IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 25/09

CPD CASE NO: 10013/07

In the matter between:

STEFAANS CONRAD BRUMMER	Applicant
and	
THE MINISTER OF SOCIAL DEVELOPMENT	First Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT OF SOCIAL DEVELOPMENT	Second Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent

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RESPONDENTS' WRITTEN SUBMISSIONS

TABLE OF CONTENTS

Item	Page number
Introduction	3-6
Request for access	6-13
Confirmation of constitutional invalidity	14-32
Condonation	32-44
The merits	44-52
Remedy in terms of section 80	52-53
Retrospective effect of finding of invalidity	53-54
Conclusion	54

INTRODUCTION

1. The applicant seeks leave to appeal directly to this Court against paragraphs 1 and 2 of the order handed down by His Lordship Mr Justice Zondi J ("*Zondi J*") in the Cape High Court on 16 March 2009 ("*the Judgment*").[1] In the order Zondi J dismissed the applicant's applications for condonation and for access to certain records from the Minister of Social Development and the Director General of the Department of Social Development, the latter being the information officer of the Department, (the "*Minister*" and the "*D-G*" respectively).

2. The applicant also seeks confirmation of an order of constitutional invalidity of section 78(2) of the Promotion of Access to Information Act, 2 of 2000 ("*PAIA*"), in accordance with paragraphs 3 and 4 of Zondi J's order, in as far as section 78(2) provides that an applicant wishing to enforce a right of access to records must apply to Court within a period of 30 days.

3. The respondents oppose the application for leave to appeal, the confirmation of the order of constitutional invalidity and the appeal on the merits if leave to appeal is granted.

[1] Vol 7 p 601.

4. The respondents' grounds of opposition are those that they relied upon in the Court *a quo*,[2] subject to the qualification that they abandoned the contention that the Court lacked the competence to condone the non-compliance by the applicant with the 30 day time period provided for in section 78(2) of PAIA as is reflected in the applicant's founding affidavit in this Court at paragraph 34.[3]

5. The respondents accept the reasoning of Zondi J as to the Court's powers to condone the non-compliance with the time period in section 78(2) of PAIA as the provisions of PAIA do not expressly oust such a power or competence – even though Zondi J seems to have simply assumed that such power exists. The application for the confirmation of the order of constitutional invalidity should be assessed in light of this power of the Court to condone.

6. We deal in more detail below with the Court's powers to condone non-compliance with the time period in section 78(2) and the significance of this power to the constitutional validity of section 78(2) of the PAIA. We submit that in view of the power to condone non-compliance with the time period, and the general scheme of the PAIA, this Court ought not to

[2] As they have not filed an answering affidavit in this Court setting out any additional basis of opposition nor additional facts upon which they rely. For this we ask the indulgence of the Court. The matter was not brought timeously to our attention to enable us to assist the respondents in filing any further affidavits in this Court.
[3] Vol 7 p 632.

confirm the order of constitutional invalidity. It ought to find that section 78(2) does not limit the applicant's rights of access to Court in terms of section 34 of the Constitution[4], alternatively that any such limitation is justifiable in terms of section 36 of the Constitution.

7. We further submit that once the Court *a quo* found that there was a power to condone non-compliance with the time periods in section 78(2) of PAIA, but that the applicant did not make out good cause for condonation, the issue whether section 78(2) was unconstitutional ought not to have been reached and decided. The application ought to have simply been dismissed. The issue of condonation depended entirely on whether or not the applicant made out good cause for condonation.

8. As regards the application for appeal directly to this Court against the dismissal of the applicant's condonation application, the respondents submit that Zondi J was correct that the applicant had failed to make out good cause for condonation. The application was correctly dismissed. In the circumstances the application for leave to appeal should be dismissed. If granted, the appeal itself should in any event be dismissed on the merits.

9. The rest of our submissions take the following format:

[4] Constitution of the Republic of South Africa, 1996.

9.1. We deal with the request for access.

9.2. The issue of confirmation in terms of section 167(5) of the Constitution.

9.3. The issue of condonation.

9.4. The merits of the application to the Court *a quo* in terms of section 78 of PAIA.

9.5. A remedy sought by the applicant in the Court *a quo* in terms of section 80 of PAIA.

9.6. The retrospective effect and suspension of an order of constitutional invalidity.

9.7. Conclusion.

THE REQUEST FOR ACCESS

10. The records to which access is sought are those set out in attachment "B" to the request for access to information[5] and annexure "A" to the notice of motion.[6] They are set out as follows:

> "1. All correspondence (including but not limited to, telefaxes, letters and emails) between IT Lynx Consortium (and/or its

[5] Vol 1 p 91.
[6] Vol 1 p 5.

representatives) and the national Department of Social Development); relating to the State Information and Technology Agency (SITA), tender no 0082/2001 ('Tender 82') for the design, development and implementation of an grant administration system and/or relating to the same grant administration system that the tender eventually envisaged. This includes but is not limited to correspondence which ensured both prior to, and after Tender 82 was initiated by SITA until the present date.

2. All correspondence (including but not limited to, telefaxes, letters and emails) between companies, persons and other entities which may be associated with the IT Lynx Consortium, including but not limited to Net 1 Support Services, Net 1 UEPS Technologies, Aplitec, New Aplitec, IT Lynx Placements, Kokeletso Investment Holdings, Nokusa Consulting, Invume Resources, Invume Management, any of the companies in the Permit Group, Mr Searge Belamant, Mr Obbey Mabena, Mr Sandi Majali (and/or their representatives), and the national Department of Social Development (and/or the Minister of Social Development and/or their representatives); relating to Tender 82 for the design, development and implementation of a grant administration system and/or relating to the same grant administration system that the tender eventually envisaged. This includes but is not limited to correspondence which ensued both prior to, and after Tender 82 was initiated by SITA until the present date.

3. 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 between IT Lynx Consortium (and/or its representatives) and/or the entities or persons who may be associated with the IT Lynx Consortium as listed in paragraph 2 above and the Department of Social Development (and/or the Minister of Social Development and/or their representatives); relating to Tender 82 for the design, development and implementation of a grant administration system and/or relating to the same grant administration system that the tender eventually designed. This includes but is not limited to records which ensued both prior to, and after Tender 82 was initiated by SITA until the present date.

