IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: _____

CPD Case No: 10013/07

In the matter between:

STEFAANS CONRAD BRÜMMER Applicant

and

THE MINISTER OF SOCIAL DEVELOPMENT First Respondent

DIRECTOR-GENERAL OF THE DEPARTMENT OF SOCIAL DEVELOPMENT Second Respondent

THE MINISTER OF JUSTICE & CONSTITUTIONAL DEVELOPMENT Third Respondent

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AFFIDAVIT

I, the undersigned,

ALISON TILLEY

do hereby make oath and state as follows:

1. I am an adult female attorney and the Director of the Open Democracy

Advice Centre (ODAC), 6 Spin Street, Cape Town. ODAC is Applicant's attorney of record. I am duly authorised to bring this application and to depose to this affidavit on behalf of the Applicant.

2. Save where otherwise stated the facts set out herein are within my personal knowledge and are to the best of my belief both true and correct. In providing this Court with a description of the relevant facts I have relied *inter alia* on the evidence tendered in an application before the Western Cape High Court (*"the court a quo"*), at which hearing I was present and in respect of which this application for leave to appeal relates.

A. THE PARTIES

3. The Applicant is an adult male journalist residing in Cape Town and currently in the employ of M&G Media Ltd, the publisher of the weekly Mail & Guardian newspaper. The application is brought in his personal capacity, in the interest of journalists and in the public interest.

4. The First Respondent is the Minister of Social Development (hereafter *"the Minister"*) the political functionary in control of the national Department of Social Development (hereafter *"the Department"*). The Minister refused the Applicant's internal appeal pursuant to section 77 of the Promotion of Access to Information Act, No. 2 of 2000 (*"the PAIA"*).

5. The Second Respondent is the Director-General of the Department and its Information Officer (hereafter *"the D-G"*) as designated in the PAIA. The Applicant addressed a request for access to information to the Department which was refused by the D-G.

6. The Third Respondent is the Minister of Justice and Constitutional Development (*"the Minister of J&CD"*), whose joinder was required pursuant to Rule 10A of the Uniform Rules of the High Court in that the Minister of J&CD is the member of the national executive authority responsible for the administration of the PAIA.

7. I shall refer to the parties as the Applicant, the First Respondent (alternatively the *"Minister"*), the Second Respondent (alternatively the *"D-G"*) and the Third Respondent (alternatively the *"Minister of J&CD"*) respectively.

8. This affidavit is filed in support of an application for leave to appeal directly to this Court against paragraphs 1 and 2 of the order handed down by the court *a quo* (per Zondi J) on 16 March 2009 (*"the Judgment"*) in which he dismissed the Applicant's applications for condonation and access to records with costs including the costs of the two counsel employed by the First and Second Respondents. Additionally it is filed in support of the confirmation of paragraph 3 of the order of the court a *quo.* A copy of the judgment is annexed

marked **"A"**.

B. APPLICATION TO APPEAL DIRECTLY TO THIS COURT

9. The Applicant is seeking leave to appeal so that this Court can resolve, in general, and authoritatively as the highest court in the land on constitutional matters, the question of the interplay between sections 32, read with the PAIA, and section 34 of the Constitution in the context of the time periods relevant to the institution of court proceedings relating to access to information applications.

10. The case further primarily involves the protection of the Applicant's right of access to court, his ability to access information as contemplated in section 32 of the Constitution and the interpretation and application of provisions of the PAIA, which involves for the most part the indirect application of the Constitution. As such it involves a number of important constitutional matters. The importance of these issues cannot be gainsaid and ordinarily issues on which obtaining the views of this Court would be desirable.

11. It is submitted, in addition, that the issues raised on appeal are also *"issues connected with a decision on a constitutional matter"* as contemplated in section 167(3)(b) of the Constitution in that they are incidental to the order of constitutional invalidity made in paragraph 3 of the order of the court *a quo.* In respect of the latter only this Court has

jurisdiction. Moreover these issues do not involve the development of the common law which would require the involvement of the Supreme Court of Appeal. No purpose would be served by an appeal to the SCA and it would only constitute a waste of time and costs were the Applicant to appeal to another Court in circumstances where the issues raised in the application for appeal directly to this Court are inextricably linked to the proceedings in respect of the order of constitutional invalidity made by the court *a quo.*

12. Moreover given the general nature of the relief sought, not only will countless people benefit, but clarity will be provided in relation to the time periods governing the institution of applications for access to information in terms of the PAIA, particularly given the blurring created by section 77(5)(c), read with section 78(2), of the PAIA which will be elaborated upon hereinbelow. Clearly it has effects beyond the Applicant and must be seen against the backdrop that lower courts have condoned non-compliance with the time limits contained in the provisions of PAIA, without it having been authoritatively determined whether the granting of such condonation is constitutionally permissible and whether the presence or absence thereof impacts on the constitutionality of the time limited ouster clauses contained in the PAIA.

13. In addition, ODAC, a public interest non-governmental body with the rights of appearance in courts of law, has assisted the Applicant

throughout this litigation. There will be a significant saving of time and money if this matter proceeds directly to this Court.

14. Furthermore as will be reflected hereinbelow the court *a quo* erred in a number of respects in dismissing the application for access to information and this dismissal has a bearing on the constitutional law issues in this case and which, I respectfully submit, puts it beyond doubt that this is an appropriate case to seek leave to directly appeal to this Court.

15. In the circumstances it is submitted that it is in the public interest and in the interests of justice that this Court grants the Applicant leave to appeal directly to this Court.

