

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT 25/09

In the application of:

THE HUMAN RIGHTS COMMISSION OF SOUTH AFRICA Applicant for admission
as an amicus curiae

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

FOUNDING AFFIDAVIT

I, the undersigned,

THOMAS MADIKWE MANTHATA

hereby make oath and say that:

1. I am a commissioner of the South African Human Rights Commission (“SAHRC”), the applicant for admission as an *amicus curiae* in these proceedings.
2. I am duly authorised to make this affidavit on behalf of the SAHRC.
3. The facts contained herein are, to the best of my knowledge, both true and correct and, unless otherwise indicated by statement or context, are within my personal knowledge. Where I make legal submissions in this affidavit, I do so on the advice of the SAHRC's legal representatives.
4. This is an application to be admitted as an *amicus curiae* in terms of Rule 10 of the Constitutional Court Rules.
5. This affidavit deals with the following issues in turn:
 - 5.1. a description of the SAHRC and its interest in this matter;
 - 5.2. the nature of and background to this application;

- 5.3. the submissions which the SAHRC will seek to advance should it be admitted as *amicus curiae*; and
- 5.4. factual material in terms of Rule 31 regarding the use and implementation of the Promotion of Access to Information Act 2 of 2000 (“PAIA”) which the SAHRC is able to put before this Court by virtue of its statutory mandate in terms of PAIA.

THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION

6. The SAHRC is a national institution established in terms of Chapter 9 of the Constitution to assist in transforming South African society, and protecting and promoting the fundamental rights in the Constitution.
7. The SAHRC is governed by The South African Human Rights Commission Act 54 of 1994 (“the SAHRC Act”) and enjoys juristic personality in terms of section 17 of the SAHRC Act to act on its own behalf and on behalf of any person in South Africa on human rights issues.
8. In recognition of the fact that the protection and promotion of human rights could not be left to individuals or government, institutions such as the SAHRC were created, subject only to the Constitution and the law, to safeguard the provisions of the Bill of

Rights in the Constitution. The SAHRC works with government, civil society and individuals, both nationally and abroad, to fulfil its constitutional mandate.

9. Since its inception on 2 October 1995, the SAHRC has endeavoured to support and advance democracy and *inter alia* to compel the State to respect, protect, promote and fulfil the rights in the Bill of Rights.

10. The SAHRC has as its primary objectives, promoting respect for human rights and a culture of human rights; promoting the protection, development, and attainment of human rights; and monitoring and assessing the observance of human rights in South Africa.

11. The SAHRC has the powers, as regulated by national legislation, necessary to perform its functions, including the power to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; and to carry out research, educate and train on human rights.

12. In terms of PAIA, the SAHRC is tasked with the critical role of monitoring implementation and compliance with PAIA in the private and public sector. It is also enjoined to promote and educate members of the public, public entities and private bodies on access to information as a fundamental right. The PAIA mandate coalesces with that of the SAHRC's broader constitutional mandate. In this sense,

the SAHRC also assists in PAIA-based rights' assertion and law reform. Within its monitoring mandate the SAHRC must receive mandatory PAIA manuals from public bodies in terms of section 14 of PAIA, and annual reports from public bodies in terms of section 32 of PAIA.

13. It is particularly due to this monitoring function exercised by the SAHRC that the institution is in a unique position to make submissions that it believes will be useful to the Constitutional Court in these proceedings as they concern the mechanisms of PAIA and their implementation and application across all spheres of South African society.

13.1. The SAHRC is in a position to put before the Court certain factual material, in terms of Rule 31 of the Constitutional Court Rules, setting out its experience of the practical implementation of the PAIA mechanisms.

13.2. It may be noted that the respondents, in their written submissions, specifically invoke the official role of the SAHRC as being "of particular importance to the claim by the applicant that certain individuals may fail to properly follow the procedures set out in the PAIA, especially as regards time limits" (paragraph 35 of the respondent's heads of argument).

14. Moreover, as part of its broader mandate to oversee the implementation of all rights in the Bill of Rights, the SAHRC has an interest in ensuring that the right to freedom of expression is promoted and protected. Acting in terms of its powers under section 184 of the Constitution, the SAHRC is at times called upon to hear disputes and issue findings on freedom of expression issues, and has done so on several occasions, particularly in the context of complaints of alleged hate speech.

15. The SAHRC has previously been admitted as an *amicus curiae* or participated as a party in the following cases (in chronological order):

15.1. *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), where the SAHRC made submissions as an *amicus* regarding its constitutional duties;

15.2. *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 2000 (2) SA 1 (CC), where the SAHRC was the second applicant in a matter concerning a challenge to the constitutionality of the common law and statutory prohibitions against sodomy;

15.3. *S v Twala (South African Human Rights Commission Intervening)* 2000 (1) SA 879 (CC), where the SAHRC was admitted as an *amicus* and made submissions on the constitutionality of certain provisions of the Criminal Procedure Act;

- 15.4. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), where the SAHRC made submissions as an *amicus* regarding its duty and preparedness to monitor and report on State compliance with its obligations in terms of section 26 of the Constitution;
- 15.5. *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission For Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of The Republic of South Africa and Another* 2005 (1) SA 580 (CC), where the SAHRC made submissions as a party in a matter concerning the constitutionality of the customary law principle that women are not competent to own and administer property; and
- 15.6. *Centre for Applied Legal Studies and Others v Hunt Road Secondary School and Others* (unreported decision of the Durban and Coast Local Division, case no 10091/2006, dated 15 June 2007), where the SAHRC made submissions as an *amicus* by providing evidence of their findings that schools were not informing indigent parents of their rights to apply for an exemption from having to pay school fees.

NATURE OF AND BACKGROUND TO THIS APPLICATION

16. The SAHRC seeks to be admitted as *amicus curiae* in this matter in terms of Rule 10(6) of the Constitutional Court Rules.
17. The directions in this matter were handed down on 14 April 2009. In terms of the directions, the applicant was directed to file written argument by 12 May 2009, and the respondents by 19 May 2009, in respect of a matter set down for hearing on 26 May 2009. On 19 May 2009, the South African History Archives Trust filed an application to be admitted as an *amicus curiae* in this matter.
18. On 21 May 2009, a letter was sent to all of the parties in this matter to request consent for this application, in accordance with Rule 10(1) of the Constitutional Court Rules. A copy of this letter is attached as Annexure "A". The letter requesting consent was also sent to the legal representatives of the South African History Archives Trust to cater for the possibility that this Court would grant its application for leave to be admitted as an *amicus curiae*. Written consent was obtained from the applicant, as well as from the South African History Archives Trust. Copies of these consent letters are attached as Annexure "B" and "C" respectively. The respondents, however, have refused consent, in terms of a letter a copy of which is attached as Annexure "D". It is noteworthy that the respondents contend that the freedom of expression dimension the SAHRC wishes to raise is not "relevant" to the application and that the results and experience of the SAHRC relating to the

implementation of PAIA will be of no assistance to this Court. These contentions are neither correct nor fair. The usefulness of the background material relating to the practical implementation of PAIA will be addressed briefly below and will emerge more fully from the written submissions if the SAHRC is admitted as *amicus curiae*. As for the contention that the freedom of speech and public interest dimension is “irrelevant” to the application, this contention, in the respectful submission of the SAHRC, serves to confirm, rather than to militate against, the admission of the SAHRC as *amicus curiae*. The fact that it is not a dimension emphasised by the applicant in argument in this Court, yet remains of undeniable relevance to the application on the papers, is precisely why it is useful for the SAHRC to advance submissions to this Court on this dimension. The applicant invoked a public interest basis for access in his application to the court *a quo*. The role of that dimension in the refusal, in the internal appeal, in the judgment of the court *a quo*, and in the application for leave to appeal in this Court on the issue of reasonable prospects of success on condonation is of importance to the SAHRC, and, we submit, useful to this Court in adjudicating the matter.

19. The SAHRC is conscious of the fact that this application for admission is being filed a matter of days before the scheduled hearing of the matter. This was, however, unavoidable because, in order for the SAHRC to comply with the requirements of Rule 10 of this Court’s Rules, it was required to consider both the applicant’s and the respondents’ written submissions to determine whether it could offer meaningful and

different submissions on the issues before this Court, that did not raise matters already adequately traversed in the written submissions.

20. Given that the respondents' written submissions were filed only on Tuesday, 19 May 2009, this presented a very truncated period within which the SAHRC could consider those submissions and draft this application. The SAHRC has moved with all reasonable speed since receipt of those submissions to file this application.

21. The SAHRC will continue to act with such expedition by filing its written submissions by 10.00 am on Monday 25 May 2009, the next working day after the filing of this application, if these will be received by the Court.

SUBMISSIONS WHICH THE SAHRC WILL SEEK TO ADVANCE SHOULD IT BE ADMITTED AS *AMICUS CURIAE*

22. Rule 10(6)(b) and (c) of the Constitutional Court Rules provides that in an application to be admitted as an *amicus curiae*, the applicant must briefly identify the position it will adopt, and set out the submissions it intends to make if admitted.

23. The SAHRC intends, if it is admitted as *amicus curiae*, to advance submissions on the following matters:

23.1. the role and experience of the SAHRC in promoting and educating the public about PAIA in terms of PAIA and section 184(1)(c) of the Constitution. This will include submissions regarding:

23.1.1. the obligations on each of the respondents in this matter to produce a manual, in terms of section 14 of PAIA, which must include, “a description of the categories of records it holds and all remedies available in respect of an act or a failure to act by the body” (section 14(1)(h) of PAIA);

23.1.2. the relationship between compliance with the obligation in section 14 and the proper enforcement of PAIA rights;

23.1.3. in the light of the respondents’ invocation in paragraph 37 of their written submissions of the role played by such manuals in the enforcement of PAIA rights, the failure, as a matter of fact, of the first respondent to comply with its obligations in terms of section 14 of PAIA; and

23.1.4. the experience of the SAHRC in receiving complaints regarding access to justice in terms of the current PAIA framework.

23.2. the limitation which section 78(2) of PAIA may have on section 16 of the Constitution, the right to freedom of expression, including a limitation on the right in section 16(1)(b) of the Constitution to “receive or impart information or ideas”; and

23.3. the failures, on the part of both the Court *a quo* and the first and second respondents, to consider the following rights in assessing the applicant’s request for information:

23.3.1. the applicant’s right to freedom of expression of the press and other media in section 16(1)(a) of the Constitution;

23.3.2. the applicant’s right and that of the public to receive or impart information or ideas in section 16(1)(b) of the Constitution; and

23.3.3. the constitutional values of openness, responsiveness and accountability;

both in the context of their analysis of the applicability of section 39(1)(b)(iii)(ee) of PAIA and of their omission to consider the public interest override set out in section 46 of PAIA.

24. The submissions on section 16 of the Constitution set out above, although squarely raised and implicated in the papers in the application, have not been canvassed by any of the parties in this matter in written argument. In addition, the South African History Archives Trust has not taken up this point in its *amicus* application.

25. The SAHRC submits that consideration of the section 16 dimension to this case has a direct bearing on whether the first and third of the High Court's orders ought to be confirmed by this Court. In this regard, it is important to highlight that the applicant in this matter has sought leave to appeal against the first and second of the High Court's orders and, therefore, provided this Court grants the applicant leave to appeal these aspects of the order, the question whether the High Court was correct to refuse to condone the applicant's late filing of his application and, with it, to conclude that the applicant's prospects of success in the application were slim, is squarely before this Court. Although the SAHRC is not directly interested in the answer to the question whether condonation ought, on the facts, to have been granted or to have been refused, it is directly interested in submitting that the public interest context under section 46 of PAIA, and in particular in that regard that the freedom of expression dimension in the circumstances of this case, ought to have featured in an assessment of reasonable prospects of success.

26. I submit that the submissions catalogued above:

26.1. will be of assistance to the Court; and

26.2. are likely to be different to the submissions advanced by the parties to these proceedings.

27. In the next section of this affidavit, I set out the factual material that the SAHRC is in a position to place before this Court in terms of Rule 31.

THE ROLE AND EXPERIENCE OF THE SAHRC IN MONITORING COMPLIANCE WITH PAIA

Monitoring the Implementation of PAIA

28. Section 83(3)(b) of PAIA obliges the SAHRC to “monitor the implementation of [PAIA]”. In fulfilling this role, the SAHRC has acquired extensive experience in monitoring the use and implementation of PAIA.

29. As part of its oversight role, the SAHRC compiles annual reports on the implementation of PAIA, known as the Human Rights Development Report. We attach copies of the 2007/2008 and draft 2008/2009 reports as Annexures “E” and “F” respectively.

30. These reports contain what is respectfully submitted to be a useful encapsulation of the experience of the SAHRC concerning the practical implementation of PAIA.

31. The information relied on for the compilation of these reports was derived primarily from the mandatory section 32 reports and the section 14 manuals which public bodies are required to submit to the SAHRC in terms of PAIA. In addition, information was obtained from an audit (described as ‘consultations with public bodies’) undertaken by the SAHRC; questionnaires solicited by the SAHRC from public bodies on “key focus areas”; information gathered through training and other engagements with implementers of PAIA by the SAHRC; and general comparative research undertaken by the SAHRC.¹ These reports therefore collate information from a wide range of sources. I submit that these reports will be of use to the Court in considering the main application as they provide important background contextual information on the difficulties faced by public bodies and requesters in seeking to promote and fulfil PAIA. In the following sub-paragraph, I highlight the key features of these reports that are of relevance to the issues to be considered by the Court:

31.1. Unlike most comparative jurisdictions, South Africa does not have a separate body dedicated to dispute resolution and enforcement of disputed requests. Instead, at present only the courts are charged with fulfilling this role.²

¹ Annexure F at page 2.

² Annexure E at pages 3 and 9.

31.2. In practice, applicants who litigate to enforce their PAIA rights are “sophisticated requesters and interest groups. There have been very few matters litigated in terms of PAIA by individuals who have not been assisted or funded by civil society or the media.”³

31.3. Enforcement of PAIA rights is uniformly experienced as burdensome, expensive, confusingly procedure-driven, and time-consuming. This is particularly so given that the required step after exhaustion of internal remedies of appeal is to apply to court. The court-based bias of PAIA enforcement acts as an effective deterrent particularly for those who do not belong to an “elite of experts” who tend to monopolise the enforcement of PAIA rights in practice. The decision to appeal to courts where a request is refused is difficult for many requesters, notably because of:

31.3.1. complex procedural requirements associated with litigation;

31.3.2. the cost of litigation;

31.3.3. the length of time before judgment could be expected to be handed down;

³ Annexure F at page 12.

31.3.4. the fact that most South Africans are not fully sufficiently rights conscious to assert their rights within formal rights assertion frameworks;

31.3.5. cultural barriers to litigation as a viable vehicle for engagement with government;

31.3.6. the fact that, in practice, most litigation is conducted by civil society and non-governmental organisations, which means that the matters which are ultimately litigated are often driven by their prospects of success and their suitability for development of the law, rather than by the wish to assert individual rights.⁴

31.4. In practice, the implementation of PAIA by public bodies is extremely poor. Reasons given for this weakness include:

31.4.1. a perception that PAIA is “legalistic” and “overly burdensome”;

31.4.2. high staff turn-over in the public sector; and

⁴ Annexure E at page 10.

31.4.3. a reluctance to provide information where there is a perception that this may open up public bodies to litigation.⁵

32. In addition, the SAHRC has found contributing factors to be low awareness levels, lack of adequate budgetary allocation for implementation and lack of senior management awareness and commitment.

33. These reports illustrate that the SAHRC has repeatedly identified such difficulties to Parliament. The SAHRC has been particularly concerned with reform that might rescue PAIA from its exclusionary and elitist enthrallment.

34. In addition to these findings in the two reports, the SAHRC has experience of further significant aspects in the implementation of PAIA:

34.1. First, public bodies regularly fail to comply with the time periods stipulated in PAIA. The facts of the appeal before the Court in the main application illustrate this feature well. These observations are confirmed through the compliance audits and training sessions which the SAHRC regularly holds with implementers in the public sector. It may be noted, for example, from the 2008 audit report, a copy of which is attached as “G”, that a majority of respondents reported that they were able to comply with the time periods for complying with PAIA requests. Yet the experience of the SAHRC derived

⁵ Annexure E at page 17–18.

from 24 workshops and training sessions held with governmental departments last year was that an overwhelming majority of (practically all) departments at all levels experienced great difficulty in complying with the time frames. The new audit report will reflect this reality.

34.2. The relevance of this observation is that it confirms a reality in the implementation of PAIA that entails a gulf between stipulated time-frames and compliance with such time-frames. Of course, the extent to which record-holders habitually ignore or fail to be able to comply with time-frames is not directly determinative of the question to what extent a time-frame placed on an applicant to approach the courts is appropriate, nor to what extent it is appropriate to excuse an applicant for not complying with a time-frame. But it remains an important part of the context of an application for leave to appeal dealing with condonation of such a failure that applicants appear almost invariably to deal with counterparties in PAIA requests to whom time-frame compliance appears (from the perspective of the applicant) to be a matter of trivial importance. Such applicants may be brought under the impression by such treatment of their applications that the process of enforcing PAIA rights is something counted in months, not days, and that adherence to statutory time-frames is not an important aspect of such a process.

34.3. Furthermore, the experience of the SAHRC is that the perception of procedural complexity and confusion with respect to PAIA rights and obligations plays a part in fostering an attitude that non-compliance is justifiable, as complete compliance is regarded as in any event too burdensome and too difficult to understand. This creates the danger that important procedural requirements may be swamped in a perceived fog of procedural complexity and in the process suffer by association. This phenomenon impedes the fostering of an attitude of respect for the importance of the rights entrenched in PAIA.

34.4. Based on section 32 reports submitted to it, the SAHRC notes that the third respondent required extensions to the 30-day period advocated in PAIA for responses to requests in 50% of the requests received by it.

34.5. The SAHRC is unfortunately not possessed of specific data relating to the compliance ratio with respect to the 30 day time-frame stipulated in section 78(2).

34.6. Nevertheless, the following important observations may be highlighted arising out of the SAHRC experience in this regard –

34.6.1. the audit report feedback confirms the empirical observation that
very few appeals proceed to court;

- 34.6.2. the central theme of negative feedback that the SAHRC has gained from the public with respect to the enforcement of PAIA has been that the key challenge is the inordinate procedure-driven complexity of the process, in particular the need to fulfil a plethora of procedural requirements at various steps along the way;
- 34.6.3. this perception on the part of applicants acts as an effective deterrent and greatly contributes to the monopolisation of PAIA enforcement by an elite of corporates and interest groups, and to the virtual absence of any PAIA litigation by individuals, let alone the poor, the unlaywered and the marginalised;
- 34.6.4. the strict 30 day requirement to enforce the rights found in s78(2) (whether or not subject to an ability to obtain condonation for non-compliance) will inevitably play an important part in enhancing this deterrent effect.
- 34.7. The SAHRC submits that confirmation of the unconstitutionality of the 30 day time period in section 78(2) would have a beneficial impact on the practical burdens particularly individual applicants face in enforcing their PAIA rights.
- 34.8. Section 32 of PAIA obliges public bodies to submit annual reports to the SAHRC regarding requests that have been made of that body for

information. In the SAHRC's experience, a significant number of public bodies, across all spheres of government, do not submit these reports.⁶ On our calculation, there are 300 out of approximately 450 public bodies that serially fail to comply with these reporting obligations.⁷

34.9. Even where reports are submitted, they may not contain accurate information on requests. The section 32 report filed by the second respondent, for example, is inaccurate to the extent that it does not reflect the present matter in its reports. It does not note the request for an extension of the initial 30-day response period, nor does it reflect the matter as having gone on internal appeal.

35. The facts set out in the reports illustrate that PAIA is not sufficiently sensitive to the specific social context in which it operates in relying on a court-centred solution to enforce PAIA rights.

36. The background highlighted above is relevant both for the arguments relating to the constitutionality of the 30 day period in section 78(2), and for the questions that arise in the application for leave to appeal concerning condonation of the applicant's failure to comply with the time period.

⁶ Annexure E at pages 11–14; annexure F at pages 15–16.

⁷ These figures are derived from new research carried out the SAHRC covering a period of 2005 to 2008.

37. It is also important to note that many of the grounds of refusal, such as in particular that contained in section 39(1)(b)(iii)(ee), require a fine fact-sensitive assessment to be performed by the responsible person on behalf of the record-holder, to make a critical assessment whether access would, for example, impair the fairness of proceedings, in circumstances where the level of compliance and awareness among public entities of PAIA obligations is unfortunately in a pitiful state. This renders the kind of apparent uncritical deference accorded by the court *a quo* to the assessment of the second respondent that the elements of the section were applicable quite inappropriate, as it would be premised on unrealistic assumptions of the level of sophistication and individualised scrutiny accorded to such requests as a matter of course.

Section 14 Manuals

38. Section 14 of PAIA obliges all public bodies, including the three respondents, to prepare manuals which provide detailed information on the procedure to be adopted by prospective requesters of information in making requests. This manual is a roadmap to the organisation and must include, “a description of the categories of records which it holds and all remedies available in respect of an act or a failure to act by the body” (section 14(1)(h) of PAIA).

39. The respondents themselves refer to the significance of these manuals in their written submissions, pointing out the important role which they play in educating members of the public in the enforcement of their PAIA rights.

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.

41. This failure is consistent with the broad failure by most public bodies to file manuals, and significantly undermines the ability of members of the public to exercise their PAIA rights.

CONCLUSION

42. In the circumstances, I ask that this Court admit the SAHRC as *amicus curiae* in the present proceedings and grant it leave to present both written submissions and oral argument at the hearing of the matter.

THOMAS MADIKWE MANTHATA

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at _____ this 22 day of May 2009 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

COMMISSIONER OF OATHS