4. All correspondence (including, but not limited to telefaxes, letters and emails) between the Treasury/Department of Finance and/or the Minister of Finance (and/or their representatives) and the Department of Social Development and/or the Minister of Social Development (and/or their representatives); relating to Tender 82 for the design, development and implementation of a grant administration

system and/or relating to the same grant administration system that the tender eventually envisaged. This includes but is not limited to correspondence which ensued both prior to, and after Tender 82 was initiated by SITA until the present date.

5. 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 between the Treasury/Department of Finance and/or the Minister of Finance (and/or their representatives) and the Department of Social Development and/or the Minister of Social Development (and/or their representatives); relating to Tender 82 for the design, development and implementation of a grant administration system and/or relating to the same grant administration system that the tender eventually envisaged. This includes but is not limited to records which ensued both prior to, and after Tender 82 was initiated by SITA until the present date."

11. The records relate to the State Information and Technology Agency tender number 0082/2001 ("*Tender 82*").

12. It is common cause that a decision not to award Tender 82 but to withdraw it is the subject matter of litigation between IT Lynx Consortium ("*IT Lynx*"), as the plaintiff on the one hand, and on the other hand, the SITA, the Minister and the Minister of Finance as the first, second and third defendants, respectively, in the North Gauteng High Court.[7]

13. As appears from annexure "SCB21" to the applicant's founding affidavit, which is a report of the Public Protector made in terms of section 182(1)(b) of the Constitution, the basis of the claim by IT Lynx Consortium is that the

[7] Respondents' Answer, Vol 3 pp 218-220 paras 17-22; Reply Vol 3 pp 242-243 para 8.

Tender 82 was awarded to it and that the SITA and the Minister have failed to implement the award. IT Lynx seeks the implementation of the award, alternatively the cancellation of the contract resulting from the alleged award of the tender to it and the payment of damages in the amount of R149 256 285,00 plus interest and costs.[8]

14. The trial of the action by IT Lynx was initially set down to commence in April 2007 but was postponed *sine die*. It is currently not set down for trial, after an improper set down was set aside by His Lordship Mr Justice Hartzenberg J.

15. What is clear from the IT Lynx claim is that the defendants in the action are at risk to pay huge sums of money to IT Lynx should it succeed with its claim.

16. The records to which the applicant seeks access are all relevant to the claim by IT Lynx and will in due course be discovered for purposes of the trial. The Department of Social Development ("*the Department*") was, for want of a better word, a client of the SITA for purposes of Tender 82. The decision not to award the tender but to withdraw it was taken by the Department, i.e. the Minister, communicated to the SITA and implemented by the SITA. Documents and correspondence between the Minister (or the

[8] Vol 2 p 126.

Department through its other officials) and the SITA, the National Treasury and the Minister of Finance, and all other parties associated with the tender, are relevant to the issues that arise in the IT Lynx claim. They are discoverable in that litigation. These documents will all have a bearing on the adjudication of the issues that arise in the trial.[9] They reflect, *inter alia*, the process and reasoning culminating in the decision not to award Tender 82 at all but to withdraw it.

17. It is important to highlight the position that the applicant has adopted in relation to the contention by IT Lynx that Tender 82 was awarded to it. He takes sides with IT Lynx. He says this in his founding affidavit in the Court *a quo*:

> "8.4 In respect of the allegations contained in paragraph 21 it is not necessarily correct that the tender was not awarded, but withdrawn. IT Lynx was informed by way of a letter that it had been awarded the tender jointly with another party. Whether or not this constitutes 'an award of the tender' is one of the issues which will have to be determined at the hearing of the IT Lynx claim, if it ever proceeds. In this regard Part 8, paragraph 31 of the Public Protector report states that: '*The basis of the claim is that part of the tender ... was awarded by SITA to IT Lynx and that SITA has failed to implement the contractual agreement between it and IT Lynx*".[10]

(Emphasis added)

[9] Respondents' Answer Vol 3 p 220 para 22.
[10] Vol 3 p 243 (**part of missing page**).

18. In his replying affidavit in the Court *a quo*, the applicant did not really contest the relevance of the records (to which access is sought) to the IT Lynx claim. He contested what he called a blanket refusal. He said:

> "8.3 Given that all documentation which would be used during those purported proceedings would in any event form part of a public record and would have to be disclosed during the discovery process, there is no merit to this defence. In any event this defence is not valid in terms of the PAIA. It is also not a reason for a blanket refusal of all documentation which I requested."[11]

19. The fact of the matter is that all the documents that the applicant seeks access to are relevant and discoverable in the IT Lynx claim and will form the basis of the adjudication of the claim by the High Court.[12]

20. The contention that the records are not coterminous[13] with documents so far discovered in the IT Lynx claim is of no real consequence. The records cover documents that are relevant to the determination of the IT Lynx claim and are discoverable. It is in light of this, the position adopted by the applicant on the key issue in the IT Lynx claim, as well as the applicant's declared intention to publish, that the respondents' ground of refusal ought to be adjudicated.

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[11] Vol 3 p 242-243 para 8 (**there is a page missing which the respondents will hand up at the hearing of the application**).
[12] Vol 3 p 227 para 43.2.
[13] Having the same boundaries or extent in space, time or measurement.

21. Although the D-G initially refused access to the records, which decision gave rise to an internal appeal by the applicant, it is the decision of the Minister to dismiss the applicant's internal appeal that was relevant to the application in the Court *a quo* and is relevant before this Court. It was the reason given by the Minister that required determination by the Court *a quo* – and that is the assessment that the Court *a quo* performed.

22. The Minister communicated the reason for refusing access in a letter dated 22 December 2006[14] which stated the following:

> "1. I refer to your appeal lodged with the Director-General against his decision to refuse access to information you requested in your letter dated 11 February 2006, in terms of the Promotion of Access to Information Act, 2 of 2000 ("**PAIA**").
>
> 2. As required by law, the Director-General as the Information Officer for the Department of Social Development notified me, the Executive Authority, of the appeal which I must consider and make a decision on.
>
> 3. In terms of section 76(3) of the Act I have notified third parties to whom the requested information relates and I need[ed] to study their representation, your appeal and the Director General's reasons for refusal to grant access before I arrive[d] at a decision.
>
> 4. After studying the representations of the third parties, your appeal, as well as the Director General's reasons for refusal, I came to the conclusion that your request for access to the information should be refused in terms of section 39(1)(b)(iii)(ee) of [PAIA].
>
> 5. As you are aware, you are entitled to lodge an application with a court against the decision to turn down the internal appeal."

[14] Annexure "SCB24" p 203.

23. The only issue on the merits of the application for access is whether the Minister was entitled to rely on section 39(1)(b)(iii)(ee) of the PAIA in refusing access to the records. We submit that the Minister was justified to refuse access on the grounds in section 39(1)(b)(iii)(ee) of the PAIA in the circumstances of this case. We deal with this issue further when we discuss the merits of the application for access to the records.

24. There were delays on the part of the D-G and the Minister in dealing with the request for access and the internal appeal. Requests for extensions of time were directed to the applicant and agreed to by him for reasons that were given to him from time to time. Fully aware of his rights, the applicant agreed to the extensions of time and did not invoke the provisions of the PAIA which would deem any of the delays as refusals of access. He could have done this and approached the Court to compel access. We submit below when we deal with the issue of condonation that these delays could not have assisted the applicant in his application for condonation. The only relevant issue before the Court was whether his delays were justified by the disclosure of good cause in order to warrant the grant of condonation.

CONFIRMATION OF CONSTITUTIONAL INVALIDITY

25. The applicant raised (in his papers in the Court *a quo*) the constitutional validity of section 78(2) only in the event that the Court *a quo* found that it lacked the power to condone non-compliance with the 30 day time period. He stated abundantly clearly *inter alia* the following in the application for the joinder of the third respondent:

> "9. In light of the Respondents['] opposition to the Applicant's application for condonation and in the event that this Court is of the view that it does not have the power to condone non-compliance with section 78 of the PAIA, the Applicant would be denied access to court in that the application launched would have [been] brought outside of the time period specified in the PAIA.
>
> 10. Section 78 of PAIA amounts to an unreasonable time-limited ouster clause to the extent that the Applicant would effectively be ousted from seeking relief from this Honourable Court[15] irrespective of the principles of justice and fair play and that other litigants, acting under other provisions of law or even PAIA would be entitled to their applications in a much longer period of time.
>
> 11. Accordingly, the time period provided for in section 78 of PAIA is unreasonable and irrational and contrary to the rule of law and unconstitutional in that an ordinary litigant may very well not have the knowledge, financial means or ability to be able to launch a court application within 30 days. ..."[16]

[15] Vol 3 pp 267 (**there is also a page missing which contains part of paragraph 10 and paragraph 11**).

[16]

26. The constitutional validity of section 78(2) must be considered in the scheme of the PAIA as a whole. In such consideration, the power of the Court to condone non-compliance with the 30 day time period is a significant factor, contrary to the applicant's contentions.

27. That the power of the Court to condone non-compliance with statutory time periods of the kind contained in section 78(2) is a significant factor is clear from the judgment of this Court in the *Moise* case.[17] In *Moise,* the Court approached the matter as follows:

> "[13] The requirement of written notice as a precondition to the institution of legal proceedings is in itself an obstacle to such legal proceedings. If it is considered in conjunction with the 'very limited period' of 90 days after the due date, 'as part and parcel of a composite scheme', it is apparent that it amounts to a real impediment to the prospective claimant's access to a court. The time period is very short, the notice has to be served on the prospective debtor and it has to contain significant information regarding the occurrence and of the damages allegedly suffered. And, of course, failure to comply with the notice requirement vitiates the claim unless, under s 4 of the Act, a court can be satisfied as to the absence of prejudice to the debtor or the existence of special circumstances exculpating timeous non-compliance.
>
> [14] Moreover, the condonation opportunity afforded to a prospective claimant by s 4 does not render the impediment immaterial. The obstacle remains regardless of this potential amelioration of its harshness. This is particularly so if one takes into account that many potential litigants (arguably the majority) are poor, sometimes illiterate and lack the resources to initiate legal proceedings within a short period of time. Many are not even aware of their rights and it takes time for them to obtain legal advice. Some come by such advice only fortuitously. For them a mere 90 days from the commission of the delict within which to serve formal notice on the debtor(s)

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[17] *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC).

> is, in the words of Didcott J in *Mohlomi*, not a 'real and fair' 'initial opportunity' to approach the courts for relief.
>
> [15] It should also be noted that s 4 does not afford a defaulting creditor carte blanche. The power of a court under the section is confined to extending the period for notice and is by no means open-ended. The jurisdictional criteria for the grant of the indulgence are quite clearly circumscribed and are not mere formalities. As the plaintiff in *Abrahamse* found to his cost, condonation may well be refused despite a hard-luck tale.
>
> [16] Viewing s 2(1)(a) of the Act in the context of the composite scheme consisting of (i) specific notice (ii) within a short period and (iii) with limited scope for condonation for non-compliance, it does constitute a material limitation of an individual's right of access to a court of law under s 34 of the Constitution.
>
> [17] The enquiry must then turn to possible justification. Can the limitation be justified under s 36(1) of the Constitution? ..."

28. That the power to condone is an important consideration also appears from the comments of Didcott J in *Mohlomi* at paragraphs 17 to 19.

29. In a recent decision, the Supreme Court of Appeal accepted that the notice requirement in section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002 is compliant with the Constitution due to the power given to the Courts to condone non-compliance with the notice requirements. Giving judgment for the Court, Lewis JA said the following in this regard:

> "[1] This appeal turns on the interpretation of s 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. The Act was introduced to harmonise periods of prescription of debts owed by organs of State, and to make provision for a uniform requirement for the giving of notice in

connection with the institution of legal proceedings. It repealed several statutes that had previously regulated proceedings against various State bodies such as the police and the defence force. And it came after a decision in the Constitutional Court - *Mohlomi v Minister of Defence* - in which it was held that s 113(1) of the Defence Act was unconstitutional since it made no allowance for failure timeously to notify the defence force of the intention to sue it, despite the circumstances.

[2] The Act is meant not only to bring consistency to procedural requirements for litigating against organs of State but also, it is clear, to render them compliant with the Constitution. The way in which it seeks to achieve a procedure that is not arbitrary and that operates efficiently and fairly both for a plaintiff and an organ of State is to give a court the power to condone a plaintiff's non-compliance with procedural requirements in certain circumstances. Thus access to courts is facilitated, while at the same time procedures against large governmental organisations that need to keep their affairs in order are regulated.

[3] The purpose of having special requirements in place for the institution of action against a State body is well recognised and was put thus by Didcott J in *Mohlomi*:

> Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate 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. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.
>
> It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which s 22 bestows on everyone to have his or her justiciable disputes settled by a court of law. The right is denied altogether, of course, whenever an action gets barred eventually

> because it was not instituted within the time allowed. But the prospect of such an outcome is inherent in every case, no matter how generous or meagre the allowance may have been there, and it does not per se dispose of the point, as I view that at any rate. What counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line.
>
> [4] As I have said, the way in which the legislature has sought to avoid drawing a hard-and-fast rule that may cause undue hardship to a plaintiff is to make provision for time limits, and notices of intention to sue, but also to enable a court to condone a failure to comply with the requirements. Section 3(4) gives the court a discretion to condone non-compliance, subject to three requirements being met. ..."
>
> (Emphasis added)

30. In *Minister of Home Affairs, Namibia v Majiedt and others*[18], Chomba AJA found that a provision which was otherwise identical to section 113(1) considered in *Mohlomi* contained a provision for waiver which saved the time limit notice requirement as it did not have the rigidity and inflexibility of the identical requirement in *Mohlomi*. He concluded that the waiver "proviso [possessed] an ameliorative attribute".[19]

31. We submit that a general power of a Court to condone non-compliance with a time limit provision also contains an ameliorative attribute. It removes

[18] *Minister of Home Affairs, Namibia v Majiedt and others* 2008 (5) SA 543 (NmS).
[19] At paras 37-38.

the rigidity and inflexibility of a time bar and allows access to Court in cases where the failure to approach the Court within the stipulated time period is justifiable and where it would be just and equitable to permit an applicant to pursue his or her claim.

32. If the power to condone is not a general one but is circumscribed, the ameliorating attributes may be lost as was the case in *Moise*. We submit below that this is not the case with section 78(2) of the PAIA. It provides a general power with ameliorative attributes of the kind that permit rather than deny altogether the right of access to Court which was the case in *Mohlomi*.[20]

The scheme of the PAIA

33. The objects of the PAIA are set out in section 9. Whereas the PAIA is intended to give effect to the constitutional rights of access to any information held by the State, the rights are given effect to subject to certain justifiable limitations, which include, but are not limited to:

33.1. limitations aimed at the reasonable protection of privacy, commercial confidentiality; and

33.2. effective, efficient and good governance.

[20] At para 12.

34. Other objects of the PAIA are to:

34.1. establish voluntary and mandatory mechanisms or procedures to give effect to the right of access to information in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible;

34.2. generally promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating anyone:

34.2.1. to understand their rights in terms of the PAIA in order to exercise their rights in relation to public and private bodies;

34.2.2. to understand the functions and operation of public bodies; and

34.2.3. to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.

35. Certain obligations are imposed upon the Human Rights Commission in terms of section 10 of the PAIA to educate the public about the PAIA, their rights under the PAIA and the procedures to be followed in enforcing rights under the PAIA. This is of particular importance to the claim made by the

applicant that certain individuals may fail to properly follow the procedures set out in the PAIA, especially as regards time limits. Section 10 of the PAIA is intended to remedy such difficulties. It is, in any event, doubtful that the contention advanced by the applicant in this regard holds water as the applicant shows a clear understanding of the PAIA and his rights under the PAIA (as is evident from his affidavits and the annexures thereto), and who it appears may have been legally assisted throughout the process. We deal with this issue further when we address the issue of condonation.

36. The obligation of a public body (in section 11 of the PAIA) to grant access to a requester is expressly made subject to such a requester complying with the "procedural requirements" of the PAIA. Thus the PAIA places significance on compliance with procedural requirements.

37. Section 14 places an obligation on a public body to publish a manual within six months after the commencement of the section (in at least three official languages) which deals *inter alia* with remedies available to requesters in respect of a public body's act or failure to act under the PAIA. Section 19 places duties on information officers of public bodies to assist requesters in processing their requests. This is also intended to assist requesters.

38. The PAIA imposes time periods in relation to *inter alia* when requests must be dealt with by information officers; when appeals are to be lodged against refusals to grant requests for access; and entitles requesters to deem their requests to have been refused after the lapse of the time periods prescribed and to then approach a Court. The PAIA specifically makes provision for extensions of time periods in certain instances. Examples of the relevant provisions in this regard which concern public bodies are sections 25, 26 and 27.

39. When the provisions highlighted above are properly analysed in the context of the PAIA as a whole, it is clear that:

39.1. the PAIA is intended to give effect to the right of access to information held by a public body;

39.2. in a regulated manner;

39.3. which takes into account and balances the need for a swift and inexpensive right of access to information against the need to maintain effective, efficient and good governance;

39.4. in order to enable compliance with the procedural requirements of the PAIA by all persons, the PAIA places obligations on the public body, information officers and the Human Rights Commission to

take active steps to assist requesters in the use of the PAIA and its procedures.

40. In terms of section 75 of the PAIA, a requester has 60 days to lodge an internal appeal against a refusal of access to records by an information officer. The period of 60 days may be extended (in terms of section 75(2)) by the relevant authority on good cause shown. It thus provides ample opportunity for a proper formulation of the appeal and the grounds and reasons for the appeal.

41. Section 76 of the PAIA deals with notice to and representations by other interested parties in respect of an internal appeal.

42. Section 77 of the PAIA deals with a decision of an internal appeal and notice of such a decision. We return to this provision when we address the issue of the constitutional validity of section 78(2) of the PAIA.

43. Section 78(1) requires a requester or third party to first exhaust an internal appeal procedure before applying to Court in terms of section 82. This is an important requirement and is relevant to the assessment of the adequacy of the 30 day time period in section 78(2). By the time a requester approaches a Court on application, he would have lodged an appeal against a refusal of access and set out reasons why access should be granted.

44. The time limit in section 78(2) comes at the end of an elaborate process with prescribed time periods and in respect of which extensions are permitted. By the time that an application to Court is made by an applicant (as was the case with the present applicant), an internal appeal process would have been exhausted. An application of this kind is likely to be based substantially on the grounds of the internal appeal and is likely to take a similar form as such an appeal.

45. In this case the applicant had, in his internal appeal, dealt exhaustively with the reasons why access should be granted. Except for background material, the application to the Court *a quo* traversed the same ground as the internal appeal.[21]

Unlimited power to condone – subject only to a showing of good cause

46. The applicant has, in his written argument, dealt at length with the importance of the right of access to information. The respondents do not contest the importance of this right, subject to the limitations as to its exercise which are provided in the PAIA.

47. The provisions of the PAIA are to be read in terms of section 39(2) of the Constitution. Where a provision of the PAIA is reasonably capable of an

[21] Vol 2 p 111.

interpretation which promotes and protects rights, such as the right of access to information, such an interpretation should be preferred.[22]

48. Section 78(2) of the PAIA stipulates a time period in which an applicant is to approach a Court to enforce his right of access to records that he has requested but where access has been denied, including after an internal appeal. This time period is 30 days.

49. Section 78(2) does not expressly or by necessary implication exclude the power of a Court to condone failure to comply with the time period of 30 days. It provides that an applicant in terms of section 78(2) may seek appropriate relief in terms of section 82 of the PAIA.

50. Section 82 of the PAIA gives a Court hearing an application in terms of section 78(2) power to make "any order that is just and equitable, including orders ...".

51. We submit that the power given to the Court to grant <u>any</u> order that is "just and equitable" is sufficiently wide to cover an order condoning non-compliance with any provision of PAIA, including section 78(2). At the very least, section 82 is reasonably capable of this interpretation. This interpretation should be preferred. It renders section 78(2) consistent with

[22] This is trite and does not require the citation of authority any longer.

the Constitution in relation to the time period of 30 days. That time period will not be rigid and inflexible, automatically barring an applicant from approaching a Court to vindicate his right of access to records and thus his right of access to Court. It ameliorates any time barring effect that section 78(2) would otherwise have.

52. Unlike in *Moise,* the power of the Court to condone is not circumscribed or trammelled by section 82. It is a power to give an order that is just and equitable in the circumstances of each case. Where an applicant is able to demonstrate good cause for condonation, an order to condone non-compliance with the time period or to extend the time period would be just and equitable.

53. Thus the respondents support the judgment of Zondi J that the Court can condone non-compliance with the 30 day time period. However, and with respect, Zondi J failed to take proper account of the ameliorating attributes of the Court's power to condone, in his assessment of whether or not section 78(2) is consistent with the Constitution. Had he conducted this assessment he would have concluded that the power to grant condonation removes the rigid time barring attribute of section 78(2) and brings it in line

with the Constitution – in that it does not unreasonably prevent access to Court on the part of an applicant.[23]

54. The ameliorating effect of the power to condone non-compliance with section 78(2) is of particular significance when regard is had to the scheme of the PAIA as discussed above. At the point of applying to Court in terms of section 78(2), an applicant will have exhausted the internal appeal process and formulated his grounds to challenge the refusal of access. His case will relatively be clear. It is significant in this regard that the time period for lodging an internal appeal is 60 days which can be extended on good cause shown. This period offers an applicant ample opportunity to fully work out and formulate his grounds as to why access should be granted. The internal appeal which the applicant lodged in this case is evidence of this – as regards the clarity of the grounds of appeal and the detail thereof.

55. Unlike in cases where civil action is instituted afresh and there are time barring provisions (for example, in *Moise, Mohlomi, Potgieter, Majiedt, Engelbrecht v Road Accident Fund and another*[24]*,* and other cases), in the case of an application in terms of section 78(2) of PAIA (after an internal

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[23] The position is different from that in *Mohlomi*, *Moise* (the power to condone was too circumscribed) and *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng en Andere* 2001 (11) BCLR 1175 (CC) para 6.

[24] *Majiedt, Engelbrecht v Road Accident Fund and another* 2007 (6) SA (CC).

appeal), the application is a continuation of a process of engagement and argumentation between the requester and the public body concerned as to why the refusal of access by the information officer should be overturned. The initial 30 day period to prepare such an application is not patently unreasonable in the circumstances. Where, on a case by case basis, it could be considered inadequate for good reason, for example,

55.1. where compliance was not achieved despite diligent attempts to do so; and/or

55.2. where an applicant was genuinely unaware of the applicable time period but can adequately explain any delays after becoming aware of the applicable time period,

a Court would be able to protect the right of access to Court by granting condonation for non-compliance.

56. We therefore submit that the cumulative effect of a consideration of the power of the Court to condone non-compliance with the time period in section 78(2) and the scheme of the PAIA makes the time period compliant with the Constitution. The time period is in the circumstances not unreasonable and inadequate.

The issue regarding section 77(5) of the PAIA

57. As Zondi J states in his judgment, the applicant brought his application in terms of section 78(2) of PAIA and was aware that the applicable time period was 30 days.[25]

58. In the Court *a quo* both parties proceeded on the basis that the Court in *SA Metal & Machinery Co (Pty) Ltd v Transnet Ltd & another*[26] was correct that section 77(5) and section 78(2) contained different time periods for approaching a Court. That Court held that such a distinction was unexplained – it failed to understand the reasons for the different time periods stipulated. The applicant contends along these lines to submit that the distinction is irrational and points to the constitutional invalidity of the 30 day time period in section 78(2) of the PAIA. We submit that a proper interpretation of section 77(5) points to no inconsistency between it and section 78(2) in as far as the applicable time periods are concerned – and the respondents were also wrong in their submissions in the Court *a quo* in this regard.

59. Section 77(5) serves a different purpose and does not provide time periods which are different from, or conflict with, those in section 78(2). There is

[25] Judgment Vol 6 p 578 para 20.
[26] *SA Metal & Machinery Co (Pty) Ltd v Transnet Ltd & another* [2003] JOL 11882 (T).

no irrational distinction. The provisions of section 77(5) can be analysed as follows to demonstrate this submission:

59.1. Subsection (1) regulates what must be taken into account in making a decision on an internal appeal.

59.2. Subsection (2) stipulates the type of decisions that a relevant authority may make with regard to an internal appeal.

59.3. Subsection (3) sets out the different time periods within which a decision in an internal appeal should be made, given the different circumstances set out in the subsection.

59.4. Subsection (4) sets out who the relevant authority must give notice of its decision to: i.e., the appellant, every third party informed as required by section 76(1) and the requester as required by section 76(7).

59.4.1. It is not in every case that a third party is informed of an appeal in terms of section 76(1).

59.4.2. The notification to a requester only applies where the internal appeal is lodged against the granting of a request for access.

59.4.3. In this case third parties were informed of the internal

appeal.[27]

59.5. Subsection (5) sets out what the notice of the decision on the internal appeal must state or contain. The controversy arises from the 60 day period in subsection (5)(c)(i). But this is to read subsection (5)(c)(i) in isolation. It must be read with subsection (5)(c)(ii) in the scheme of the section as a whole. When it is read in this way, it is clear that the period to approach the Court is 30 days. This is so because subsection (4) applies where a third party is involved and has been given notice of a decision of the internal appeal as in this case. In such a case subsection 5(c)(ii) is clear that the period for applying to Court is 30 days.

60. There is therefore no irrational distinction in the time periods provided for in sections 77(5) and 78(2) of the PAIA. The only issue for the Court is whether the 30 day time period, whether in section 77(5) or 78(2) is consistent with the Constitution.

Justification

61. We submit that even if section 78(2) is found to limit the applicant's rights of access to Court, such a limitation is minimal in light of the Court's

[27] Vol 3 pp 232 (SITA) and 233 (Minister of Finance).

general power to condone non-compliance. The limitation is relatively easy to justify – even on a common sense basis.

CONDONATION

62. We point out that it is trite the refusal of condonation involves the exercise of a discretion on the proven facts. There is a limited basis upon which this Court is entitled to interfere with such exercise of discretion on appeal where the judge in the Court *a quo* did not act capriciously or upon a wrong principle. We submit that the applicant has not demonstrated that Zondi J acted capriciously or upon a wrong principle.

63. The applicant brought the application to the Court *a quo* in terms of section 78(2) of PAIA. He made this clear in paragraph 5 of his founding affidavit.[28]

64. An applicant has 30 days in which to apply to Court in terms of section 78(2) of PAIA if he has been unsuccessful in an internal appeal to the relevant authority of a public body (such as the Minister) for access to records.

[28] Vol 1 p 9.

65. The applicant failed to bring the application within the 30 day period and applied for condonation. This appears from prayer 1 of the notice of motion[29] and paragraphs 94 to 109 of the founding affidavit.[30]

66. Initially the Minister and the D-G opposed the condonation application on the grounds *inter alia* that PAIA does not grant the Court the power to condone non-compliance with the time periods in section 78(2). This ground of opposition was abandoned as stated above and is not resuscitated in these proceedings. On the contrary, the respondents agree with the finding of Zondi J in this regard.

67. The Minister contends that the applicant failed to make out good cause for condonation to be granted.

The material facts on condonation

68. As we submit above, the relevant decision for purposes of both the condonation application and the merits is the decision of the Minister to dismiss the applicant's internal appeal.

69. The Minister's decision dismissing the internal appeal has been quoted above.

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[29] Vol 1 p 1.
[30] Vol 1 pp 39-42.

70. The applicant states that he only became aware of the Minister's decision on 2 February 2007 (when it was again telefaxed to him by the Minister's office) although:

    70.1. it had been successfully faxed to his office on 23 or 24 December 2007 (but he suspects it may have been mislaid by his office); and

    70.2. his office received the Minister's decision sent by post with a postal stamp on the envelope dated 8 January 2007 confirming that indeed the office received the letter on 8 January 2007.[31]

71. The application to Court was only launched on 25 July 2007, being more than five months after 2 February 2007; and more than six months after 8 January 2007.

The relevant provisions of the PAIA as to time periods

72. The request for access was made in terms of section 11 of the PAIA.

73. As explained above, the D-G initially refused the request. The applicant lodged an internal appeal in terms of sections 74 and 75 of the PAIA. The Minister dealt with the internal appeal as envisaged in section 76 and made a decision in terms of section 77(1) to (3).

[31] Vol 1 para 91 p 38.

74. The Minister notified the applicant of the outcome of his appeal. Prior to this notification, the applicant never expressed an intention to approach the Court on the basis that the failure to notify him of the outcome of the appeal within the time periods prescribed by the PAIA was a deemed dismissal of the appeal as envisaged in section 77(7) of the PAIA. On his version, it appears that he reluctantly waited for the notification.[32]

75. The notification of the outcome of the appeal (quoted above) set out the reasons for the Minister's decision and the provisions of the PAIA relied upon; and reminded the applicant of his right to apply to Court against the decision to dismissal his internal appeal.

76. The applicant had 30 days in which to apply to Court. Non-compliance with this period could be condoned by the Court on good cause shown as submitted above.

The applicant's delay and the explanation for it

77. The applicant ought to have applied to Court as set out below.

77.1. On or about 8 March 2007 – if the date of notification of the dismissal of the internal appeal is taken to be 8 January 2007. The

[32] Vol 1 para 82 p 36.

application was instead launched on 25 July 2007. This is a delay of about 5 months and 18 days.

77.2. If the date of notification is taken to be 2 February 2007, then the applicant ought to have launched the application on or about 2 April 2007. On this basis the application was late by a period of about 4 months and 23 days.

77.3. Both dates of notification above are to the benefit of the applicant as it is not disputed that the notification was successfully faxed to the applicant's office on 23 or 24 December 2007.[33]

78. The Court *a quo* accepted the period of notification to be 2 February 2007.[34]

79. A period of delay of about four months or more is considerable and the applicant had to provide a good explanation, which is sufficiently detailed and convincing.

