2) that a disclosure of the records would disclose a contravention of the Executive Members Ethics Act 82 of 1998 and the Executive Ethics Code. It relies on the findings of the Public Protector.

31. The findings by the Public Protector after investigation do not support this allegation. The Public Protector's report summarises the key findings as follows [Vol 2 page 194]:

> "The key findings made from the investigation are that:
>
> 55. The allegation that the loan granted by Mr Majali to Mrs Skweyiya in December 2003 resulted in the Minister of Social Development exposing himself to a situation involving the risk of a conflict of interest which constituted a breach of the Executive Ethics Code, is unfounded; and
>
> 56. The failure of the Minister of Social Development to disclose the benefit of the interest free loan granted to his wife by Mr Majali in December 2003 constituted a breach of the Executive Ethics Code."

32. The suggestion that the Minister refused to grant access in order to suppress access to records that may reveal unlawful conduct is far from the truth if any reliance is to be placed by the HRC (a Chapter 9 body) on the findings of the Public Protector (a fellow Chapter 9 body). The Minister refused for the reasons given in his letter turning down the internal appeal. It is this reason that requires adjudication and not section 46 as the applicant has long realised and effectively relinquished the ground.

Lack of interest on the part of IT Lynx in pursuing the litigation

33. The HRC says in paragraph 62 (page 38) of its written submissions:

> "... and no further steps had been taken, since the matter was struck from the roll, to re-enroll the matter".

34. No shred of evidence is presented to support this allegation. It is a significant allegation as it is intended to bolster the argument that the litigation brought by IT Lynx is effectively dormant so as to fit it within the principles developed in the foreign case law that the HRC relies upon. I am advised that the suitability of the tests developed in the foreign cases will be addressed in written submissions.

35. It is submitted with respect that it is improper for an *amicus curiae* to submit allegations of fact which are not verified and which not even the applicant is prepared to make.

36. The fact is that the IT Lynx claim is not dormant at all. In the first place, the reason for the High Court in Pretoria to remove the matter from the roll was that it was improperly enrolled. There were two firms of attorneys which both insisted to be acting for IT Lynx and properly on record. They were both requested to produce a power of attorney to prove their mandate in accordance with the provisions of rule 7 of the Uniform Rules of Court. None of them has filed a power of attorney but one of them had purported to set the matter down.

37. I wish to bring to the attention of this Court that despite the removal of the matter from the roll, the Registrar of the High had in fact enrolled the

matter for trial on 25 August 2009. This fact was only brought to our counsel's attention on 27 May 2009. The attorneys for the Department are liaising with the Registrar of the High Court to have the matter removed from the roll as none of the attorneys has yet filed a power of attorney.

38. I am bringing these facts to the attention of the Court merely to indicate that there is no factual basis to the contention that the IT Lynx matter is dormant.

Miscellaneous

39. <u>The contention that the records sought extend beyond those that are relevant to the IT Lynx claim and are sought for a different purpose</u>

39.1. The respondents accept that the applicant does not have to justify access to the records from the Department. This is made clear in their written submissions.

39.2. The HRC contends in its written submissions that the records that the applicant seeks are wider than those that are relevant to the IT Lynx claim and are sought for a purpose which is different from the issues that arise in the IT Lynx claim. [HRC written submissions from paragraph 72].

39.3. I have been advised that it is important in this regard to give the Court an idea of the records that the Department has in its possession in comparison to annexure "A" to the notice of motion. [Annexure "A", Vol 1 page 5].

39.4. As stated in the respondents' written submissions, the Department was the client of the SITA for purposes of Tender 82. The SITA was responsible for soliciting bids and evaluating tenders.

39.5. The Department did not correspond with tenderers in respect of Tender 82. The records referred to in paragraphs 1 to 3 of annexure "A" that exist are correspondences and the like between the SITA and any of the entities mentioned. Such records have been discovered in the IT Lynx claim as they are directly relevant to that claim.

