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' WRITTEN SUBMISSIONS ON THE APPLICATION BY THE HUMAN RIGHTS COMMISSION

INTRODUCTION

1. These written submissions are delivered in accordance with the directions of the Court given at the hearing of the application on 26 May 2009. They address matters raised by the Human Rights Commission ("*HRC*") in its founding affidavit and in written submissions in the application for admission as *amicus curiae.*

2. We do not intend to repeat submissions already made in the respondents' written submissions on the main application.

3. Before we address the submissions made by the HRC, we comment briefly on the role of *amicus curiae.*

4. We submit that the application by the HRC should be refused on all of the grounds set out below.

THE ROLE OF *AMICUS CURIAE*

5. This Court dealt with the special role of *amicus curiae* in *In re Certain Amici Curiae: Minister of Health and Others v Treatment Action Campaign and Others*[1]. We quote what the Court said:

> "**The amicus curiae application**

[1] *In re Certain Amici Curiae : Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1023 (CC).

[2] On the morning of the first day of the hearing Professor Mhlongo, head of the Department of Medicine and Primary Health Care at the Medical University of South Africa, applied to be admitted as amicus for the purpose of presenting certain new evidence. This related to two aspects, namely, first, the circumstances and implications of the withdrawal by the manufacturers of an application to licence Nevirapine in the United States of America for the prevention of mother-to-child transmission of HIV; and second, evidence challenging the scientific integrity of the method, the conclusions and the recommendations of the clinical trial that led to the approval of Nevirapine for such use.

[3] A person may be admitted as an amicus either on the basis of the written consent of all the parties in the proceedings or on the basis of an application addressed to the Chief Justice. In the latter event admission is entirely in the discretion of the Court. In the exercise of that discretion the Court will consider whether the submissions sought to be advanced by the amicus will give the Court assistance it would not otherwise enjoy. The requirements for admission as an amicus are set out in Rule 9 and, as this Court pointed out in *Fose v Minister of Safety and Security*:

> "It is clear from the provisions of Rule 9 that the underlying principles governing the admission of an amicus in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the amicus are relevant to the proceedings and raise new contentions which may be useful to the Court. The fact that a person or body has, pursuant to Rule 9(1), obtained the written consent of all parties does not detract from these principles; nor does it diminish the Court's control over the participation of the amicus in the proceedings, because in terms of subrule (3) the terms, conditions, rights and privileges agreed upon between the parties and the person seeking amicus status are subject to amendment by the [Chief Justice]" (footnotes omitted).

To this we would add that the application for amicus status must be made timeously and, failing that, condonation must be sought without delay.

[4] In an application for leave to appeal an amicus wishing to be admitted with the leave of the Chief Justice, must apply for admission within 10 days after the application for leave to appeal has been lodged with the Registrar of this Court. Where this is not possible, an application for condonation must be made as soon as possible. Here the application for

leave to appeal was lodged on 8 January 2002 and the application for admission as amicus was made on 2 May 2002, when condonation was first mentioned.

[5] The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence.

[6] The applicant's purpose in seeking admission as an amicus was to enable him to challenge the scientific integrity of the clinical trial that led to the approval by the Medicines Control Council of Nevirapine for the prevention of mother-to-child transmission of HIV. The applicant wanted to introduce a substantial body of new evidence in support of a challenge to the decision of the Council to approve the use of Nevirapine for this purpose. The evidence was untested and the submissions based on it would have opened an entirely new issue on appeal. It was therefore inappropriate for the amicus belatedly to try to introduce the challenge to the approval of Nevirapine as a new issue in the case.

[7] Moreover, allowing the applicant to raise this new issue on the first day of a protracted hearing would have been both disruptive and prejudicial to the parties. It would have necessitated the postponement of an otherwise urgent matter and inevitably delay in resolving a matter that required urgent attention. It would therefore not have been in the interests of justice to admit the applicant as an amicus in these circumstances. That is why the application was refused."