C. BACKGROUND

16. During the period 2004 to 2006 the Applicant wrote and co-authored a number of articles published in the weekly Mail & Guardian which exposed the so-called "Oilgate" scandal. A number hereof related to Imvume Management ("*Imvume*"), a company, headed by Mr Sandi Majali ("*Majali*") who was regarded as having links to the African National Congress (ANC).

17. According to the Applicant's investigations Imvume received a R 15 million oil condensate supply contract from the state oil company, the Petroleum, Oil and Gas Corporation of South Africa (PetroSA).

Subsequent to the conclusion of that contract Imvume donated R11-million to the ANC. As a consequence Imvume ended up in financial difficulty, unable to pay its debts to foreign suppliers. These debts were then settled by PetroSA.

18. From the articles published it appeared that Imvume had also effected payments, shortly after receipt of the advance payment from PetroSA, to a brother of the then Minister of Minerals and Energy, whose portfolio included control of PetroSA. In addition it paid Hartkon, a construction company, an amount of R 65 000 in relation to renovations done at the Minister's private home.

19. At that stage it was confirmed that Majali's companies appeared to be engaged in ongoing contracts relating to social grants distribution, a function of government under the control, directly and indirectly of the Minister as well as contracts which fell directly or indirectly under the control of the then Minister of Minerals and Energy. This gave rise to allegations of conflict of interest, as well as possible bribery.

20. The Minister responded by denying the allegations and stating *inter alia*, that his wife had arranged a loan from Majali and that he had been unaware of the payment to Hartkon. In addition, that he was not aware of Majali's companies' involvement in social grants distribution.

21. Subsequent to these reports, during June 2005, the IT Lynx

Consortium (*"the consortium"*) launched an action in the Pretoria High Court (now referred to as the North Gauteng High Court) under case number 21290/05 against the State Information and Technology Agency (Pty) Ltd (SITA), the Minister and the Minister of Finance. The basic complaint of the consortium which formed the subject matter of the action is that Tender no 0082/2001 ("Tender 82") was awarded to it, and that SITA and the Minister failed to implement such award. The consortium sought implementation of the award; alternatively, the cancellation of the contract resulting from the alleged award of the tender to it, and payment of damages amounting to almost R150 million plus interest and costs.

22. The matter in the North Gauteng High Court was initially set down for trial in 2007 but was postponed *sine die.* The pleadings in that court, as it existed at the time of the hearing of this matter were handed up to the court *a quo* by agreement between the parties. The pleadings indicated that although the matter was set down for trial on 23 February 2010, it was removed from the roll by order of Hartzenberg J dated 29 September 2008 and to my recollection at the time of the hearing of this matter in the court *a quo* there was no trial date set. (The court *a quo* erred in concluding that the matter was set down for hearing on 23 September 2010).

23. One of Majali's companies has an interest as an investor, in one of the groupings comprising the consortium and it appeared that at the time

Majali was paying a contractor to effect improvements at the Minister's home, the latter was being asked to perform his duties in a manner advantageous to a consortium of which Majali/Imvume/or another company to which Majali was connected or had ties.

24. In order to be able to report accurately and properly on this issue, which clearly fell within the public domain, the Applicant applied in terms of the PAIA for the following documentation as detailed in Annexure A to the Applicant's Notice of Motion in the court *a quo*:

24.1 All correspondence relating to the design, development and implementation of a grant administration system under Tender 82 including, but not limited to, correspondence which ensued both prior to, and after Tender 82 was initiated by SITA, until the present date between:

24.1.1 the consortium (and/or it's representatives) the Department and/or the Minister (and/or their representatives);

24.1.2 companies, persons and other entities which may be associated with the consortium, including but not limited to Net 1 UEPS Technologies, Aplitec, New Aplitic, IT Lynx Placement, Kokeletso Investment Holdings, Nokusa Consulting, Imvume Resources, Imvume Management,

any of the companies in the Permit Group, Mr Serge Belamont, Mr Obbey Mabena, Mr Sandi Majali (and/or their representatives) and the Department (and/or the Minister and/or their representatives);

24.1.3 between the Treasury/ Department of Finance and/or the Minister of Finance (and/or their representatives) and the Department and/or the Minister and/or their representatives);

24.2 All records, including, but not limited to agendas, minutes, notes, memoranda and any other communication in writing, or in audio or video communication of/or relating to meetings and/or conversations relating to Tender 82 initiated by SITA, in respect of the intended tender and/or the grant administrative system that the tender eventually envisaged including all correspondence after Tender 82 was initiated up until the present date:

24.2.1 between the consortium (and/or its representatives) and/or the entities or persons who may be associated with the consortium and the Department (and/or the Minister and/or their representatives);

24.2.2 between the Treasury/Department of Finance and/or the Minister of Finance (and/or their representatives) and the Department and/or the Minister (and/or their representatives); in respect of Tender 82. This includes meetings and/or conversations before Tender 82 was initiated by SITA, relating to the intended tender and/or regarding the same grant administrative system that the tender eventually envisaged. It also includes all correspondence after Tender 82 was initiated and until the present date.

25. The Applicant's interest as a journalist in the documentation sought from the First and Second Respondents relate to whether the Minister had knowledge at the time when Majali/Imvume paid Hartkon R65 000 that Majali/one of his companies was part of the consortium that demanded the implementation of Tender 82 in the belief that it has been awarded to them. The Applicant's interest in the records sought does not lie in the actual award of tender or the adjudications by SITA or whether SITA had indeed made such an award to the consortium, being the subject of the dispute in the North Gauteng High Court. This was made clear notwithstanding that the Applicant had no obligation to do so in light of section 11(3) of the PAIA which provides that the requester's reasons for wanting the records is not relevant once the procedural requirements for access have been complied with and he or she is able to overcome the refusal grounds as set out in chapter 4 of

the PAIA.

26. Furthermore, the information sought by the Applicant did not relate specifically to the actual adjudication of Tender 82 which formed the subject of proceedings in the North Gauteng High Court. The Applicant also did not seek correspondence from SITA, nor did he seek correspondence which ensued between SITA, the tender administrator, and the consortium, which according to the pleadings and the discovery affidavit of the State parties before the North Gauteng High Court constituted the bulk of the documentation discovered.

27. As such the documentation sought by the Applicant did not exactly overlap with those required for the proceedings in the North Gauteng High Court, as the Applicant sought records which would obviously have no bearing on any proceedings to take place in the North Gauteng High Court, and in a similar vein there are a number of documents that have been discovered relating to the adjudication of the Tender 82 which are not the subject of the request for information.

D. REQUEST FOR ACCESS TO INFORMATION

(i) The Request

28. On 21 February 2006 the Applicant submitted an access to information application to the D-G requesting the aforementioned documentation.

A response refusing such request was received on 12 May 2006, approximately 80 days later. In refusing the request reliance was placed on sections 7(1), 36(1)(a), (b) and (C), 37(1)(a), 39(1)(b)(iii)(ee) and 44(1)(a) of PAIA.

(ii) <u>The Internal Appeal</u>

29. On 9 June 2006 the Applicant filed a notice of internal appeal against the decision of the D-G. After numerous excuses and delays as detailed in the founding affidavit, on 22 December 2006 the Minister refused the Applicant's appeal. The Applicant received a copy of the appeal decision on 2 February 2007, almost 8 months after lodging the appeal.

30. As apparent from the Notice of Appeal the First Respondent dismissed the Applicant's appeal solely on the basis of section 39(1)(iii) of PAIA (presumably meant to be section 39(1)(b)(iii)(ee) of PAIA) which provides that the information officer of a public body may refuse a request for access to a record if *"the disclosure of the record could reasonably be expected to prejudice or impair the fairness of a trial or the impartiality of an adjudication.* I revert to this issue when I consider the prospects of success of the application.

(iii) The Court application

31. On 25 July 2007 the Applicant launched an application for access to information in the court *a quo* in essence seeking to have set aside the Minister's decision of 22 December 2006 as well as the D-G's decision refusing the Applicant's request for access to information for records.

32. Given that the parties were in agreement that the only decision which remained relevant to the court proceedings was that taken by the Minister together with the reasons furnished by the Minister, in respect thereof i.e. that the furnishing of such information could be refused on the basis as set out in section 39(1)(b)(iii)(ee) of the PAIA, the Applicant did not persist in seeking relief against the D-G.

33. In addition, the Applicant sought condonation given that the application was launched outside the 30 days contemplated by section 78(2) of PAIA. The Applicant did so in light of the decision of Daniel J in **SA Metal & Machinery Co (Pty) Ltd v Transnet Ltd & another** [2003] JOL11882 (T) (confirmed on appeal in **Transnet Ltd v SA Metal Machinery Co (Pty) Ltd** 2006 (6) SA 285 (SCA)). The court below that it had the power to grant condonation with the time limit provisions of the PAIA given the objects sought to be achieved by the PAIA and given that section 82 of the PAIA provides that a court hearing an application may grant any order that is just and equitable which would include tailoring relief to which a successful applicant would be entitled.

34. Although the Respondents initially opposed the Applicant's application on the basis that a court did not have the power to condone non-compliance with the time periods set out in section 78 of PAIA, it abandoned this ground of opposition and sought instead to contend that in light of this power to condone, section 78(2) of the PAIA was not unconstitutional. The court *a quo* assumed that it indeed had a discretion to condone non-compliance with any of the time limit provisions, notwithstanding that section 78(2) of the PAIA makes no specific provision for such condonation, ostensibly because it does not *ex facie* prohibit such condonation (at para 22 of the Judgment).

35. The Applicant, notwithstanding, persisted in contending that the application could not be determined without a finding on the constitutionality of section 78 of PAIA as it was integral to a determination as to whether good cause existed for the granting of condonation or whether it was in the interests of equity and justice to grant the relief sought by the Applicant. In other words the application could not be finally determined without a determination of the constitutional issue.

36. It is respectfully submitted that there exists an illogicality in the judgment of the court *a quo* which flowed from a wrong appreciation of the facts and the law in that it held, on one hand, that the time period of 30 days, as provided for in section 78(2) of the PAIA is unconstitutional,

yet on the other hand refused to condone the Applicant's non-compliance with that requirement (given that it assumed it had the power to so condone). It is respectfully submitted that in doing so the court *a quo* materially misdirected itself in failing to grant such condonation. This is particularly evident from its finding that even though:

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

37. For this reason I now turn to consider why this Court should confirm the order of constitutional invalidity even in the face of a power to condone non-compliance with the time provisions as set out in section 78(2) of the PAIA. I then turn to deal with the scenario should this Court find that section 78(2) of the PAIA is not unconstitutional contending that even so, and even if the Applicant is found not to have given a full explanation of the entire period of the delay, that the court *a quo* materially misdirected itself and failed to properly appreciate the facts and the relevant law in interpreting section 39(1)(b)(iii)(ee) and in finding that the Applicant did not have good prospects of success.