80. It is important to point out that the explanation given must be a full one, i.e. one which explains the delay in respect of the entire period of delay and not

[33] Vol 1 para 91 p 38.
[34] Judgment Vol 6 para 25 p 581.

only parts of it. This Court emphasised this point in *Van Wyk v Unitas Hospital*[35] at paragraph 22 where it said *inter alia* the following:

> "[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing. ..."

81. We submit that the explanation given by the applicant for the delay fails to meet the requirements set out in *Van Wyk*. It does not cover the entire period and is, in material respects, unreasonable.

82. The applicant's explanation is contained in paragraphs 97 to 109 of his founding affidavit.

83. The applicant alleges that he sought advice from ODAC (his attorneys of record) on whether or not to approach this Court. He emailed his attorneys copies of the relevant correspondence on 5 February 2007.[36] These documents included the notification of the dismissal of the internal appeal.

84. On 8 February 2007, the applicant alleges that he made it clear to ODAC that he intended to pursue the matter through the courts.[37]

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[35] *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC).
[36] Vol 1 paras 99-100 p 40.
[37] Vol 1 para 101 p 41.

85. At the request of ODAC he emailed the bulk of his file on the matter to them on 20 and 21 February 2007.[38]

86. The applicant gives no explanation as to what happened between the period 22 February and 8 March 2007. This is significant as the applicant states that on 8 February 2007 he made it clear to ODAC that he intended to pursue the matter through the courts and ODAC had already indicated a willingness to assist him.

87. Then the applicant states the following in paragraph 104 of his founding affidavit:

> "104. On 9 March 2007, and only after obtaining documentation from my instructing attorney, I became aware that the PAIA specified a 30-day limit for an appeal to the Honourable Court to be lodged. By that date the 30-day limit had already expired."[39]

88. The explanation in paragraph 104 quoted above is unreasonable and not supported by any properly pleaded facts.

 88.1. First, the applicant does not take the Court into his confidence, nor does he provide a shred of detail as to what documentation it is that he received from ODAC which made him aware of the time limit. There is no basis on which to assume that the applicant,

[38] Vol 1 para 103 p 41.
[39] Vol 1 p 41.

notwithstanding the clear statement in the notification of the dismissal of the appeal, failed to verify himself or through ODAC what time periods applied to his intended application to Court.

88.2. Second, the correspondence exchanged between the applicant and the respondents regarding the request for access to information and the content of the grounds of appeal show that the applicant is sophisticated and was always aware of the provisions of the PAIA as regards time frames and his rights in general.[40]

88.3. Third, the applicant does not explain in paragraph 104 why it took him and ODAC a month from 8 February 2007 to discover the time limits in the PAIA for launching the application. It is reasonable to expect that the applicant would have at least on 8 February 2007, if he did not already know, found out from ODAC what time frames applied. His correspondence with the respondents shows that he was always aware that the PAIA imposes time limits for various actions or steps that a requester wishes to take. The Court *a quo* was justified to find that there was "no explanation as to why it took the applicant's attorneys more than a month to discover that the Act imposed a 30 day time limit for an application to be launched in this

[40] See examples of this correspondence from Vol 1 p 97-99; Vol 2 pp 101-125 and 197.

court and to have alerted the applicant of the relevant provisions of the Act."[41]

89. The applicant states in paragraph 105 of the founding affidavit[42] that ODAC needed to secure the services of counsel who would act on a contingency basis. He does not explain the terms of such a contingency. No copy of the contingency agreement concluded is attached.

90. It is significant that the applicant does not say that he personally could not pay for the application and that he required that counsel be engaged on a contingency basis. This, he says, was the approach adopted by ODAC. Significantly, the applicant is in the employ of the *Mail & Guardian* newspaper[43] and intends to publish the fruits of his request for access to information in that newspaper.[44] His correspondence with the respondents regarding the request for access and the internal appeal were on the letterhead of the *Mail & Guardian*. Despite all of these, the applicant does not explain to the Court whether he even approached the *Mail & Guardian* to carry the costs of this application.

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[41] Judgment Vol 6 p 584 para 31.
[42] Vol 1 p 42.
[43] Vol 1 para 1 p 7.
[44] Vol 1 para 20 p 15.

91. Then the applicant simply states that counsel was not available in March and April 2007 to work on the application. No explanation is given as to why counsel secured could not deal with the application in March and April 2007. This is an unacceptable explanation. Not only is the unavailability of counsel not an excuse, but the applicant and ODAC do not provide any explanation as to whether or not they tried at all to secure other counsel in any division to act for the applicant on a contingency basis as suggested in paragraph 105 or on any other acceptable basis.[45]

92. The applicant and ODAC do not explain why it took counsel two months to "carefully" consider the prospects of success in this application.[46] The fact that the Courts had not yet pronounced on the ambit of a number of the provisions of the PAIA invoked by the respondents is of no help. The applicant had already in his internal appeal dealt extensively with the grounds of refusal. Furthermore, the Minister only dismissed the internal appeal on one ground – implying an acceptance of the applicant's contentions on the other grounds on which the D-G had refused the request for access. Counsel only needed to apply him or herself to the ground on which the Minister had dismissed the internal appeal.

[45] Vol 1 para 106 p 42.
[46] Vol 1 para 106 p 42.

93. Another bald statement is made in paragraph 107 of the founding affidavit. The applicant states that during this time (which time is not specified), information and documentation was required for purposes of finalising the application.[47] The applicant does not explain what this information and documentation is. What is clear is that the applicant had emailed the bulk of his file on the matter to ODAC on 20 and 21 February 2007.[48]

94. No explanation whatsoever is furnished as to why it took a further 25 days from the end of June 2007 to 25 July 2007 before the application was launched.[49]

95. The applicant's attempt to justify his delay by reference to previous delays on the part of the Minister and D-G does not assist him. Such delays were explained to him and his indulgence was sought. He agreed to the indulgencies – albeit sometimes reluctantly as he says. The PAIA provided him with ample safeguards in the case of delays by the respondents. He could have relied on deemed refusals to approach this Court to compel access to the records. Knowing that such rights existed, the applicant chose not to enforce them.

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[47] Vol 1 p 42.
[48] Vol 1 paras 102-103 p 41.
[49] Vol 1 para 108 p 42.