(Emphasis added and footnotes omitted)

6. The HRC brought its application a day before the hearing of the main application on 26 May 2009. It did not apply for condonation in its

application or during its written and oral submissions.[2] This is despite the fact that the respondents' attorneys wrote to it on 22 May 2009 and complained that its application would be brought too late, leaving no time for the respondents to deal with any matters that it would raise.[3]

7. The explanation given by the HRC for the late application is unconvincing and gives no real details.[4]

8. The HRC not only makes submissions based on evidence before the Court in the record, it seeks to adduce new evidence. The new evidence is unhelpful to the Court as:

8.1. it overlooks evidence already before the Court: the HRC manual prepared in terms of section 10 of the PAIA has been presented to the Court by the applicant [Vol 4 page 303]; and the manual published by the first respondent has also been presented to the Court by the applicant [Vol 4 page 340];

8.2. it is not presented fairly in a balanced manner, a matter which is explained in the affidavit filed on behalf of the first and second

[2] Notice of Motion p 2.
[3] Annexure "D" to the HRC founding affidavit p 36.
[4] Founding affidavit p 12 para 17.

respondents in response to the HRC application for admission as *amicus curiae.*

9. Where the HRC (in its written submissions) relies on evidence already before the Court to support its contentions, it does so selectively and without presenting this evidence in a fair and balanced manner. This is explained in the affidavit filed on behalf of the first and second respondents and will be highlighted below where necessary.

10. The HRC also enters the fray as though it were a party – when it is not a party but occupies a special position. A good example is its contention on section 46 of the PAIA which, on the available facts, the applicant has chosen not to persist with. When it does this, the HRC also fails to present facts in a fair and balanced manner.

11. We submit with respect that the above reasons are sufficient on their own to refuse the HRC application for admission as *amicus curiae.*

12. We now address certain of the key contentions that the HRC makes in its written submissions.

PART A OF THE HRC SUBMISSIONS

13. This part of the HRC's written submissions is devoted largely to showing how public bodies fail to comply with their obligations under PAIA and the unreasonableness of the 30 day time period in section 78(2) of the PAIA. The alleged non-compliance by public bodies with their PAIA obligations is tendered as context in which the refusal for access and the condonation application should be considered.

14. In its founding affidavit the HRC made the claim that the first respondent has not only failed to submit a manual in terms of section 14 of PAIA, but that the first respondent also failed to place such a manual on the website of the Department of Social Development ("*the Department*"). It later retracted the allegation that the manual was not published on the Department's website.

    14.1. First, the allegation regarding the publication of the manual on the Department's website ought not to have been made in the first place if the HRC had been diligent enough to read the record before the Court. Such a manual is at page 340 of Vol 4. It was presented to the Court *a quo* by the applicant. This indicates that the applicant was at all times aware of the manual on the Department's website.

14.2. Second, the HRC says nothing about the publication of its guide in terms of section 10 of the PAIA. The applicant presented a copy of this guide to the Court *a quo.* [Vol 4 page 303]. The applicant was at all times aware of this guide. The guide sets out how to use the PAIA. It also sets out the right to apply to Court and the time period of 30 days. [Vol 4 page 327]. In light of this fact, the guide is a relevant consideration in determining the reasonableness of the 30 day period in section 78(2) on the basis that ordinary members of the public who wish to use PAIA would not know their rights – especially the period within which they have to approach the Court in terms of section 78. Members of the public such as the applicant are informed of the applicable time periods, *inter alia,* by way of the guide.

14.3. It is also important in determining the reasonableness of the time period under section 78(2) of the PAIA that appeals to this Court under rule 18, which are brought on notice of motion supported by affidavit, must be brought within 15 days of the date of the order appealed against – which is a shorter time period than 30 days. These applications are not substantially different from applications

in terms of section 78 of the PAIA, which are brought after the exhaustion of internal appeals. The period of 15 days is reasonable.

14.4. Third, the first and second respondents make it clear in their affidavit in response to the HRC application that the first respondent has not only published the manual on the Department website but has also submitted the manual to the HRC. We refer to the affidavit of Mr Madonsela, the second respondent, in this regard.

15. In the circumstances, the allegations of fact underpinning the submissions made by the HRC in Part A of its submissions are of no assistance to the Court insofar as they relate to the first respondent.

16. The allegations made about public bodies in general are difficult to respond to; they are untested as such public bodies have had no opportunity to respond to them; and their admission would be unfair to public bodies in general and would not assist the Court in determining the issues before it.

PART B

17. This part of the HRC submissions addresses the proper test to apply under section 39(1)(b)(iii)(ee) of the PAIA; the application of section 46 of the PAIA on the facts of this case; as well as the right to freedom of expression.

18. We make the following main submissions:

18.1. the English and American cases upon which the HRC relies are not appropriate as the wording of section 39(1)(b)(iii)(ee) is different;

18.2. there is no challenge to the constitutional validity of section 39(1)(b)(iii)(ee) and the Court is thus confined to interpreting and applying that section without importing a stricter test than the section imposes;

18.3. section 46 of the PAIA does not apply on the facts of this case; and

18.4. the refusal in terms of section 39(1)(b)(iii)(ee) does not infringe the applicant's right to freedom of expression (and this right is irrelevant) – the applicant is free to receive and impart information, some of which is contained in the Public Protector's reports upon which the applicant relies.

Section 39(1)(b)(iii)(ee) is not concerned with prior restraints on publication

19. The test postulated by the HRC is based on tests developed by the Courts in the context of prior restraints.[5]

[5] It refers to the *Midi Television* case and UK cases.

20. Section 39(1)(b)(iii)(ee) does not impose a ban on publication. It is simply fortuitous that in this case the respondents' apprehension arises from the applicant's expressed intention to publish on the contents of the records to which he seeks access.

21. There are, conceivably, a vast number of cases in which section 39(1)(b)(iii)(ee) could be invoked where the apprehension does not arise from an expressed intention on the part of a requester to publish the fruits of his or her request. An example that comes to mind could be where the requester is to be a witness in pending litigation and the public body is one of the defendants. It could, depending on the particular circumstances of the case, be reasonably apprehended that the disclosure of a particular record could prejudice the defendant's defence when the matter proceeds to trial.

22. It would be inappropriate to apply a test to section 39(1)(b)(iii)(ee) which has been developed for purposes of determining the justifiability of prior restraints to publication. The facts of a particular case (i.e. this case) cannot be used to give meaning to a statutory provision.

23. We have submitted in the written submissions on the main application what section 39(1)(b)(iii)(ee) means.

The American cases

24. The American cases cannot be relied upon because of the important differences in wording between the provisions of section 39(1)(b)(iii)(ee) and the provisions of the FOIA. Both the respondents and the HRC rely on a discussion by the learned authors I Currie and Klaaren where they draw a proper and clear distinction between the provisions of section 39(1)(b)(iii)(ee) and the FOIA. We refer the Court to these distinctions.[6]

In any event, the respondents should succeed even on the test preferred by the HRC

25. The HRC contends, correctly, that in applications in terms of section 78 of the PAIA, the Court is not confined to information placed before the information officer. The parties before the Court may present evidence and travel well beyond the information that was present to the information officer in seeking to advance their respective cases for access or refusal.[7]

26. The significance of this submission is that the applicant has presented evidence in his replying affidavit in the Court *a quo* effectively that the litigation in the IT Lynx claim should be resolved in favour of IT Lynx and against the respondents. He says the following:

[6] HRC Written Submissions para 55.
[7] HRC Written Submissions para 37.

> "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".[8]

27. There is nothing which would bar the applicant from publishing this view in newspapers. He will say it is fair comment on information provided to him. The *sub judice* rule provides cold comfort because of the requirements that need to be proved to obtain a criminal conviction, notably *mens rea*. In any event, fully aware of the *sub judice* rule, the legislature saw fit to enact section 39(1)(b)(iii)(ee) which is not under attack in the present proceedings.

28. The HRC contends that the requirements of section 39(1)(b)(iii)(ee) would be met *inter alia* "... where publication would expose one of the parties to public and prejudicial discussion of their case such that it may inhibit their recourse to the courts, the administration of justice is brought into disrepute".[9] It repeats this contention in paragraph 72.2 of the written

[8] We refer in this regard to the affidavit of Madonsela in response to the HRC application.
[9] HRC Written Submissions para 71.2.4.

submissions: "... it is insufficient to show simply that the disclosure relates to evidence that may be led in those proceedings. It is necessary, instead, to establish that such disclosure, and the publication which follows it, will likely give rise to either an usurpation of the functions of the court or prejudicial of the merits of one of the party's case".

29. Quite clearly, and on the authorities cited by the HRC, the effect on the opinions of witnesses is an important consideration in the context of section 39(1)(b)(iii)(ee).

30. There is no better indication that the consequences that the HRC says must be likely before section 39(1)(b)(iii)(ee) is met are present than the applicant's adoption of a stance inimical to the respondents' defence and in support of the applicant's case on oath. There is no demonstrable reason why he has seen fit to do this, other than that this is the position that he truly believes to be correct and is likely to portray as correct in his publications.

31. The applicant's stance shows that "publication which is likely to follow such access bear some relationship to the issues in dispute in the litigation" and will be prejudicial to the respondents' case or will affect the opinions of witnesses.

32. The contention by the applicant that he only wants to publish on the existence of a conflict of interest between the Minister and IT Lynx or some of its members is not convincing:

32.1. If that was the case he would have maintained a neutral stance as far as the merits of the IT Lynx claim are concerned. He has not.

32.2. The Public Protector has already made findings of fact on the existence or otherwise of the alleged conflict of interest that the applicant wishes to publish on.[10] The applicant says nothing about his stance in relation to these findings.

33. The HRC's contention (on the authority of the American cases) that the IT Lynx claim is dormant is not supported by any evidence. It is one thing to argue that there have been delays in the IT Lynx claim and to point to the removal of the matter from the roll. It is another to say that because of this the claim is dormant. We refer in this regard to the affidavit of Mr Madonsela in response to the HRC application to show that the claim is not dormant. Therefore, this factor should play no role in the assessment of the ground of refusal under section 39(1)(b)(iii)(ee). In any event, section 39(1)(b)(iii)(ee) does not require a party refusing access to show that the

[10] I refer to the affidavit of Madonsela in response to the HRC application.

litigation in question is currently active. It is sufficient that the litigation has not been withdrawn or settled and is still live.

34. The affidavit of Mr Madonsela also shows that the statement by the HRC that "... no further steps had been taken, since the matter was struck off from the roll, to re-enrol the matter" has no factual basis.[11] The matter has (inexplicably) been enrolled for August 2009. The attorneys for the respondents are liaising with the Registrar of the High Court to rectify the enrolment as the attorneys for IT Lynx have not yet addressed the objections raised by the respondents which gave rise to the matter being removed from the roll.[12]

35. The cases to which the HRC refers from paragraph 58 of the written submissions are distinguishable from the circumstances of the IT Lynx claim. There are no settlement discussions between the parties; and the litigation is against, *inter alios*, the Minister, from whom access to records is sought.

36. It must be emphasised that section 39(1)(b)(iii)(ee) postulates a probabilistic test. The respondents do not have to show that as a matter of

[11] HRC Written Submissions paras 63 and 64.
[12] We refer to the affidavit of Madonsela.

fact the adverse consequences referred to in the section will occur. We refer to our written submissions in the main application in this regard.

37. We refer to the affidavit of Mr Madonsela in response to the HRC application as further support for the apprehension that the respondents have which justifies the refusal in terms of section 39(1)(b)(iii)(ee).

Section 46 does not apply

38. We refer to the affidavit of Mr Madonsela in response to the HRC application which demonstrates why there is no factual basis in the affidavits of the applicant to support the HRC's contentions on the application of section 46 of the PAIA.

39. It is significant to emphasise (which Mr Madonsela also does in his affidavit) that the applicant initially relied on section 46 but did not persist with it. What the HRC does on this score is to embroil itself in the litigation as though it were a party and to pursue a basis which the applicant raised but did not pursue. This is not in line with the special role of *amicus curiae*.

40. Significantly, and as demonstrated by Mr Madonsela in his affidavit, the HRC relies for its contention on section 46 of the PAIA on facts that it reads or presents in an incomplete, inaccurate and unfair manner. This

aggravates its attempt to participate as though it were a party in the litigation.

41. There is simply no justification for the HRC's contention that the judgment of Zondi J should be set aside because he failed to consider and deal with section 46 of the PAIA. It was simply not brought before him (by the applicant or the respondents) as an issue for determination. That is the end of that contention.

Freedom of expression

42. The applicant is free to receive and impart information regarding the alleged conflict of interest on the part of the Minister. The Public Protector's reports contain a wealth of information on which to publish. The applicant has also interviewed the Minister, his wife and other parties and can publish the fruits of such interviews.

43. The respondents have simply invoked the provisions of section 39(1)(b)(iii)(ee). If the HRC so wishes, it could challenge the constitutionality of this section in other proceedings on the basis that it unjustifiably limits the right to freedom of expression.

44. Section 78(2) also does not limit the applicant's right to freedom of expression. He can receive and impart information to the public as set out above.

Relevance of motive

45. The HRC is correct that motive is relevant, especially to the ground of refusal in section 39(1)(b)(iii)(ee).

46. What the applicant (for access) wishes to do with the records once access is obtained is of particular relevance to the rights and interests protected by section 39(1)(b)(iii)(ee). In this case the applicant's standpoint as to the merits of the IT Lynx litigation assumes particular significance when it is known that the applicant wishes to publish the fruits of his application for access.

CONCLUSION

47. We submit, in conclusion, that the HRC application should be dismissed for all of the reasons advanced above. It is of no assistance to the Court on the matters to be decided.

MTK MOERANE SC

NH MAENETJE

Chambers

Durban and Sandton

8 June 2009