E. THE CONFIRMATION OF THE ORDER OF CONSTITUTIONAL INVALIDITY

(i) The constitutionality of section 78(2) of the PAIA

38. Section 78 is headed *Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies.* Section 78(2) provides:

"(2) A requester-

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;

(b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75 (2);

(c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1-

(i) to refuse a request for access; or

(ii) taken in terms of section 22, 26 (1) or 29 (3); or

(d) aggrieved by a decision of the head of a private body-

(i) to refuse a request for access; or

(ii) taken in terms of section 54, 57 (1) or 60,

may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82.

(my underlining)

39. Once a dispute can be resolved by law, section 34 generates a right of

access to a court or, where appropriate, another tribunal or forum. The purpose of the right is to provide protection against actions by the State and other persons to deny access to the courts and other forums.

40. Section 34 does more than merely outlaw ouster clauses. It hits also *"subtler restrictions on access to courts which will fall foul of the section"*. Section 78(2) of the PAIA creates a distinction between litigants reviewing decisions in relation to access to information applications and other litigants. The latter in effect being afforded a longer period of time under provisions of other law. But for section 78 of PAIA the Applicant would have been entitled to review the refusal on the part of the Respondents in the ordinary course and utilising the time period available to all other litigants, i.e. 180 days, and as such not only is his right of access to court infringed but he is also being discriminated against.

41. This Court has held that section 34 is one of the founding provisions of in the Constitution and guarantees that any constraint upon a person or property shall be exercised by another only after recourse to a Court recognised in terms of the laws of the land. Furthermore, that the right of access is of cardinal importance for the adjudication of judicial disputes and that, when regard is had to the nature of the right in terms of section 36(1)(a) of the Constitution, there can be no dispute that this right is by nature a right that requires active protection.

42. It is trite that every rights challenge in South African constitutional law involves a two-stage enquiry:

(a) Whether there is a violation of a right or rights.

(b) Whether such violation is justified under the limitation clause.

43. It is also trite that the onus in (a) is on the party asserting the unconstitutionality of the impugned statute/action; and the onus in (b) is on the party seeking to uphold the constitutionality of such statute/ action.

44. In light of the decision of this Court that provisions which regulates access to court *per se* infringes the right of access to court, it is submitted that section 78(2), an unreasonable time-limited ouster clause, indeed offends against section 34 of the Constitution.

45. In this regard it cannot be gainsaid that section 78(2) of the PAIA, by allowing only a period of 30 days within which to launch an application, does not afford an aggrieved party with a real and fair opportunity to institute legal proceedings in a court of law particularly considering that for a lay litigant to seek recourse in a court is not a simple matter, nor does it provide a speedier resolution of a dispute unless the matter is of an urgent nature. In addition, and without legal aid being readily available in public interest matters, litigation without assistance it is a

costly matter, not lightly undertaken.

46. In the premises the 30 day limit does not afford a claimant an adequate and fair opportunity to seek judicial redress and as such constitutes a clear infringement of the right.

47. All rights are however subject to limitation, provided that there is compliance with the limitation clause.

48. The requirement of section 36 that limitations of rights should be reasonable and justifiable involves a three-part enquiry:

48.1 Firstly, the evaluation of the reasons for the law that limits rights.

28.1 Secondly, the determination of whether there is a rational relationship between these reasons and the limitation.

28.2 Thirdly, the determination of whether there is an acceptable degree of proportionality between the benefits to be obtained by the limitation and the harm that it entails.

49. It is also trite that what is reasonable and justifiable as far as the limitation on a fundamental right is concerned will depend on the circumstances of each case and that the State parties must be able to defend its conduct by rational argument and establish justification clearly and convincingly.

50. Since section 78(2) undisputedly limits the right of access to the Courts, it can pass constitutional muster only if the Respondents can show that it complies with the provisions of the limitation clause (section 36 of the Constitution).

51. However, given the cardinal importance of the right of access to courts, powerful reasons would be required for its limitation to be reasonable and justifiable.

52. In this regard it is apparent *ex facie* the provisions of the PAIA in its entirety what purpose the limitation of 30 days seeks to achieve or its importance in the context of the objectives as set out in section 9 thereof. On the contrary the primary objective sought to be achieved by PAIA is to give effect to the constitutional right of access to any information held by the State and section 78(2) constitutes an egregious impediment thereto.

53. In this matter the Minister of J&CD, despite having been joined specifically for this purpose, put up no meaningful defence of section 78(2) of the PAIA simply contending that the 30 day time period is reasonable in that by that stage an internal appeal process would have been completed and an applicant would not require extensive time to bring a court application. Firstly, the existence and/or adjudication of an internal appeal in most cases by the political functionary of the very

Department that refused the access to information application does not mean that it would necessarily follow that the time required for the launching of a court application would be significantly reduced. This would differ from case to case. Secondly, the court *a quo* correctly accepted that it is not a basis to contend that the provision is reasonable in the context of this case where the D-G took nearly 3 months to consider the request and the Minister took almost 8 months to determine the internal appeal.

54. Even if the purpose of section 78(2) of the PAIA as contended by the Respondents is to prevent *"unnecessary administrative and financial burdens on public bodies which should be entitled to dispose of records in accordance with departmental and archival policies and procedures "* this has not been supported by any evidence showing that this was the purpose for which section 78(2) of the PAIA was introduced. More pertinently, in the instant case given that on the Respondents' versions these records are intended for use in subsequent litigation on a yet to be determined date and have for that reason had to have been preserved, there can be no complaint of an unnecessary administrative and financial burden.

55. This infringement is further exacerbated by the fact that an ordinary litigant may very well not have the knowledge, financial means or ability to access legal assistance to launch a court application within 30 days. It would thus have the collective effect that it would impede persons

from invoking the right of access to information in a manner contrary to the very objectives which the PAIA seeks to achieve. In the instant case this would be the consequence, even in the absence of any complaint of prejudice on the part of the Respondents and in circumstances where despite the lapse of time the documentation and records sought exist and has been preserved and where there is no evidence to indicate that the delay was excessive, wilful or deliberate.

56. Against this background it is submitted that the limitation imposed by section 78(2) is too restrictive for the purpose it is alleged to have been designed to achieve, particularly if one has regard to the nature of the right which it infringes. In the circumstances it is submitted that the time provided by section 78(2) of the PAIA for the institution of legal proceedings is not a real and fair one and cannot pass muster under section 36 of the Constitution.

(ii) <u>Sections 77(5) read with section 78(2) of the PAIA</u>

57. Section 77(5)(c) read with section 77(4) of PAIA compels an appeal authority after making a decision on an internal appeal to give notice of the decision to the appellant and in the notice to advise the appellant that an application may be lodged with a court against the decision on internal appeal –

59.1 within 60 days or;

59.2 if notice to a third party is required by subsection 4(a)(ii),within 30 days; after notice is given.

58. The notice must also provide the procedure to be followed for the lodging of the appeal of the application.

59. This is a peremptory requirement with which the First Respondent failed entirely in his notice to the Applicant to comply with in that it made no mention of any time period at all (see para [10] of the Judgment). Despite such non-compliance the court *a quo* assumed for purposes of determining the application for condonation that the notice of the appeal decision substantially complied with the requirements of section 77(5)(c) of the PAIA (at para [20] of the Judgment). It is respectfully submitted that the court *a quo* erred in doing so. On the contrary the court *a quo* should in its consideration of the application have taken into account the fact that the Minister had failed to comply with his statutory obligations provided for in section 77 of the PAIA by failing to inform the Applicant of the period within which an application to court should be launched.

60. Although it was never the Applicant's case that he had been confused by the different provisions as correctly pointed by the court *a quo* (at para [28] of the Judgment), the Applicant in terms stated in his founding affidavit that he first became aware of the 30-day time period when he

was alerted thereto on 9 March 2007, seven days after the expiration of the 30-day period from when he was provided with a notice of internal appeal, that such appeal had to be lodged within 30 days by ODAC. Obviously had it been stated in the Notice of Appeal he would have been aware thereof on receipt of the Notice.

61. In the absence of a proper notice as contemplated by section 77 the majority of requesters would probably be unaware of the requirement of 30 days and only find out thereof after receiving legal advice.

62. The Respondents however persist with the contention that an applicant had 60 days – as contemplated in section 77(5)(c)(i) of PAIA and not 30 days as required by section 78 of PAIA – within which to approach a Court after being notified of a dismissal of an appeal and the reasons for such decision, and that this period was more than ample for the launching of an application. In other words that the Applicant had until 3 April 2007 within which to launch his application yet only did so by 25 July 2007 (a delay of some 31/2 months). Further that these provisions had been overlooked by the Applicant in relation to his constitutional attack.

63. In response hereto that the Applicant pointed out that the 30 day limit is particularly egregious in light of the two different time periods for the launching of court applications provided for in section 77(5) of PAIA and as such there could not be a basis, on a reading of PAIA itself, that

the 30 day requirement constituted the least restrictive means of achieving the purpose of PAIA as envisaged in the limitation enquiry. In other words it would not save section 78(2) of the PAIA from unconstitutionality.

64. It was in this context that the Applicant raised the apparent different time periods contemplated by section 77(5)(c)(i) and section 78(2) which *ex facie* conflicted with each other. The former contemplating a notice to an appellant advising that an application to court should be launched within 60 days and the latter compelling such application to be launched within 30 days.

65. The court *a quo* in an attempt to explain the inconsistency in the time periods provided for in section 77(5)(c)(i) and section 78(2) respectively, held that whilst section 78 exhaustively governed applications for relief in terms of section 82 of the PAIA thus compelling the institution of court proceedings within 30 days of receipt of a notice of appeal, a requester, though aggrieved by the appeal authority's decision yet sought relief outside the ambit of section 82, may do so within 60 days after receipt of the appeal decision (para 27 of the judgment). It is respectfully submitted that the court *a quo* erred in seeking to draw this somewhat artificial distinction in order to justify the inconsistency created by the provision of different time periods provided for in the PAIA. This interpretation is not borne out by Chapter 2 of PAIA, which set out the procedure to be followed in

relation to applications to court for the judicial review of decisions made under the PAIA and contemplates that such be invoked once an internal appeal is exhausted. It is also not supported by section 77(5)(b) which merely sets out the peremptory requirements to be contained in a notice of appeal and is not an empowering provision permitting the institution of legal proceedings within period of 30 days for some litigants and 60 days for others.

66. In light of the aforegoing the class of persons informed by notice that they had 60 days within which to launch a court application and who did so after 30 days would fall foul of section 78(2) of the PAIA. In this regard it is submitted that section 77(4) read with subsection (5) does no more than detail the information which an appeal authority is obliged to furnish an appellant after deciding an appeal and as such the court *a quo* erred in characterising it any differently.

F. ON THE ASSUMPTION THAT THIS COURT DOES NOT FIND SECTION 78(2) TO BE UNCONSTITUTIONAL AND CONCLUDES THAT THE COURT A QUO HAD THE POWER TO CONDONE NON-COMPLIANCE WITH THE TIME LIMITS IN SECTION 78(2) OF PAIA

(i) Condonation

67. In this section it is assumed that the court *a quo* had the power to condone non-compliance with the time period contained in section 78(2), that this Court finds that section 78(2) is not inconsistent with the provisions of the Constitution and that these submissions apply

irrespective whether the court *a quo* was correct (which is denied) in finding that the Applicant had failed to provided a full explanation for the entire period of his delay in bringing a court application.

68. At the outset it is submitted, with reference to the aforementioned consideration of the provisions of section 77(5), read with section 77(4) of the PAIA, that the court *a quo* materially erred in the exercise of its judicial discretion in deciding the application for condonation on the assumption that the Minister's appeal notice substantially complied with the requirements of section 77(5)(c) when there was a blatant non-compliance with the peremptory requirement which would have informed the Applicant in terms of the time period applicable to court applications. At the very least it should have been a factor which the court *a quo* had to take into account in the exercise of its judicial discretion. In failing to do so from inception of the exercise of its discretion it did not act fairly to the parties before it and in fact did not properly exercise its judicial discretion.

69. The Applicant provided a full explanation for the delay in launching his application. In the interest of fairness to the parties this explanation must be considered against the backdrop that the D-G delayed 2 ½ months in providing reasons for refusing the Applicant's request and the Minister took more than 6 months in deciding the appeal. This can only be indicative of the complexity of the matter or the fact that it pertains to new matters of law.

70. The court *a quo* correctly held that the Applicant became aware of the Minister's decision on 2 February 2007 and that although the decision was dated 22 December 2006, it only reached the Applicant by 2 February 2007 (at para [25] of the judgment).

71. Even though the court *a quo* accepted that the Applicant only became aware of the 30 day time limit after it had expired, it failed to attribute this to the Minister's failure to comply with the peremptory requirements contained in section 77 of the PAIA which compelled him to inform the Applicant of the 30-day period. Instead the court *a quo* sought to attribute this failure to ODAC drawing a negative inference from the failure of an explanation as to why it had taken the "applicant's attorneys more than a month to discover the Act imposed a 30 day limit" and its failure to alert the Applicant thereof.

72. This is not consistent with the explanation given in the Applicant's affidavit. The Applicant indicated that after he obtained the Minister's decision he sought legal assistance and approached ODAC, a non-governmental organisation engaged in public interest litigation unit for assistance. He did so aware that court litigation would be both costly and time-consuming and could be protracted if against Government.

73. Documentation was provided to ODAC on 5 February 2007 in order for it to ascertain whether they would assist the Applicant as the attorney of record in a court application

74. The Applicant decided on 8 February 2007 that he would pursue the matter further through the courts and informed me thereof. By 16 February 2007 I indicated to the Applicant that although ODAC "in principle" would assist further information was required. This was provided to me on 20 and 21 February 2007. I informed him that I would consider the information and ascertain whether there was any legal basis on which this matter could proceed in which case ODAC would assist him.

75. This was determined by 9 March 2007 on which day the Applicant became aware that the PAIA specified a 30-day limit for an appeal to the Honourable Court to be lodged and that such had already expired.

76. The court *a quo* was thus not correct in drawing an inference from the founding affidavit that the Applicant had been represented by ODAC for the better part of February 2007 during which time it had inexplicably delayed as the Applicant's attorney and failed to inform the Applicant of the 30 day period thus self-creating an urgency. Had this construction been raised in the answering papers, the Applicant would have sought to clarify this factual misconception in reply.

77. Moreover, the court *a quo* appears to infer that the Applicant should have acted "with greater urgency" and not have waited for counsel to prepare papers. It appears that the court *a quo* expected him to launch the application himself and to do so despite the deficiency of the Minister's notice in not detailing the procedure for filing such

application. Despite setting out the basis why no application was launched in February 2007 and informing the court *a quo* that it was a question of the costs attendant to the launching of the application that that resulted in the engagement of counsel on contingency only being able to deal with the matter during May or June 2007, the court *a quo* erroneously characterised this delay as being *"inexplicable"* and devoid of an acceptable reasons for a court *"to nullify"* any culpability on the part of the Applicant. In reaching this conclusion the court *a quo* failed to consider that the Applicant made it clear that the delays in the launching of this application were largely beyond his control given that matter was complex in nature and required careful consideration by the legal representatives whose services he had managed to procure.

78. None of the explanations furnished as the grounds for the delay was specifically challenged or denied by the Respondents in their answering affidavit. Instead the opposition was premised on the court *a quo* not having the power to grant condonation in the first instance and a bald allegation that the explanation given by the Applicant for the his delay was not reasonable given that by July 2007 several decisions had already been handed down which dealt with the provision of PAIA.

79. It is submitted that the reason for the delay in the launch of the application was explained in detail in the founding papers and met the requirements for good cause shown. These were not placed in issue nor did the Respondents indicate that the delay was excessive, wilful or

deliberate or complained of any prejudice as a consequence of the delay.

(ii) **The court *a quo*'s findings on the merits and in relation to prospects of success**

80. The court *a quo* correctly concluded that even though it was not satisfied with the Applicant's explanation for his delay, this alone was not fatal to his application.

81. However it materially misdirected itself in then proceeding only to consider the issue of prospects of success – only to materially misconceive the Applicant's prospect of success.

82. It is respectfully submitted that the approach of the court *a quo* in exercising its discretion was not consistent. Although it accepted that in applications for condonation in order to determine whether there was "good cause" to grant condonation it had to exercise a judicial discretion upon a consideration of all the facts and circumstances of a case in a manner that is fair to both parties. It failed to do precisely that.

83. In concluding that condonation should not be granted the court *a quo* solely had regard to the sufficiency of the explanation and extent of the delay on the part of the Applicant and the Applicant's prospects of

success on the merits.

84. Whilst it is accepted that good prospects of success would compensate for any deficiencies in an explanation for the delay the court *a quo* should also have given consideration to other factors relevant to the exercise of its discretion and assessed the circumstances in a balanced fashion.

85. In adopting the approach which it did, the court *a quo* failed to have regard to the nature and importance of the relief sought; that the questions to be resolved in the case were of paramount importance; the effect of the delay on the administration of justice and other litigants; the extent to which the court may have been inconvenienced; the nature of the default; the *bona fides* of the Applicant and any contribution by other persons or parties to the delay and the Applicant's responsibility therefor. Nor did it consider that the Respondents did not complain of prejudice caused by the delay or that the Respondents would not suffer any potential prejudice should the condonation be granted.

86. It erred in concluding that the period of delay of approximately 4½ months was too long given that there was no prejudice and that in the ordinary course review applications as provided for in the Promotion of Administrative Justice Act can be launched within a period of 180 days.

87. This Court has held that the broad test for granting condonation for late

applications is whether it is in the interests of justice to do so and if the matter raises fundamental questions the resolution of which is of paramount importance not only to the immediate parties, but also serve the broader community and public interest then the request for condonation should be granted. This assessment would depend on the facts and circumstances of each case.

88. The explanation furnished by the Applicant for the delay was not so unreasonable that it would be contrary to the interests of justice in the circumstances of this case to grant such condonation particularly given that:

90.1 The nature of the relief sought relates to the enforcement of a constitutional right and the determination of constitutional issues.

90.2 The extent and cause of the delay is but one factor to be considered and in light of this Court having condoned a delay in the lodging of an application for leave to appeal just under a year late having had regard to the procurement of legal assistance, as the explanation advanced for the delay, the absence of apparent prejudice to and opposition by the State, as well as the fact that reasonable prospects of success do exist.

90.3 The delay did not negatively affect the administration of justice and other litigants, nor did it cause any prejudice to the Respondents (see **Chirwa v Transnet Ltd** 2008 (4) SA 367 (CC)).

90.4 Even if the reasons for the delay are not wholly satisfactory it would not serve the interests of justice in this case to be overly technical, particularly given that no one is prejudiced by this application (see **Wallach v High Court of South Africa, Witwatersrand Local Division, and Others** 2003 (5) SA 273 (CC)).

89. In **Veldman v Director Of Public Prosecutions, Witwatersrand Local Division** 2007 (3) SA 210 (CC) this Court considered all the factors including the reasonableness of the explanation for the delay. It held that the applicant failed to comply with the time limits set out in the Rules regarding appeals from the SCA to this Court and that even though the explanation tendered, if viewed in isolation, might not seem sufficient, the prospects of success in this matter and the fact that the respondent did not oppose the application for condonation tilted the scales in the applicant's favour. Moreover, the matter was of particular importance to the applicant in circumstances in which, overall, it had not been shown that the delay caused any prejudice. For these reasons, considered collectively, the application for condonation was granted.

90. In considering the Applicant’s prospects of success it must be borne in mind that section 39(1)(b)(iii)(ee) of the PAIA is the only ground relied upon by the Minister to justify the refusal of the Applicant’s request for access to information.

(a) Section 39(1)(b)(iii)(ee)

91. Section 39(1)(b)(iii)(ee) of PAIA provides:

"The information officer of a public body--

(a) …

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

(i) …

(ii) …

(iii) the disclosure of records could reasonably be expected –

(aa) …

(bb) …

(cc) …

(dd) …

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

92. A restrictive approach must be adopted to the interpretation of section 39(1)(b)(iii)(ee) of PAIA insofar as constitutes a limitation on the right of access to information read with ss 36 and 39(2) of the Constitution.

93. Moreover section 39(1)(b)(iii)(ee) of PAIA lays down an objective test - in other words a type of fact or state of affairs must exist in an objective sense before there can be a refusal to disclose and a court is entitled to enquire as to the objective existence thereof to which end the court *a quo* should have considered both the categorisation of the records

sought as well as the assessment of the adverse consequences of the disclosure of that information.

94. This Court would thus have to determine whether in fact the likelihood of harm exists or whether in fact there is good reason to expect a harmful consequence – an onus which was borne by the Respondents and which had not been discharged in this application.

95. The Minister in invoking section 39(1)(b)(iii)(ee) of PAIA, as the basis to refuse the Applicant's request, did so after having regard to the request, representations made by third parties and the D-G's reasons for refusal of the request. The Respondents did not take the court *a quo* into its confidence as to the identity or nature of the representations made by third parties. (In this regard it is pointed out the definition for third party would in respect of a record of a public body exclude the requester and a public body such as SITA.)

96. The Minister, however, adopted (almost verbatim) the reasons furnished by the D-G in relying on section 39(1)(b)(iii)(ee) of PAIA stating:

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

97. Whilst the court *a quo* was correct in concluding that in discharging their onus the Respondents had to show that the probable consequences of a disclosure of a record could reasonably be expected to produce results which will prejudice or impair the fairness of the trial or the impartiality of its adjudication, it erred in failing to find that the Respondents had not so discharged this burden.

98. No details are provided on affidavit of what constituted the *"reasonable grounds"* for the aforementioned expectation, nor is the Court taken into their confidence in respect of the anticipated prejudice which the Respondents foresaw impairing the fairness of the civil trial.

99. In oral argument the only "reasonable grounds" on which the Respondents sought to rely as a basis for an apprehension that harmful consequences would be probably with regard to the fairness of the trial or the adjudication of the issues between the parties is the declared intention of the Applicant to report on information reflected in the records . No causal link or foundation is shown to demonstrate that the disclosure of the records sought will lead to publication which would either:

99.1 prejudice or impair the fairness of the trail; or

99.2 the *"impartiality of the adjudication"*.

100. In this regard the Respondents contended that the fairness of the trial related both to the position and role of the judge i.e. the ability of the judge to determine the issues between the parties with impartiality, without being tainted by the prior disclosure of records or any act associated with such a disclosure as well as to the parties' respective abilities to fairly present their case without being compromised by the disclosure of records.

101. No other *"reasonable grounds"* were provided for the Respondents concluding that the judge presiding would be influenced by articles which the Applicant would write. The Respondents relied on these contentions as a basis for their *"reasonable belief"* without even knowing when (or if) the trial would commence or who the judge presiding would be then, in all likelihood at least 2 years hence.

102. In this regard it is pointed out that the Respondents failed to establish their case for refusal of access to documentation under section 39(1)(b)(iii)(ee) i.e. failed to discharge an onus showing that a likelihood or reasonable expectation of probable harm exists or good reasons existed to expect a harmful consequence be it in the form of prejudice or impairment.

103. As such there was no impediment to the granting of the Applicant's right of access to documents. Looked at objectively, articulate and acceptable reasons must exist for the expectation and the Minister

cannot rely on grounds merely speculative, imaginable or theoretically possible.

104. In this regard it is respectfully submitted that the court *a quo* erred in concluding that the Applicant failed to show reasonable prospects of success and misdirected itself on the merits of the application and applied incorrect facts and wrong principles of law in finding that:

107.1 the Applicant's request for records by virtue of the use of the descriptive phrase *"design, development and implementation of a grant administration system"* meant that it undoubtedly related directly or indirectly to records which have a bearing on the subject matter of the litigation pending in the Pretoria Court, namely, whether or not SITA awarded Tender 82 to the consortium;

107.2 the integrity of the judicial process would be severely compromised if a record, which a party to litigation intended to use to prove or disprove a claim was made available to a third party before the finalisation of a trial and that such disclosure created a risk of prejudice to the administration of justice;

107.3 the Respondents had provided *"proof of probability"* that access to the records will result in prejudice or impairment the fairness of the trail; or the *"impartiality of the adjudication"* and on that basis could refuse access to such records.

105. Whilst the Respondents initially contended that all the documents in relation to which the Applicant sought access had been discovered in the North Gauteng High Court, in response to a query at the hearing of the matter from the court *a quo* whether the First Respondent had discovered all the documents to which the Applicant sought access, or only some of the documents, senior counsel for the Respondents submitted that the discovered documentation included some of the documents but that there was *"no way"* that the First Respondent, could have discovered all the documents sought including records of conversations, etc given the vastness of the documentation requested.

106. Accordingly, it is apparent that there was no exact overlap between the discovered documentation and the records requested by the Applicant particularly given that the discovered documentation is not vast in number. As all documents relevant to the trial had to be discovered in terms of the rules relating to discovery, the inference can be drawn that the Department has retained in its possession documentation not discovered but which form part of the Applicant's request. In respect hereof the Respondents would not be entitled to invoke section 39(1)(b)(iii)(ee) of the PAIA and for that reason alone the court *a quo* erred in concluding that the Applicant had no prospects of success on the merits.

107. To the extent that the Department discovered records sought by the Applicant relevant to any future pending proceedings in the Gauteng High Court such documentation is already in the possession of the Plaintiff (or could relatively easily be so obtained through the discovery process) and there is no case made out that the disclosure thereof to a third party would prejudice the Defendants in that court or what the exact nature of such prejudice would be or how the integrity of the judicial process would be tainted particularly given that court proceedings are protected by the common law *sub judice* rule, a factor simply ignored by the court *a quo* in the circumstances of a case unlikely to proceed to court before 2011.

108. As to the court *a quo* finding that the Respondents had provided *"proof of probability"* that access to the records will result in prejudice or impairment the fairness of the trail; or the *"impartiality of the adjudication"* in reaching this conclusion the court *a quo* failed to have regard to dicta and meaning attributed to the phrase "**reasonably be expected to*" as determined in the Minister For Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukhuneland)** 2005 (2) SA 110 (SCA) and in doing so erred in concluding that the Applicant's application for condonation and access to information must be dismissed with costs.

G. CONCLUSION

109. In the circumstances, the Applicants submit that the rule of law and demands of justice are such that the immensely important constitutional issues raised by the present matter ought to reach this Court by the grant of leave to appeal directly to it.

110. The Applicant submits that it has demonstrated the required reasonable prospects of success in this appeal, should leave to appeal be granted. The Applicant has also demonstrated that the issues raised by the present case are unquestionably constitutional matters of substance.

111. For this reason I respectfully request that this application to appeal directly to this Court and for confirmation of the order of constitutional invalidity be granted.

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Alison Tilley

I certify that the deponent acknowledged to me that he knows and understands the contents of this declaration, that he has no objection to taking the prescribed oath and considers it binding on his conscience.

Thus signed and sworn before me at on this day of 2009.

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COMMMISSIONER OF OATHS