39.6. The records in paragraphs 4 and 5 of annexure "A" relating to interactions between the Minister of Finance or National Treasury and the Minister (of Social Development) or the Department are relevant to the IT Lynx claim. As explained in the first and second respondents' answering affidavit in the Court *a quo*, these

documents relate directly to the decision not to award Tender 82 but to withdraw it.

39.7. That these records and the interactions between the Minister of Finance or National Treasury and the Minister and the Department are key to the issues that arise in the IT Lynx claim is clear from a public statement made on behalf of the consortium (IT Lynx consortium) as early as January 2006. I refer the Court to a document in Vol 1 page 77 where the chairman of the consortium, Obbey Mabena (see also a reference to him in paragraph 2 of annexure "A" to the notice of motion), stated the following:

> "The SITA Tender Board, including representatives of the Department, Treasury, SITA itself and all other relevant role players recognized that the new system proposed by the Consortium would, through its verification system, which previously did not exist, prevent problems in the existing system in a cost-effective and expeditious way." [page 77]

39.8. The quoted passage is clear support for IT Lynx's contention that, against such acknowledgement, Tender 82 was awarded to it. The Department will dispute this. The records sought in paragraphs 4 and 5 of annexure "A" will be relevant to this dispute and are discoverable in the IT Lynx claim.

39.9. The Minister has refused access to the records because the Department reasonably apprehend the kind of damage that section 39(1)(b)(iii)(ee) of the PAIA is intended to guard against.

39.10. I highlight the position adopted by the applicant in his replying affidavit in the Court *a quo* that Tender 82 was awarded to IT Lynx. This page is missing from the record before the Court. I attach it as annexure "**M2**". The page contains paragraphs 8.1 to 8.4. At paragraph 8.4 the applicant states the following:

> "8.4 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 party. 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. In this regard Part 8, paragraph 31 of the Public Protector report states that: 'The basis of the 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".
>
> (Emphasis added)

39.11. I am advised that the respondents have referred to this fact in the written submissions to support the apprehension that in his publication, it is probable that the applicant will persist with this stance – which is without a doubt prejudicial to the respondents' defence in the IT Lynx's claim. It has real potential to influence the

evidence that witnesses will tender to the Court on the key issue in the IT Lynx claim.

40. The HRC's obligations in terms of section 10 of the PAIA

40.1. The affidavit filed by the HRC and its written submissions do not disclose what the HRC has done to fulfil its obligations in terms of section 10 of the PAIA in light of the allegations of non-compliance by public bodies with their obligations under the PAIA. This is notwithstanding the fact that the respondents' attorneys drew the HRC's attention to its obligations under this section and its powers in terms of sections 6 and 7 of the Human Rights Commission Act, 54 of 1994. These matters were drawn to the attention of the HRC before it lodged its application for admission as *amicus curiae*. [See annexure "D" to the HRC application page 36 paragraph 2].

40.2. An *amicus curiae* with the constitutional role of the HRC ought to present all the relevant facts to the Court and not only select those facts that are intended to portray a party to the litigation (in this case the respondents) in a bad light. I have shown above that the allegations of non-compliance by the Department are not entirely true.

41. The HRC asks that access be granted to the applicant

41.1. We submit that granting access would not be a proper course to follow. A proper course would be to refer the matter back to the High Court to deal with the matter on the merits as it deems fit, including considering whether or not to invoke the provisions of section 80 of the PAIA. If section 80 is invoked, the respondents would be entitled to address appropriate submissions to the Court on whether or not the ground of refusal covers all or only some of the records.

42. In the circumstances, I respectfully submit that no purpose will be served by admitting the HRC as *amicus curiae.*

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DEPONENT

THUS SWORN AND SIGNED TO before me at Johannesburg on this the _____day of JUNE 2009 the Deponent having acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath which he considers to be binding on his conscience. The provisions of Regulation no R1258 published in

Government Gazette no 3619 of 21 July 1972, as amended, were complied with.

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COMMISSIONER OF AOTHS

full names:

business address:

designation:

capacity: