

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 25/09

CPD Case No: 10013/07

In the *ex parte* application of:

**THE SOUTH AFRICAN HISTORY ARCHIVES
TRUST**

Applicant for admission
as *amicus curiae*

In the application for leave to appeal in the matter between:

STEFAANS CONRAD BRUMMER

Applicant

and

THE MINISTER OF SOCIAL DEVELOPMENT

First Respondent

THE DIRECTOR-GENERAL OF THE DEPARTMENT

OF SOCIAL DEVELOPMENT

Second Respondent

THE MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned

PIERS PIGOU

state under oath the following:

1. I am an adult male director of the South African History Archives Trust (“SAHA”), situated at the William Cullen Library at the University of the Witwatersrand, Braamfontein, Johannesburg.
2. I am duly authorised to make this affidavit on behalf of SAHA.
3. The facts contained herein are to the best of my knowledge true and correct and, unless otherwise stated or indicated by the context, are within my personal knowledge.
4. In this application, SAHA seeks admission as *amicus curiae* in the present proceedings.
5. The purpose of this affidavit is to set out the basis of the application as per requirements listed in Rule 10 of the Rules of this Court.

SAHA’S INTEREST IN THIS MATTER

6. SAHA is a Non-Governmental Organisation (“NGO”) constituted as a trust in terms of the laws of South Africa. I attach a copy of SAHA’s trust deed marked “Annexure A” hereto.

7. SAHA's objective is *inter alia* to collect, preserve and catalogue materials of historic, contemporary, political, social, economic and cultural significance and to promote the accessibility of archival materials to the general public.
8. SAHA is an independent NGO archive dedicated to documenting and supporting the struggles for justice in South Africa. Established in the late 1980s and registered as a trust in 1994, its founding mission was to promote the recapturing of South Africa's lost and neglected history and to record history in the making, which informed a focus on documenting the making of democracy.
9. In 2001, SAHA launched its Freedom of Information Programme dedicated to using the Promotion of Access to Information Act 2 of 2002 ("PAIA") in order to extend the boundaries of freedom of information and to build up an archive of materials released under the Act for public use.
10. The Freedom of Information Programme aims to create awareness of, compliance with and use of PAIA through requests for information. The programme provides access to released materials and conducts research, information dissemination, lobbying, education and training in the use of the legislation.
11. In seeking to achieve these objectives, SAHA has made over 1000 requests for information from various government departments since

2001. It has brought eleven applications in the High Court arising out of refusals of these requests. In all of these applications, SAHA has had to seek the condonation of the High Court for the late filing of its application. In most of these cases, the application had been launched a significant time after the expiry of the 30 day period set out in section 78 of PAIA.

12. To my knowledge, SAHA makes more requests for access to information held by Government Departments than any other NGO in South Africa.
13. SAHA therefore has a substantial interest in the outcome of these proceedings as it will affect applications to court presently contemplated by SAHA as well as have an enormous impact on future requests for information that SAHA will make.
14. Not only has SAHA an interest in these proceedings but it is of the view that it is uniquely placed to assist this Court in determining the constitutionality of section 78 of PAIA. In particular, SAHA is of the view that its own experience of the practical implications of the 30 day period in section 78 will be of assistance to this Court in this matter.
15. Having read the judgment of Zondi J in the Cape High Court as well as the Applicant's written submissions in this Court, SAHA wrote to the parties in this matter on 13 May 2009, seeking their consent for SAHA's admission as an *amicus curiae* in these proceedings, in accordance with

Rule 10 of the Rules of this Court. The Applicant consented in writing to SAHA's request. Our attorneys were advised by the Third Respondent's attorneys by telephone that the Third Respondent declined to consent to our admission as *amicus curiae* without providing any reasons, and to date, we have not received any reply, written or oral, from the First and Second Respondents. I attach a copy of my attorney's letter marked "**Annexure B**".

16. SAHA therefore seeks to be admitted as *amicus curiae* in these proceedings. SAHA is aware that the normal practice in this Court is for an application for admission as *amicus curiae* to be made after the filing of heads of argument by both sides.
17. However, in view of the importance of this matter to SAHA as well as the extremely short time period between the date for filing of the Respondents' written submissions and the date set down for the hearing of this matter, SAHA makes this applications after having read only the Applicant's written submissions. SAHA's submissions will largely be in support of the Applicant but having read the Applicant's submissions, it is clear that SAHA's submissions will canvass substantially different issues to those dealt with by the Applicant.
18. In this regard, I note that while Rule 10(5) of this Court's rules prescribes a time-limit for applications for admission as *amici curiae* (that is five days after the filing of the respondent's heads of argument) it does not

require that parties must necessarily wait until heads of argument are filed before applying for such admission.

19. SAHA therefore seeks leave to be admitted as *amicus curiae* and to present both written and oral argument.

THE SUBMISSIONS THAT SAHA SEEKS TO MAKE

20. Should SAHA be admitted as *amicus curiae* in these proceedings, its submissions will be largely related to the practical implications of a time bar on approaching a court for relief (as contained in section 78 of PAIA). In particular, SAHA will submit that such a time bar operates unduly harshly on NGO's and ordinary litigants, who seek to protect their right of access to information as guaranteed by section 32 of the Constitution.

21. The issue to be determined in this case is whether the 30 day period in section 78 of PAIA, in terms of which an applicant must approach a court for relief in relation to a refusal of access to information, is in conflict with section 32 and 34 of the Constitution. In particular, the question raised is whether the power of a court to condone non-compliance with this period, renders section 78 constitutional.

22. SAHA's submissions will focus on the fact that it is extremely difficult for NGO's as well as individual litigants to bring a court application within 30 days as contemplated by section 78 of PAIA. It will further be submitted that the power of a Court to condone non-compliance with the 30 day period does not alleviate these difficulties for the reasons I set out below.

THE DIFFICULTIES OF BRINGING COURT APPLICATIONS FOR SAHA

23. In order to launch an application in the High Court for relief in terms of section 82 of PAIA, SAHA needs to do the following:

23.1 First, SAHA often needs to obtain legal opinion on the prospects of success of any application it may need to bring before officially launching a court application. This requires that Attorneys and Counsel are briefed and that if necessary additional funding is secured in order to do so. This process in and of itself often takes almost 30 days.

23.2 Once SAHA has decided to bring a court application, it must get approval and authorisation from its Board of Trustees in order to litigate. This takes some time as a Board meeting needs to be called and all Trustees informed of the nature of the proceedings, the risks involved, possibility of an adverse costs order and the prospects of success of the case. Trustees are located all over the country and as a result the process of

authorisation can often take the better part of 30 days to complete.

23.3 Once Board approval has been obtained, SAHA has to retain the services of attorneys who are willing to take on the case on a *pro bono* basis or at very reduced rates.

23.4 Counsel must also be retained in order to assess the prospects of success of the application, consult with SAHA and its attorneys and draft the necessary application. SAHA's limited funding inevitably means that Counsel is required to represent SAHA on a *pro bono* basis or at very reduced rates.

23.5 It is often very difficult to retain Counsel that has an expertise in PAIA applications and is willing and able to consult and draft papers within 30 days as contemplated by section 78 of PAIA.

THE DIFFICULTIES OF BRINGING COURT APPLICATIONS FOR INDIVIDUAL LITIGANTS

24. For an ordinary litigant, the process of getting to court is even more difficult than for an NGO. An individual litigant, is in all likelihood, not well versed in the workings of PAIA, may not be aware of the 30 day time bar, nor is he/she able to easily obtain attorneys and Counsel who are willing to act on a *pro bono* basis and in the very short period that will

inevitably be the case. Moreover, the prospect of litigation is a daunting and difficult one for an individual litigant. Often such a litigant requires some time to assess his/her financial and emotional ability to approach a Court for relief. 30 days in which to do all of this, is not sufficient time and therefore seriously impacts on the ability of litigants to approach a Court.

25. SAHA is an organisation which has as one of its primary areas of focus, the making of requests for access to information which is relevant to the public and which SAHA believes is necessary to archive for the use of present and future generations. If the 30 day period operates harshly as against an organisation like SAHA which understands and daily utilises PAIA, the operation of the time bar in relation to organisations that do not make frequent use of PAIA and in relation to individuals who seek to obtain information on their own behalf, is even more severe.

THE EFFECT OF THE CONDONATION POWER IN RELATION TO THE 30 DAY PERIOD

26. In all of the eleven cases SAHA has sought to litigate it has not once been able to do so within the 30 day time period in section 78. In all these cases, it has had to seek condonation of the Court for the late filing of its application. In most of the eleven cases SAHA has litigated, the question of condonation has been of great concern to SAHA, as the

refusal of condonation means that the application as whole must be dismissed and this may have cost implications for SAHA. As an organisation dependant on outside funding, the threat of an adverse costs order has enormous implications for SAHA.

27. The fact that a Court is able to condone non-compliance with the 30 day time period in section 78 does not render the provision constitutional. In fact, in all the cases where SAHA has sought condonation, it has had to deal with its reasons for condonation in the substance of its founding affidavit and without being certain of whether a Court will be inclined to exercise its power to condone or indeed whether a Court will regard the reasons provided as sufficient to justify condonation.

28. The difficulties experienced are pertinently demonstrated by the following experience:

28.1 In SAHA's own practical experience, the need to apply for condonation has at least in one recent case, resulted in SAHA not approaching a court for relief but rather, choosing to make a fresh request for the same information to the same bodies, in order that it could comply with the 30 day period when its internal appeal ultimately is again unsuccessful.

28.2 That particular request related to the records of the Eugene De Kock amnesty application, the Truth and Reconciliation

Commission (“the TRC”) victims’ database and transcripts of the section 29 in camera hearings of the TRC. The nature of the information requested was of such importance to SAHA for archival and historical reasons that it could not take the chance that its application would be refused for non-compliance with the 30 day time period and the possibility of an adverse costs order against SAHA. In that case, the reasons for SAHA’s delay were related to the fact that its Board of Trustees was in the process of being properly reconstituted. In addition to this, SAHA had unsuccessfully sought the intervention of the Human Rights Commission to mediate between the Department of Justice and SAHA in an attempt to avoid having to go to Court. All of this took significantly longer than 30 days.

29. The following is therefore clear:

- 29.1 30 days is not sufficient time in the context of section 78 to approach a court for relief;
- 29.2 The Court’s power to condone non-compliance does mitigate the harshness of the 30 day period; and
- 29.3 All the facts set out in this affidavit combine to have a “chilling effect” on litigants wishing to exercise their rights in terms of section 32 and 34 of the Constitution and section 82 of PAIA.

30. It is submitted that SAHA's submissions are likely to be significantly different to those advanced by the parties and respectfully suggest that they will be of assistance to this Court as SAHA is in a unique position to provide an understanding of the practical implications of the 30 day time bar in section 78 of PAIA for NGO's and individual litigants.

CONCLUSION

31. In all the circumstances, SAHA prays for an order as set out in the notice of motion.

DEPONENT

SIGNED and SWORN to before me at PRETORIA on the ____day of _____2009, after the deponent stated that he is aware of the content of this statement and considers the oath to be binding on his conscience. I certify that the regulations provided for in the Government Gazette Notice R. 1258 of 21 July 1972 have been complied with.

COMMISSIONER OF OATHS

FULL NAMES:
DESIGNATION:

