CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 25/09
[2009] ZACC 21

STEFAANS CONRAD BRÜMMER	Applicant
versus	
MINISTER FOR SOCIAL DEVELOPMENT	First Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT OF SOCIAL DEVELOPMENT	Second Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
with	
SOUTH AFRICAN HISTORY ARCHIVES TRUST	First Amicus Curiae
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Second Amicus Curiae

Heard on : 26 May 2009

Decided on : 13 August 2009

JUDGMENT

NGCOBO J:

Introduction

[1] These proceedings involve three applications. The first is an application for leave to appeal directly to this Court against the decision of the Western Cape High

Court (the High Court) refusing condonation. The High Court refused to condone the applicant's non-compliance with the 30 day limit which section 78(2)[1] of the Promotion of Access to Information Act, 2000[2] (PAIA) prescribes for lodging applications to court. The second is an application for confirmation of the order made by the High Court declaring invalid section 78(2). The third application is by the South African Human Rights Commission (the Commission) for its admission as amicus curiae. These applications arise from a request by the applicant, Mr Brümmer, a journalist, for certain records held by the Department of Social Development (the Department).

[2] The confirmatory proceedings raise three interrelated questions concerning the enforcement of the constitutional right of access to information held by a public body. The first is whether the provisions of section 77(4) read with section 77(5)(c)(i) or the provisions of section 78(2) govern applications to court to challenge a decision refusing access to information held by a public body.[3] The second question, which arises only if the provisions of section 78(2) govern applications to court, is whether the 30 day limit prescribed by section 78(2) is consistent with sections 32 and 34 of the Constitution. The third question, which arises only if section 78(2) is inconsistent with the Constitution, is the appropriate relief.

[1] Section 78(2) is set out in full at [38] below.

[2] Act 2 of 2000.

[3] The text of these sections is set out in full at [37] – [38] below.

Background

[3] Mr Brümmer, a journalist, seeks access to certain information held by the Department under the provisions of PAIA.[4] The information relates to a government tender that the Department is alleged to have awarded to IT Lynx Consortium (the consortium). The applicant alleges that he requires this information in order to report accurately and properly on an article that he is writing. The information requested by the applicant comprises "records which pertain directly and indirectly to the State Information and Technology Agency (Pty) Ltd (SITA) tender no 0082/2001 ('Tender 82') for the design, development and implementation of a grant administration system." Tender 82 is the subject matter of the litigation between the consortium and SITA, the Minister for Social Development (the Minister) and the Minister for Finance.

[4] The Director-General of the Department, who considered the request in the first instance, refused the request on various grounds. One of the grounds advanced for refusal was that the information sought was the subject of civil litigation between the

[4] Section 11 of PAIA deals with access to records of public bodies and information and provides:

> "(1) A requester must be given access to a record of a public body if—
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> *(a)* that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
>
> *(b)* access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.
>
> (2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.
>
> (3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by—
>
> *(a)* any reasons the requester gives for requesting access; or
>
> *(b)* the information officer's belief as to what the requester's reasons are for requesting access."

Department and the consortium. Elaborating on this ground of refusal, the Director-General informed the applicant, amongst other things, that "the Department has reasonable grounds to expect that the disclosure of the records will lead to publications by the media, the Mail & Guardian in particular, 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 . . . ."

[5] On appeal to the Minister, the application suffered the same fate. The Minister refused access to the information on the basis that the Department had reasonable grounds to expect that the disclosure of the records would lead to publication in the media, the *Mail & Guardian* in particular, which could prejudice or impair the fairness of the trial or the impartiality of the adjudication of the IT Lynx matter under case number 21290/05. In refusing the information, the Minister relied upon the provisions of section 39(1)(b)(iii)(ee) of PAIA.[5]

[5] Section 39(1)(b)(iii) of PAIA provides:

> "The information officer of a public body—
>
> (b) may refuse a request for access to a record of the body if—
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> (iii) the disclosure of the record could reasonably be expected—
>
> *(aa)* to prejudice the investigation of a contravention or possible contravention of the law which is about to commence or is in progress or, if it has been suspended or terminated, is likely to be resumed;
>
> *(bb)* to reveal, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;
>
> *(cc)* to result in the intimidation or coercion of a witness, or a person who might be or has been called as a witness, in criminal proceedings or other proceedings to enforce the law;

[6] The applicant thereafter instituted review proceedings in the High Court under section 78(2) of PAIA. He sought, amongst other things, an order setting aside the decision to refuse information and an order directing the Minister to furnish him with the information sought. But as his application was brought well after the 30 day limit prescribed in section 78(2), he also sought an order condoning his non-compliance with the 30 day limit. The applicant contended that the decision to refuse him access to the information sought constituted an unjustifiable and unreasonable limitation of his right of access to court, as well as his right of access to information and therefore violated those rights.

[7] The Minister and the Director-General resisted the application maintaining, first, that the review application should have been brought under section 77(4) read with section 77(5)(c)(i) which gives the applicant 60 days to bring an application challenging refusal of access to information. Second, they contended that the High Court had no power to condone non-compliance with the time limit prescribed in section 78(2). They also opposed the application for condonation on the merits on the ground that the case for condonation had not been made out. They maintained that the decision refusing access to the information sought had been properly taken under the provisions of section 39(1)(b)(iii)(ee).

(dd) to facilitate the commission of a contravention of the law, including, but not limited to, subject to subsection (2), escape from lawful detention; or

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

[8] The point taken by the Minister that the High Court did not have the power to condone non-compliance with the 30 day limit in section 78(2) triggered an amendment to the notice of motion which introduced a constitutional challenge to section 78(2). This challenge was conditional upon the court upholding the point taken by the Minister. This challenge necessitated the joinder of the Minister for Justice and Constitutional Development as the third respondent. The Minister for Justice and Constitutional Development did not enter the fray on whether the High Court has the power to condone non-compliance with section 78(2) and, if so, whether the applicant had made out a case for condonation. Instead he limited his submissions to the challenge to the constitutionality of section 78(2), maintaining that the section does not limit any of the constitutional rights contended for by the applicant, and if it does, that the limitation is reasonable and justifiable. I shall refer to the Minister for Social Development, the Minister for Justice and Constitutional Development and the Director-General collectively as the respondents.

[9] During the hearing in the High Court a further amendment was introduced. This time the constitutional challenge to section 78(2) was conditioned upon the court finding that it had the power to condone, but refusing condonation on the basis that the applicant had not made out a case for condonation. This amendment appears to have been prompted by the concession by the respondents, made in the course of the hearing, that the High Court had the power to condone non-compliance with section 78(2).

[10] The High Court held that it had the power to condone non-compliance with the provision of section 78(2). However, it refused condonation holding that the applicant had not provided a satisfactory explanation for the delay and that the applicant had no prospects of success in the underlying review. It found that the Minister had demonstrated that releasing the information sought would prejudice the trial or otherwise be unfair to the trial. The High Court was referring to the litigation between the Department and the consortium. In the event, the High Court dismissed the application for condonation and ordered the applicant to pay the first and second respondents' costs, including those consequent upon the employment of two counsel.

[11] This conclusion led the High Court to accept the invitation extended to it through the second amendment to the notice of motion, namely, to consider the constitutionality of section 78(2) in the event the application for condonation was unsuccessful on the merits. It concluded that section 78(2) was unconstitutional because, in the first place, the 30 day limit was grossly inadequate and therefore limited the right of access to court and, in the second place, this limitation was unjustifiable under section 36(1) of the Constitution.[6] It accordingly declared the

[6] Section 36 of the Constitution provides:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> *(a)* the nature of the right;
>
> *(b)* the importance of the purpose of the limitation;
>
> *(c)* the nature and extent of the limitation;
>
> *(d)* the relation between the limitation and its purpose; and
>
> *(e)* less restrictive means to achieve the purpose.

provisions of section 78(2) unconstitutional and referred its order embodying that declaration to this Court for confirmation. In addition, it ordered the Minister for Justice and Constitutional Development to pay the applicant's costs, including those consequent upon the employment of two counsel.

[12] The present proceedings are a sequel.

Proceedings in this Court

[13] In this Court the applicant seeks the confirmation of the order of invalidity. He is also seeking leave to appeal directly to this Court against the order of the High Court refusing to condone his non-compliance with section 78(2). The respondents are resisting both applications.

[14] The South African History Archives Trust (SAHA), a non-governmental organisation, applied for and was admitted as amicus curiae. One of the objectives of SAHA is to collect, preserve and catalogue material of historical, contemporary, political, social, economic and cultural significance. It also promotes the accessibility of archival materials to the general public. It describes itself as "an independent NGO archive dedicated to documenting and supporting the struggles for justice in South Africa." It entered the fray and joined the side of the applicant contending that the 30 day period in section 78(2) is in conflict with sections 32 and 34 of the Constitution. In addition, it drew to our attention the difficulties associated with bringing court

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(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

applications under section 78(2). These difficulties will be referred to later in this judgment.

[15] Shortly before the hearing, the Commission launched an application for admission as amicus curiae. This application, which consisted of two volumes, contained amongst other things, the Human Rights Development Report for the period 2007/2008, a draft Human Rights Development Report 2008/2009 and the South African Human Rights Commission Audit Report for the period January to April 2008. The Chief Justice issued directions dealing with the filing of opposition, if any, to the application by the Commission and the filing of written argument by the Commission and the response thereto.

[16] The respondents opposed the application. The respondents did not have the opportunity to respond to either the Commission's application, or the material submitted by the Commission under Rule 31.[7] Nor did they have the opportunity to respond to the written submissions of the Commission. In these circumstances, the respondents' opposition to the application was understandable.

[7] Rule 31 provides:

> "(1) Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
>
> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification.
>
> (2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

[17] It will be convenient to deal with these applications in the following order: first the application by the Commission for admission as amicus curiae; then the application for leave to appeal directly to this Court; and finally, the application for confirmation.

Application for admission as amicus curiae

[18] Regrettably, time constraints compelled the Commission to launch its application for admission as amicus curiae in terms of Rule 10 of the Rules of this Court shortly before the hearing. Under Rule 10(5) an application for admission as amicus curiae "shall be made not later than five days after the lodging of the respondent's written submissions or after the time for lodging such submissions has expired." This time limit flows from the requirement in Rule 10(7) that an amicus should not repeat any matter set forth in the argument of the other parties but should raise new contentions. It is implicit, if not explicit, from this requirement that an applicant for admission as amicus may only launch an application after all the parties have lodged their written argument.

[19] In this case the respondents' written submissions were due on 19 May. These proceedings were set down for hearing on Tuesday 26 May. This left the Commission with very little time to consider the submissions by the parties and to decide whether there were any contentions that had not been raised by the parties that would be helpful to the Court. Despite these severe time constraints, the Commission acted

promptly. It lodged its electronic version of the application on Friday 22 May followed by the printed version and its written submissions on Monday 25 May. This procedure is in accordance with our Rules. The Commission has therefore complied with the Rules. While the respondents complained about the lateness of the application, I did not understand them to contend that the application was launched outside of the time limit set out in the Rules.

[20] The question for determination is whether the Commission has complied with the requirements for admission as amicus. We have previously set out the principles that govern the admission of an amicus curiae.[8] In *Fose v Minister of Safety and Security*, a case dealing with Rule 9, the predecessor to the present Rule 10, this Court held:

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

[8] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC); *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 13; 2002 (5) SA 713 (CC); *Ex Parte Institute for Security Studies: In Re S v Basson* [2005] ZACC 4; 2006 (6) SA 195 (CC).

[9] *Fose* above n 8 at para 9.

[21] And in *Ex Parte Institute for Security Studies*, in relation to Rule 10 we reiterated these principles, saying:

> "These principles are whether the submissions sought to be advanced are relevant to the issues before the Court, will be useful to the Court and are different from those of the other parties. As Rule 10(7) indicates, the submission should raise new contentions and should 'not repeat any matter set forth in the argument of the other parties'. It is the duty of this Court, in the exercise of its discretion, to ensure that these principles are satisfied before a person can be admitted as an *amicus*. Where these principles are not satisfied, a person cannot be admitted as an *amicus*. It follows therefore that this Court is not bound to admit a person who has obtained written consent of all the parties. . . . Nor does the fact that a person was admitted as an *amicus curiae* in the Court below matter."[10]

[22] As these passages indicate, the fact that an applicant for admission as an amicus has obtained written consent of all the parties is not decisive.[11] This Court may refuse to admit such an applicant where the underlying principles referred to above are not satisfied. Nor is the fact that the applicant was admitted as an amicus in the court below conclusive.[12] This is so because this Court has a discretion whether or not to admit a person as an amicus and this discretion must be exercised in the light of the principles that govern the admission of an amicus. As we explained in *Ex Parte Institute for Security Studies*:

> "It is true that Rule 10(2) read with Rule 10(4) may appear to be suggesting that a person who has obtained a written consent contemplated in Rule 10(1) need not make an application for admission as an *amicus*. These subrules must be read in the light of Rule 10 as a whole, in particular, the underlying principles governing the admission

[10] *Ex Parte Institute for Security Studies* above n 8 at para 7.

[11] Id.

[12] Id.

> of an *amicus.* As pointed out above, this Court has a discretion whether or not to admit a person as an *amicus* and that discretion must be exercised in the light of the principles that govern the admission of an *amicus.* The fact that a person has obtained the required written consent neither detracts from nor diminishes the control which this Court exercises over the admission of persons as *amici.*"[13]

[23] Whether the Commission should be admitted as an amicus therefore depends on the interest that it has in the issues before us and the contentions that it seeks to advance.

[24] The interest the Commission has in the issues before us, which concern the proper application of the provisions of PAIA, cannot be gainsaid. The Commission is one of the state institutions that was established under the provisions of section 181 of the Constitution in order to strengthen our constitutional democracy.[14] It is an independent institution that is subject to the Constitution and the law. The Constitution imposes on it duties to promote respect for human rights and a culture of human rights;[15] to promote the protection, development and attainment of human rights;[16] and to monitor and assess the observance of human rights in our country.[17] The right of access to information is a right guaranteed by our Constitution.

[25] In the context of this case, PAIA imposes additional duties on the Commission, including compiling a guide on how to use the provisions of PAIA and submitting

[13] Id at para 8.

[14] Section 181(1)(b) of the Constitution.

[15] Id at section 184(1)(a).

[16] Id at section 184(1)(b).

[17] Id at section 184(1)(c).

annual reports to the National Assembly dealing with, among other things, particulars of the number of requests for access received; the number of requests for access granted; the number of internal appeals lodged with relevant authorities; and the number of applications made to every court and the outcome of such applications.[18] The Commission is unquestionably an important constitutional body with the task of advancing and protecting human rights in our country, including the right of access to information.

[26] The contentions that the Commission wishes to advance differ from those advanced by the other parties in one fundamental respect. The Commission contends

[18] Section 84(b)(i)-(xi) of PAIA provides:

> "*(b)* in relation to each public body, particulars of—
>
> (i) the number of requests for access received;
>
> (ii) the number of requests for access granted in full;
>
> (iii) the number of requests for access granted in terms of section 46;
>
> (iv) the number of requests for access refused in full and refused partially and the number of times each provision of this Act was relied on to refuse access in full or partially;
>
> (v) the number of cases in which the periods stipulated in section 25(1) were extended in terms of section 26(1);
>
> (vi) the number of internal appeals lodged with the relevant authority and the number of cases in which, as a result of an internal appeal, access was given to a record or a part thereof;
>
> (vii) the number of internal appeals which were lodged on the ground that a request for access was regarded as having been refused in terms of section 27;
>
> (viii) the number of applications made to every court and the outcome thereof and the number of decisions of every court appealed against and the outcome thereof;
>
> (ix) the number of applications to every court which were lodged on the ground that an internal appeal was regarded as having been dismissed in terms of section 77(7);
>
> (x) the number of complaints lodged with the Public Protector in respect of a right conferred or duty imposed by this Act and the nature and outcome thereof; and
>
> (xi) such other matters as may be prescribed."

that section 78(2) also limits the freedom of expression that is guaranteed in section 16(1)(a) of the Constitution as well as the right to receive and impart information guaranteed in section 16(1)(b) of the Constitution. It argues that the High Court and the respondents, in assessing the applicant's request for access to information, ignored the right to freedom of expression of the press and other media and the applicant's right as well as that of other members of the public to receive or impart information or ideas. While section 16 is raised in the applicant's papers, the applicant did not advance any argument in support of section 16 rights. SAHA does not deal with this aspect in its written submissions.

[27] The remaining question then is whether, in the exercise of our discretion, we should admit the Commission as amicus curiae. The only hurdle besetting the Commission's pathway to admission as an amicus curiae is prejudice to the respondents. But this hurdle is not insurmountable. Indeed, in the course of argument, counsel for the respondents very properly conceded that the only conceivable prejudice to the respondents was their inability to deal with the issues raised by the Commission in their oral argument, but that this prejudice could be cured by allowing the respondents the opportunity to lodge their response to the application by the Commission and further written argument dealing with the issues raised by the Commission in its written arguments.

[28] Accordingly, the respondents and the applicant were afforded the opportunity to respond to the Commission's application and to lodge written arguments in response

to the Commission's written argument. The respondents have since done so. This has removed the last obstacle to the admission of the Commission as amicus curiae. Under these circumstances, the Commission should be admitted as amicus curiae.

Application for leave to appeal

[29] The applicant is seeking leave to appeal directly to this Court against the order of the High Court refusing condonation. The issue of condonation is connected with a decision on whether the applicant is entitled to access to information held by the Department and to seek judicial redress in the event of a refusal of access to information sought. The application thus concerns the right of access to information guaranteed in section 32 of the Constitution as well as the right of access to courts which is guaranteed by section 34 of the Constitution. The application therefore raises a constitutional matter.

[30] The applicant's right of access to information and his right of access to court are issues for determination in the confirmatory proceedings that are before us. And on the view I take of the decision to refuse condonation, and, in particular, in the light of the order of the High Court declaring section 78(2) invalid, the application for leave to appeal directly to this Court bears prospects of success. In all the circumstances, I consider it to be in the interests of justice that the applicant be allowed to appeal directly to this Court against the decision of the High Court refusing him condonation and ordering him to pay costs of the application.

[31] The High Court considered first whether it had the power to condone non-compliance with the 30 day period in section 78(2). Having found that it did, it then considered whether the applicant had made out a case for condonation. It concluded that the applicant had not made out a case for condonation and accordingly refused the application for condonation with costs. At the invitation of the applicant, foreshadowed in his second notice of amendment, the High Court went on to consider whether the 30 day limit in section 78(2) was consistent with the Constitution. It was not, it concluded. The effect of this conclusion is that in considering the application for condonation the High Court applied a provision which it concluded was unconstitutional. Its consideration of the application for condonation was, in these circumstances, rendered an academic exercise.

[32] The proper course for the High Court to have followed was first to consider the constitutionality of section 78(2). If it had concluded that it was unconstitutional, as it did, that should have been the end of the matter. The issue of condonation would not have arisen. And the High Court should have made no order on the application for condonation. The High Court should have put the applicant to an election: to either argue that the provisions of section 78(2) are unconstitutional, or accept that section 78(2) is not unconstitutional and argue that he is entitled to condonation. A litigant should not be allowed to blow hot and cold. It is impermissible for a litigant to ask a court to apply the provisions of a statute and, if this yields adverse results, then to ask the court to declare the statute unconstitutional. It is however permissible to urge a court to adopt a particular construction of a statute, and, if it should find that the

statute is incapable of the construction contended for, then to contend that the provision is unconstitutional.

[33] As it turned out, the High Court's extensive discussion of condonation was unnecessary. It follows that the order of the High Court refusing condonation must be set aside. So too must the order for costs relating to condonation. In the event, the applicant is entitled to leave to appeal directly to this Court against the refusal of condonation and the appeal must accordingly be upheld. In view of the conclusion I reach on the issue of the constitutionality of section 78(2) below, it is not necessary to consider condonation further at this stage.

[34] With the application for leave to appeal being out of the way, I now turn to the confirmatory proceedings.

The issues presented

[35] There are three interrelated questions in these confirmatory proceedings:

(a) Which provisions of PAIA govern applications to court to challenge a decision refusing access to information?;

(b) If applications to court are governed by section 78(2), then is the 30 day limit in section 78(2) inconsistent with the Constitution?;

(c) If the 30 day limit is unconstitutional, what is the appropriate relief?

The statutory provisions that govern applications to court

[36] The provisions that govern applications to court must be determined in the light of the scheme of PAIA for dealing with appeals against decisions of relevant authorities. This scheme emerges from sections 77 and 78.

[37] The relevant provisions of section 77 are subsections (4), (5) and (6) which provide:

> "(4) The relevant authority must, immediately after the decision on an internal appeal—
>
> *(a)* give notice of the decision to—
>
> (i) the appellant;
>
> (ii) every third party informed as required by section 76(1); and
>
> (iii) the requester notified as required by section 76(7); and
>
> *(b)* if reasonably possible, inform the appellant about the decision in any other manner stated in terms of section 75(1)*(d)*.
>
> (5) The notice in terms of subsection (4)*(a)* must—
>
> *(a)* state adequate reasons for the decision, including the provision of this Act relied upon;
>
> *(b)* exclude, from such reasons, any reference to the content of the record;
>
> *(c)* state that the appellant, third party or requester, as the case may be, may lodge an application with a court against the decision on internal appeal—
>
> (i) within 60 days; or
>
> (ii) if notice to a third party is required by subsection (4)*(a)*(ii), within 30 days
>
> after notice is given, and the procedure for lodging the application; and
>
> *(d)* if the relevant authority decides on internal appeal to grant a request for access and notice to a third party—

(i) is not required by subsection (4)*(a)*(ii), that access to the record will forthwith be given; or

(ii) is so required, that access to the record will be given after the expiry of the applicable period for lodging an application with a court against the decision on internal appeal referred to in paragraph *(c)*, unless that application is lodged before the end of that applicable period.

(6) If the relevant authority decides on internal appeal to grant a request for access and notice to a third party—

(a) is not required by subsection (4)*(a)*(ii), the information officer of the body must forthwith give the requester concerned access to the record concerned; or

(b) is so required, the information officer must, after the expiry of 30 days after the notice is given to every third party concerned, give the requester access to the record concerned, unless an application with a court is lodged against the decision on internal appeal before the end of the period contemplated in subsection (5)*(c)*(ii) for lodging that application."

[38] Section 78 provides:

"(1) A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.

(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.
>
> (3) A third party—
>
> *(a)* that has been unsuccessful in an internal appeal to the relevant authority of a public body;
>
> *(b)* 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 to grant a request for access; or
>
> *(c)* aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body,
>
> may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82."

The parties' contentions and the High Court's findings on the applicable statutory provision

[39] The applicant contended that section 78(2) governs applications to court. As I understand the applicant's argument, it is as follows: there is a conflict between, on the one hand, the provisions of section 77(5)(c)(i), and, on the other hand, the provisions of section 78(2). These provisions prescribe different time limits for launching applications to court. These provisions are irreconcilable. Upon a proper construction, section 77(4) read with section 77(5)(c)(i) does no more than tell the relevant authority what information should be set out in the notice to the requestor

who has been unsuccessful in an internal appeal. Section 77 does not therefore purport to set time limits for launching applications to court. That is a function of section 78. This argument is markedly different from the submissions made in the application for confirmation.[19]

[40] In the High Court and in this Court the respondents contended that applications to court are governed by sections 78(2) and 77(5)(c). They submitted that the provisions of section 77(5)(c)(i) are applicable where the relevant authority has notified the requestor of the decision on an internal appeal and there is no third party involved. In that event, the respondents argued, the requestor has 60 days within which to launch an application to court. Where notice is given to a third party, a court application must be launched within 30 days as required by section 77(5)(c)(ii). This 30 day period, the respondents argued, is the same as that which is provided for in section 78(2). The respondents submitted that section 77(5)(c)(ii) does not therefore prescribe a time limit that is different from, or in conflict with, section 78(2).

[41] The High Court found that there appears to be a conflict between the provisions of section 77(5)(c)(i) and 78(2).[20] It held that "section 78 is a self-contained provision

[19] In his application for confirmation the applicant contended that section 77(4) read with section 77(5)(c)(i) governs applications under section 82. He submitted that the respondents did not comply with the provisions of these sections which are peremptory. He drew attention to the requirement in section 77(5)(c)(i) that the notice in terms of section 77(4)(a) "must . . . state that the appellant . . . may lodge an application with a court against the decision on internal appeal . . . within 60 days." Although the notice informing the applicant of the decision on internal appeal stated that he is "entitled to lodge an appeal with a court against the decision to turn down the internal appeal", it did not tell him that he is required to do so within 60 days as section 77(5)(c)(i) requires. The applicant, however, conceded that this is not the case he sought to make in the High Court. This line of argument was not pursued before us. On the view I take of the matter it is not necessary to say anything further on this argument.

[20] *Brümmer v Minister of Social Development and Others*, Case No 100103/07, 16 March 2009 as yet unreported, at para 26.

which exhaustively governs applications for relief in terms of section 82."[21] It reasoned that section 78(2) governs relief sought in terms of section 82 while section 77(5)(c) governs relief which falls outside the ambit of section 82.[22] The High Court based its reasoning on the absence of the reference to section 82 in section 77.[23] It accordingly concluded that section 78(2) was applicable as the applicant was seeking relief in terms of section 82.[24]

The scheme of PAIA

[42] Part 4 of PAIA deals with "Appeals against Decisions". The scheme of PAIA is to deal separately with internal appeals and with applications to court to challenge decisions on internal appeals. To this end it has two chapters. One deals with internal appeals and the other with applications to court. Chapter 1 deals with "Internal Appeals against Decisions of Information Officers of Certain Public Bodies" in sections 74 to 77. These sections deal with the "right of internal appeal to [the] relevant authority",[25] the manner of lodging internal appeals,[26] giving notice to and representations by other interested parties,[27] and decisions on internal appeals.[28] Section 77(4) requires the relevant authority to give notice of the decision on an internal appeal to the appellant, third parties involved and where the requestor was not

[21] Id at para 27.

[22] Id.

[23] Id.

[24] Id.

[25] Section 74 of PAIA.

[26] Id at section 75.

[27] Id at section 76.

[28] Id at section 77.

an appellant, to the requestor. Section 77(5) deals with the contents of the notice under section 77(4).

[43] Chapter 2 of Part 4 of PAIA deals with applications to court. It comprises sections 78 to 82. Section 78(1) provides that a requestor or a third party seeking relief in terms of section 82 may only do so after exhausting the internal appeal procedures provided for in PAIA. Section 78(2) provides that a requestor who "has been unsuccessful in an internal appeal to the relevant authority of a public body . . . may, by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82." There is a similar provision in section 78(3) which deals with an unsuccessful third party. Section 79 deals with the procedure for lodging applications to court. It requires the Rules Board for Courts of Law to make rules of procedure for dealing with applications in terms of section 78.[29] Section 80 deals with the disclosure of records for examination by the court hearing the application. Section 81 deals with the nature of the proceedings under section 82 and classifies them as civil proceedings and deals also with the applicable rules of evidence and the burden of proof. The final provision is section 82 which deals with the powers of a court hearing the application.

[44] The confusion in this scheme is introduced by the requirement in section 77(5)(c)(i) that the notice "must . . . state that the appellant . . . may lodge an application with a court against the decision on internal appeal . . . within 60 days". In

[29] I understand that these rules have since been made but have not yet been published.

addition, this provision contemplates that the notice by the relevant authority will also state "the procedure for lodging the application" to court. This provision purports to prescribe the period within which an application to court may be made by a requestor who is unsuccessful in an internal appeal. That this is so is apparent from the provisions of section 77(5)(d)(ii) which, in dealing with the granting of access to records on appeal, provides that "the record will be given after the expiry of the applicable period for lodging an application with a court against the decision on internal appeal referred to in paragraph (*c*)". I am therefore unable to agree with the view expressed by the High Court that section 77(5)(c)(i) deals with decisions other than those contemplated in section 82.

[45] The result is that there is a conflict between the provisions of sections 77(5)(c)(i) on the one hand, and, on the other hand, the provisions of section 78(2). These two provisions are incapable of being harmonised. The question is which of the two governs applications to court. Section 77(5)(c) prescribes 60 days or 30 days, as the case may be, as the period for lodging applications to court, depending on whether notice to a third party is required, and contemplates that the relevant authority will indicate to the requestor "the procedure for lodging the application[s]" to court. These are matters that are specifically dealt with by section 78(2) and section 79 of Chapter 2 of Part 4.

[46] The legislature, by enacting Chapter 2 of Part 4 and dedicating it to applications to court, intended that applications to court should be governed by the provisions of

this chapter. In my view section 78(2) must prevail. This section is part of Chapter 2 which deals specifically with applications to court. The purpose of section 78 is to deal with applications for relief in terms of section 82. Section 78(2) is therefore the primary provision which governs applications to court. Section 77(5)(c)(i) which purports to prescribe a 60 day limit does not detract from the primacy of section 78(2) as the provision that governs applications to court. The purpose of section 77 is to deal with the manner of handling internal appeals and communicating decisions on internal appeals to requestors and third parties. Its primary purpose is not to deal with applications to court. It must accordingly yield to section 78(2). This is a matter to which I return later when I deal with the appropriate order to be made.

[47] The conclusion by the High Court that section 78(2) governs applications to court and prescribes 30 days as the period within which an application for review in terms of section 82 must be launched, must therefore be upheld. Section 78(2) does not stipulate precisely the date when the period of 30 days begins to run. It seems to me that the period must begin to run from the date when the requestor receives notice of the decision on internal appeal. The question is whether the period of 30 days prescribed by section 78(2) is consistent with sections 32 and 34 of the Constitution. It is to that question that I now turn.

The constitutionality of section 78(2)

[48] The challenge to section 78(2) is directed at the 30 day period within which an application to court may be launched. The applicant and the amici contended in the

first place, that this limits the right of access to court guaranteed in section 34 and the right of access to information guaranteed in section 32, and, in the second place, that this limitation is not reasonable and justifiable under section 36. For their part, the respondents contended that the 30 day limit does not offend the Constitution. Any harshness it might otherwise have is ameliorated by the power to condone non-compliance with the 30 day time limit. If the time limit constitutes a limitation on the right of access to court, the limitation is minimal in the light of the ameliorative attribute that the unlimited power to condone brings to this section, argued the respondents. And this renders any limitation reasonable and justifiable.

[49] The High Court found that the 30 day period is "grossly inadequate to enable an ordinary applicant" to approach a court for relief.[30] It held that the fact that there is an opportunity for condonation matters not, what does "is the adequacy of the opportunity and not what he may do in order to retrieve the lost opportunity."[31] It therefore held that section 78(2) constitutes a limitation of the right of access to court which is guaranteed in section 34[32] and that this limitation is unreasonable and unjustifiable.[33]

[30] *Brümmer* above n 20 at para 69.

[31] Id at para 70.

[32] Id at para 62.

[33] Id at para 71.

[50] This Court has on at least four occasions considered the constitutionality of time bar provisions, as these provisions are sometimes called.[34] On three of those occasions, the Court considered statutory provisions containing a time limit and, in the fourth case it considered a clause in an insurance contract containing a time bar.

[51] The principles that emerge from these cases are these: Time bars limit the right to seek judicial redress. However, they serve an important purpose in that they prevent inordinate delays which may be detrimental to the interests of justice. But not all time limits are consistent with the Constitution. There is no hard and fast rule for determining the degree of limitation that is consistent with the Constitution.[35] The "enquiry turns wholly on estimations of degree."[36] Whether a time bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress.[37] To pass constitutional muster, a time bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed.[38] It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched. And finally, the existence of the power to condone non-compliance with the time bar is not necessarily decisive.

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[34] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC); *Engelbrecht v Road Accident Fund and Another* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC); *Moise v Greater Germiston Transitional Local Council* [2001] ZACC 21; 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC); and *Mohlomi v Minister of Defence* [1996] ZACC 20; 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

[35] *Mohlomi* above n 34 at para 12. See also *Moise* above n 34; *Barkhuizen* above n 34; and *Engelbrecht* above n 34.

[36] *Mohlomi* above n 34 at para 12.

[37] *Mohlomi* above n 34 at para 14. See also *Moise* above n 34; *Barkhuizen* above n 34; and *Engelbrecht* above n 34.

[38] *Mohlomi* above n 34 at paras 12 and 14.

[52] It follows from the above that not all statutory provisions that limit the time during which litigation may be launched fall foul of the right to seek judicial redress. Each provision must therefore be "scrutinised to see whether its own particular range and terms are compatible with the right which [section 34] bestows on everyone" to seek judicial redress.[39] The question therefore is whether the 30 day limit in section 78(2) allows a requestor an adequate and fair opportunity to bring an application to court against a decision on an internal appeal. This provision does not say, but I think the case must be approached on the footing, that the period of 30 days is calculated from the date when the requestor has notice of the decision of the internal appeal. The sufficiency or adequacy of the opportunity which the 30 day limit affords the requestor to exercise the right of access to court must be determined in the light of the steps that a requestor who has been unsuccessful in an internal appeal would have to take before launching an application in court.

[53] The first step is to consider the reasons for refusal of access to information. The next step is to seek legal advice on prospects of success. This step is necessary because litigation is costly and time consuming. And courts should not be burdened with frivolous or vexatious litigation as this may attract an adverse order for costs against a litigant. Litigation should not be undertaken lightly. Legal advice is therefore crucial to the decision making process. But seeking legal advice and deciding to undertake litigation require funds. Not all persons, certainly, not all

[39] *Mohlomi* above n 34 at para 12.

individuals have a separate budget for litigation. Raising funds for litigation may further delay litigation. Preparing the necessary papers will invariably contribute to the delay. Does the period of 30 days afford the requestor an adequate and fair opportunity to launch the application in the light of these steps?

[54] SAHA's experience in this regard is illuminating. It will be recalled that this is an NGO which collects, preserves and catalogues material of historic, contemporary, political, social and economic nature. Since 2001 it has made over 1 000 requests for information from various government departments. It has brought 11 applications to court arising out of these requests. In all these applications it had to seek condonation because the applications were launched "a significant time after the expiry of the 30 day period." SAHA has outlined the difficulties associated with complying with the 30 day limit in section 78(2). The delays arise from having to seek legal opinion on prospects of success; securing legal representatives; getting funding; securing approval and authorisation from its board of trustees who are scattered all over the country; and limitation of funds.

[55] If an NGO faces these difficulties in meeting the 30 day limit, I think it is fair to expect that individuals will have even greater difficulty in complying with this time limit. The applicant's predicament in this case bears testimony to this. Both NGO and individual requestors have a critical role to play in ensuring that our democratic government is accountable, responsive and open. Indeed, the Constitution

contemplates a public administration that is accountable[40] and requires that "[t]ransparency must be fostered by providing the public with timely, accessible and accurate information."[41] Thus the public and the NGOs must be encouraged and not obstructed in carrying out their civic duties.

[56] Section 78(2) has the effect, in my view, that many of the requestors whom it hits are not afforded an adequate and fair opportunity to seek judicial redress. They are left with too short a time within which to launch an application to court. The existence of the power to condone does not save it. What matters, as our jurisprudence makes plain, is the availability of the real and fair opportunity to exercise the right to seek judicial redress in order to vindicate the right of access to information. As the affidavit filed on behalf of SAHA illustrates, requestors will almost always have to apply for condonation in order to exercise their right to seek judicial redress in order to enforce their right of access to information. This shows the absence of an adequate and fair opportunity to seek judicial redress.

[57] Section 78(2) therefore limits the right of access to court. And it also limits the right of access to information guaranteed in section 32 of the Constitution.

[58] The question which arises then is whether section 36(1) countenances this limitation.[42]

[40] Section 195(1)(f) of the Constitution.

[41] Id at section 195(1)(g).

[42] See above n 6.

Justification

[59] In assessing whether the limitation imposed by section 78(2) is reasonable and justifiable under section 36(1), regard must be had to, among other factors, the nature of the right limited; the purpose of the limitation, including its importance; the nature and extent of the limitation; the efficacy of the limitation, that is, the relationship between the limitation and its purpose; and whether the purpose of the limitation could reasonably be achieved through other means that are less restrictive of the right in question. Each of these factors must be weighed up but ultimately the exercise is one of proportionality which involves the assessment of competing interests.[43] Where justification rests on factual or policy considerations, the party contending for justification must put such material before the court.[44] In the present case it was therefore incumbent upon the respondents who are defending section 78(2) to submit not only the legal argument but also place requisite factual material and policy considerations in support of reasonableness and justification.

[60] The respondents did not place any factual material either before the High Court or this Court in support of justification. In his answering affidavit, the Minister for Justice and Constitutional Development advanced four submissions in support of justification. First, he submitted that strict time limits are necessary to relieve public bodies of administrative and financial burdens that may flow from a delay in bringing

[43] *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at paras 33 and 65; *Mohlomi* above n 34 at para 15 and *Moise* above n 34 at para 18.

[44] *Moise* above n 34 at para 19.

a court application; second, the limitation does not take away the applicant's right of access to information but "simply requires an applicant to act swiftly" in enforcing his or her rights; third, the limitation is tailored to achieve its purpose and is thus less restrictive; and finally, a requestor is entitled to deem his request or internal appeal to have been refused after a lapse of the prescribed period.[45] No new submissions were advanced during oral argument.

[61] The nature and the importance of the right of access to court speak for themselves and require no elaboration. In *Chief Lesapo* we said the following concerning the right of access to court:

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance."[46]

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[45] This is apparently a reference to section 77(7) read with section 77(3). These provisions provide:

> "(3) The relevant authority must decide on the internal appeal—
>
> (a) as soon as reasonably possible, but in any event within 30 days after the internal appeal is received by the information officer of the body;
>
> (b) if a third party is informed of section 76(1), as soon as reasonably possible, but in any event within 30 days; or
>
> (c) if notice is given in terms of section 76(7)—
>
> (i) within five working days after the requester concerned has made written representations in terms of section 76(9); or
>
> (ii) in any other case within 30 days after notice is so given.
>
> (7) If the relevant authority fails to give notice of the decision on an internal appeal to the appellant within the period contemplated in subsection (3), that authority is, for the purposes of this Act, regarded as having dismissed the internal appeal."

[46] *Chief Lesapo v North West Agricultural Bank and Another* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 22.

[62] As I have held above, section 78(2) has a dual limitation; it limits not only the right to seek judicial redress, but in effect also the right of access to information by imposing a very short time period within which a person seeking information must launch litigation. The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid.[47] To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information."[48]

[63] Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media[49] and freedom to receive or impart information or ideas.[50] As the present case illustrates, Mr Brümmer, a journalist, requires information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid.[51] Its role includes informing the public about how our

[47] See section 1(d) of the Constitution.

[48] Id at section 195(1)(g).

[49] Id at section 16(1)(a).

[50] Id at section 16(1)(b).

[51] In *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 24 this Court held:

> "[i]n a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional

government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.

[64] But at the same time the importance of time bar provisions cannot be denied. Delays in litigation hamper the interests of justice. Documents may be lost. Witnesses may disappear. Memories of witnesses may fade. These provisions prevent inordinate delays in litigation that may undermine the interests of justice. Vital evidence might be lost in the process. As this Court pointed out in *Mohlomi*, "[i]nordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs."[52]

[65] However, it seems to me that different considerations apply to a time bar such as the present one that limits access to court to enforce the right of access to information. In the first place here we are concerned with the right of access to information held by a public body. PAIA is therefore concerned with access to existing documents presently held by the state. Litigation over whether the requestor

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mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16." See also paras 21-2.

[52] *Mohlomi* above n 34 at para 11.

is entitled to the information will therefore, seldom, if ever, involve the evidence of witnesses. The problem of the availability of witnesses will therefore rarely, if ever, arise. So too is the related concern of fading memories of witnesses.

[66] In the second place, it is not clear what financial and other burdens a reasonable time limit will impose. What is required is that the requestor must be allowed an adequate and fair opportunity to seek judicial redress after an unsuccessful internal appeal. The respondents did not provide any evidence to suggest that allowing a requestor an adequate and fair opportunity to seek judicial redress will impose any additional significant burden on the public body than that it had already incurred by keeping the records up to the point when information is requested. In these circumstances the argument based on administrative and financial burdens cannot be sustained.

[67] One cannot overlook the time limits provided in other statutes. They provide a yardstick against which to measure the limitation imposed by section 78(2). Section 7(1) of the Promotion of Administrative Justice Act, 2000[53] (PAJA) was enacted into law on 2 February 2000. This was about the same time that PAIA was enacted into law. PAJA allows a person who wishes to institute review proceedings 180 days after the conclusion of internal remedies or after the person was informed of administrative decisions sought to be taken on review. The Institution of Legal Proceedings Against

[53] Act 3 of 2000.

Certain Organs of State Act, 2002[54] allows a person who wishes to sue the state six months from the date on which the debt becomes due subject to notice with the provision of condonation for the late giving of the notice.[55]

[68] Now the constitutionality of section 7(1) of PAJA and section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act is not before us. Therefore, I express no opinion on the constitutionality of these provisions as they may come before us on a future occasion. These provisions, however, show what Parliament considers as an adequate and a fair opportunity to institute proceedings against the state. These provisions are less stringent and detrimental to the interests of the requestor than the provisions of section 78(2). There is no reason to doubt that the period of 180 days that has been determined for reviews under PAJA would serve the government's interests equally and, therefore, adequately in applications brought to challenge a decision on internal appeal. The submission that the 30 day period is less restrictive of the rights of the requestors cannot therefore be sustained. Nor do the deeming provisions of section 77(7) help the respondents.[56]

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[54] Act 40 of 2002.

[55] Section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act provides:

> "A notice must—
>
> *(a)* within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4(1); and
>
> *(b)* briefly set out—
>
> (i) the facts giving rise to the debt; and
>
> (ii) such particulars of such debt as are within the knowledge of the creditor."

[56] See above n 45 where section 77(7) is quoted.

[69] The respondents also submitted that all that section 78(2) does is to tell the requestor to act swiftly. This is an understatement. As SAHA's experience amply demonstrates, it is almost impossible to comply with the 30 day limit in practice. The result is that requestors are compelled to incur additional costs by making applications for condonation for non-compliance with the 30 day time limit. The time limit in section 78(2) therefore places an additional hurdle in the way of a requestor who wishes to challenge a decision on internal appeal. Apart from this, there is no reason why people who seek information should be compelled to act more swiftly than other litigants. No evidence has been placed before us to justify requiring requestors to exercise their rights to seek judicial redress under extreme pressure of time or risk the uncertainty of an application for condonation. There was no suggestion that applications to court under section 78(1) have a special attribute that requires litigants to act swiftly.

[70] I conclude, therefore, that the limitation imposed by section 78(2) on the right to seek judicial redress and the right of access to information cannot rightly be said and has not been shown to be reasonable and justifiable in the light of the option readily available to Parliament of emulating section 7 of PAJA. It follows, in my judgement, that section 36(1) does not countenance the intrusion and section 78(2) is therefore inconsistent with sections 32 and 34 of the Constitution.

[71] What remains to be considered is the form of relief, the question to which I now turn.

Remedy

[72] The constitutional defect in section 78(2) lies in that portion which requires a potential litigant to launch proceedings within 30 days. Consistently with section 172(1)(a) of the Constitution, a declaration to that effect must be made. The defective portion of section 78(2) must be struck down. That leaves the question whether this portion of section 78(2) should be struck down with immediate effect or whether its life should be prolonged until Parliament cures the defect in the provision.

[73] It is ordinarily undesirable that the defective portion should continue to be operative until the defect in it is cured. To do so would be to perpetuate unconstitutionality and the difficulties that potential litigants face when challenging the refusal of access to information. On the other hand, striking down the provision will mean that section 78(2) is without a time limit within which applications to court must be launched. Yet it is clear from the provision that Parliament, whose function it is to make law, has determined that there must be a time limit within which to launch applications to court. And what is more, I have found that time limits serve an important purpose, that of preventing inordinate delays.

[74] Under section 172(1)(b) this Court has a discretion to make an order that is just and equitable, including an order limiting the retrospectivity of the declaration of invalidity and suspending the order of invalidity to allow Parliament to cure the constitutional defect. What is apparent from the section is that Parliament has

determined that there should be a time limit within which to bring applications to court. That time limit must be determined by Parliament whose task it is to legislate. To do otherwise may be to usurp a function reserved for another branch of government. I think it is just and equitable to suspend the order of invalidity for a period of 18 months to allow Parliament to cure the defect in section 78(2) and determine a time limit that would be consistent with the Constitution. The question is whether there should be a time limit that will regulate applications to court until Parliament cures the defect in section 78(2).

[75] Section 32(1) of the Constitution guarantees the right of access to information "that is required for the exercise or protection of any rights". And the declared purpose of PAIA is to give effect to this constitutional right. It is implicit from the purpose for which the information is required that disputes over access to information must be dealt with expeditiously. But in seeking to achieve expedition, the legislation may not unduly preclude access to information. There is, in my view, sufficient reason for some time limit during which litigation may be launched. However, that time limit must afford the requestor an adequate and fair opportunity to launch a court application.

[76] It seems to me that it is necessary to put into place an interim regime that will regulate applications to court. That interim regime must not be inconsistent with the scheme of PAIA. PAIA seeks to ensure that applications to court, following an unsuccessful internal appeal, are brought to court without delay. The interim limit

must therefore bear this in mind. But it must also afford the requestor an adequate and a fair opportunity to lodge a court application. Having regard to the trend reflected in other statutes, notably PAJA, it seems to me that a time limit of 180 days would afford a requestor an adequate and a fair opportunity to seek judicial redress. It is open to Parliament to adopt what it considers a suitable time limit.

[77] The period of 180 days must be calculated from the date when the requestor receives notification of the decision on internal appeal. In addition, the time limit of 180 days must be flexible so as to allow a court, when the interests of justice demand, to extend or condone non-compliance with the period of 180 days. The applicant launched this application within the period of 180 days. In these circumstances, condonation is not necessary and therefore no order should be made on the applicant's application for condonation.

[78] And, finally on this aspect, I consider it just and equitable that the order of invalidity applies, not only to all future requests for access to information, but also to all pending applications.

[79] Before leaving this topic, there is one matter that I should like to draw to the attention of Parliament. It is a matter to which I alluded earlier in this judgment concerning the conflict between sections 77(5)(c) and 78(2). As pointed out earlier, section 77(5)(c) requires the relevant authority to give notice of the decision on internal appeal. This section specifically requires the notice to notify the requestor

that he or she must lodge an application to court within the time limits prescribed in the section. These time limits, in particular those set out in paragraph 77(5)(c)(i), are presently in conflict with the time limits in section 78(2). Unless the time limits prescribed in section 77(5)(c) are brought in line with the interim measure I propose, there will be a conflict between the interim measure and section 77(5)(c).

[80] It seems to me that it would be just and equitable, as an interim measure, that when giving notice contemplated in section 77(4) read with section 77(5)(c), the relevant authority should have regard to the time limit of 180 days that I propose to set out in the interim regime. When Parliament considers the time limit that will govern applications under section 78, it should give consideration to harmonising the provisions of sections 77 and 78 and avoid any conflict in the time limits prescribed by these sections. Thus when Parliament seeks to amend section 78(2), it should ensure that section 77(5)(c) is amended consistently with it to avoid continued conflict, since this may infringe the rule of law.[57]

[81] But what then is to become of the applicant's application for information held by the respondent?

[57] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108; *South African Liquor Traders Association and Others v Chairperson Gauteng Liquor Board* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at para 27.

The fate of the request for information in this case

[82] The High Court has so far dealt with the question of the constitutionality of section 78(2) which it held to be unconstitutional. It did not consider the merits of the application for access to information but instead referred the order of invalidity to this Court for confirmation. This was a cautious approach to take in the event this Court decided not to confirm but instead found nothing wrong with section 78(2). The applicant still needs to be told whether he is entitled to the information he seeks. The merits of the application for access to information, therefore, still have to be considered.

[83] It is true the High Court expressed some view, albeit a prima facie one, on the merits of the request for information. It did this when it considered the prospects of success in the context of the application for condonation. As it turned out, its consideration of the application for condonation became an academic exercise in the light of its conclusion that section 78(2) is unconstitutional. I have already held that the High Court order refusing condonation should be set aside, not because condonation should have been granted, but because no order should have been made on the application in the light of the conclusion reached by the High Court on the constitutionality of section 78(2). It follows, therefore, that the merits of the applicant's application for access to information held by the respondents must be considered.

[84] In all the circumstances, the just and equitable order is to refer the matter back to the High Court so that it can consider the merits of the application for access to information. Given the fact that the judge who considered the matter in the first place has already expressed some view on the merits of the application, albeit in the context of prospects of success, the application should be dealt with by another judge. Accordingly, I propose to make an order to this effect.

[85] Finally, concern was expressed during argument about the blanket refusal by the respondents to allow access to all records sought. This concern prompted counsel for the applicant to urge us to consider issuing guidelines on how public bodies should deal with requests for access to information. A compelling argument was addressed to us concerning the need for public bodies to provide a list of the records that they have in their possession and the basis for refusing access to each record. Our attention was drawn to a Pretoria High Court decision in *CCII Systems*.[58] The respondents in that case objected to affording access to some of the documents without identifying documents which enjoyed protection from disclosure and those which did not. As the High Court found, the defence was that the documents requested were so voluminous that the public bodies concerned could not reasonably be expected to analyse all the documents in order to identify those which may be protected from disclosure.[59]

[58] *CCII Systems (Pty) Ltd v Fakie and Others NNO (Open Democracy Advice Centre, as Amicus Curiae)* 2003 (2) SA 325 (T); *Vaughn v Rosen* 484 F 2d 820 (1973).

[59] *CCII Systems* above n 57 at para 15.

[86] The High Court held that the respondents' approach made it impossible to evaluate whether the respondents were justified in claiming privilege in respect of the documents and whether access could not be given to portions of those documents. It held that "it is for the respondents to identify the record which is to be protected and to state concisely why it maintains that access to it can be withheld."[60] Against this background, the High Court ordered the respondents to list all documents in respect of which they objected to in terms of PAIA and to set out "clearly and concisely *(a)* a description of the document or record, *(b)* the basis for the objection, *(c)* an indication if the objection relates to the whole document or only to portions thereof and if so, *(d)* to which portions."[61]

[87] While there is much to be said for the order made on the facts in *CCII Systems*, the question whether a similar order or guidelines along the lines of the order in that case should be issued on the facts of this case, is a matter which concerns the merits of the applicant's request for information. It is for the High Court, when dealing with the merits of the requests for information, to consider whether, on the facts of this case, it is appropriate to make an order similar to that in *CCII Systems*. It is not desirable for this Court, which is not seized with the merits, to express a view on this issue. Accordingly, the invitation to consider "issuing guidelines" similar to the order made in *CCII Systems* must be declined.

[60] Id at para 20.

[61] Id at 335I-J.

Costs

[88] That leaves only the questions of costs. Counsel were agreed that the applicant is entitled to his costs including costs of two counsel in both courts.

Order

[89] In the event, the following order is made:

a) The South African Human Rights Commission is admitted as amicus curiae.

b) The application for leave to appeal directly to this Court is granted.

c) The appeal against the order of the Western Cape High Court, in case 10013/07, made on 16 March 2009 refusing condonation succeeds and that order is set aside.

d) No order is made on the application for condonation for non-compliance with section 78(2).

e) The words "within 30 days" in section 78(2) of the Promotion of Access to Information Act 2 of 2000 are declared to be inconsistent with sections 32 and 34 of the Constitution and section 78(2) is declared to be invalid for that reason.

f) The declaration of invalidity made in paragraph (e) above is suspended for a period of 18 months from the date of this order to enable Parliament to enact legislation to correct the inconsistency which has resulted in the declaration of invalidity.

g) Pending the enactment of legislation by Parliament or the expiry of the period referred to in paragraph (f) above, whichever occurs first, the words "within 30 days" in section 78(2) of the Promotion of Access to Information Act 2 of 2000 shall be replaced by the words "within 180 days from the date when the requestor receives notice of the decision."

h) Pending the enactment of legislation by Parliament or the expiry of the period referred to in paragraph (f) above, whichever occurs first, a court considering an application contemplated in section 78(1) of the Promotion of Access to Information Act 2 of 2000 shall have the power to extend or condone non-compliance with the period of 180 days referred to in paragraph (g) above.

i) Pending the enactment of legislation by Parliament or the expiry of the period referred to in paragraph (f) above, whichever occurs first, the periods of 60 days and 30 days referred to in section 77(5)(c)(i) and (ii) of the Promotion of Access to Information Act 2 of 2000, respectively, shall be read as 180 days.

j) The declaration of invalidity will apply to and govern all future requests for access to information and to all pending applications launched under section 78(1) of the Promotion of Access to Information Act 2 of 2000 which, at the time of this order, have not yet been finally determined by judgment delivered at first instance or on appeal or by a settlement duly concluded.

k) The application is remitted to the Western Cape High Court for determination under section 82 of the Promotion of Access to Information Act 2 of 2000 by another judge.

l) The respondents are ordered to pay the applicant's costs including costs consequent upon the employment of two counsel in the High Court and in this Court.

Langa CJ, Moseneke DCJ, Cameron J, Mokgoro J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J and Yacoob J concur in the judgment of Ngcobo J.

For the Applicant:	Advocate AA Gabriel, Advocate E Fitz-Patrick and Advocate JP Broster instructed by the Open Democracy Advice Centre.
For the Respondents:	Advocate MTK Moerane SC and Advocate NH Maenetje instructed by the State Attorney.
For the South African History Archives Trust:	Advocate N Rajab-Budlender instructed by Rosin Wright Rosengarten.
For the South African Human Rights Commission:	Advocate F Snyckers, Advocate K Hofmeyr and Advocate K McLean instructed by Webber Wentzel.