96. It is submitted that the applicant has given a wholly unsatisfactory explanation for his considerable delay. When properly considered, the explanation is superficial and unconvincing as observed in *Van Wyk*'s case referred to above. It really amounts to saying that the applicant waited for ODAC and counsel to take their time to prepare the application. He made no attempts to secure other counsel on any other basis even assuming (which is denied) that he only became aware of the applicable time frames on 9 March 2007 as he alleges in paragraph 104 of his founding affidavit.[50]

97. In these circumstances it was justified for the Court *a quo* to find that:

> "[31] When the applicant brought the matter to their attention and for advice his appeal to this Court was in no way threatened by the 30 days limit. At that stage urgency was not an issue. It is the subsequent inexplicable delay which led to urgency. In my view that urgency was self-created. Even when the applicant realised that the matter had become urgent, he did not treat it with [a] sufficient degree of urgency it deserved. Applications for condonation should in general be brought as soon after the default as possible. The applicant must produce acceptable reasons for the Court to nullify any culpability on his part which attaches to the delay. In my view the applicant's condonation application is utterly lacking in this regard."[51]

98. The application for condonation must fail on this basis alone. The main application too should fail.

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[50] Vol 1 para 104 p 41.
[51] Judgment Vol 6 p 584.

Prospects of success

99. The Court *a quo* was correct in finding that the applicant failed to prove reasonable prospects of success.

100. The application for condonation should also fail as there are no reasonable prospects of success in the main application. We refer the Court to our submissions on the merits of the main application below. We also address, in that context, the applicant's contention that condonation should be granted because access to information is an important right. We submit that whilst access to information is an important right, this contention should nevertheless fail on the facts of this case.

THE MERITS

101. It is not the applicant's case that any of the provisions of Chapter 4 of the PAIA providing for the grounds of refusal of access to records is unconstitutional. As a result, the applicant cannot go behind the provisions relied upon by the Minister to refuse access by relying directly on the provisions of the Constitution.[52]

[52] Currie & De Waal *The Bill of Rights Handbook* 2005 at 688; *Institute for Democracy in SA v ANC* 2005 (5) SA 39 (CC) para 17.

102. In this case the only relevant provisions of the PAIA for purposes of determining the correctness of the refusal of access is section 39(1)(b)(iii)(ee). This section provides as follows:

> "**39. Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings**
>
> (1) 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 the record could reasonably be expected – ...
>
> (ee) to prejudice or impair the fairness of a trial or the impartiality of an adjudication."

103. The section gives a discretion to the information officer to refuse a request – "may refuse a request".

104. The section does not set a high threshold.

104.1. It requires the information officer to form a view that the record could reasonably be expected to produce any of the results in (ee). Such a view would of course have to be formed on objective grounds

which a Court can examine to determine whether the view thus formed is reasonable.

104.2. All that is required is that the disclosure of the record could reasonably be expected to "prejudice" or "impair". It does not have to be expected to do both. It can either prejudice or impair "the fairness of a trial" or "the impartiality of an adjudication". It does not have to prejudice or impair both.

104.3. "Prejudice" is defined in the Oxford Dictionary of English to mean "cause harm to (a state of affairs)". Impair is defined to mean "weaken or damage (especially a human faculty or function".

104.4. It is clear that the words "prejudice" and "impair" as used in the section contemplate different degrees of harmful consequences to the fairness of a trial or the impartiality of an adjudication.

104.5. Furthermore, the fairness of a trial relates as much to the position and role of the adjudicator as it does to the parties' respective abilities to fairly present their case without being compromised by the disclosure of records. The impartiality of the adjudication appears to refer more to the ability of the adjudicator 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 – such as publication in the media.

104.6. This ground of refusal is clearly a broad and permissive one. It applies to any information the disclosure of which could reasonably be expected to have a harmful consequence – i.e. mere prejudice or impairment.

104.7. Currie and Klaaren *The Promotion of Access to Information Act Commentary* say the following in this regard:

> "Section 39(1)(b)(iii)(ee) aims to prevent prejudice or impairment of the fairness of a trial or the impartiality of an adjudication. This language appears to draw directly on the language of exemption 7(B) of the US FOIA which protects from disclosure 'records or information compiled for law enforcement purposes [the disclosure of which] would deprive a person of a right to a fair trial or an impartial adjudication'. The purpose of the South African exemption is however broader in two respects. First, the US exemption aims to prevent *deprivation* of the right to a fair trial or an impartial adjudication, whereas the AIA aims to prevent mere prejudice or impairment. Second, the US exemption requires a higher connection justifying non-disclosure justifying non-disclosure ('would deprive') than the somewhat more permissive standard of the AIA ('could reasonably be expected to prejudice or impair'). ..."[53]

(Emphasis added)

104.8. We submit that Currie and Klaaren are correct in their assessment of the provision.

[53] At p 167.

104.9. What "could reasonably be expected" to happen is not that which is indeed expected to happen. It is something which "could be expected as probable ... if reasonable grounds exist for that expectation".[54]

105. We submit that on the facts of this case, there are reasonable grounds to believe that prejudice or impairment to the fairness of the trial in the IT Lynx matter and/or the adjudication of the issues between the parties in that matter could be expected as probable given the intentions of the applicant regarding the utilisation of the records once disclosed. (We do not mean by this that the applicant had to provide reasons to justify access. We mean what he intends to do with the records once access is granted).

106. The records in respect of which access is sought are all relevant to the determination of the issues between the parties in the IT Lynx trial. This is not seriously disputed. What is disputed is the extent of the documents that are relevant to the IT Lynx claim – i.e. whether literally each and every piece of document that falls within the category of documents for which access is required is relevant. We submit that this is the case, given the broad and all-encompassing manner in which the documents are defined by the applicant.

[54] See the judgment of Howie P in *Transnet Ltd & another v SA Metal Machinery Co (Pty) Ltd* [2006] 1 ALL SA 352 SCA para 42.

107. It is clear from what the applicant states in his founding affidavit that he wishes to publish certain articles in the newspaper on the records to which access is sought.[55] Although the applicant states that his main interest is to publish on the Minister's alleged "knowledge at the time when Majali/Mvume ... made R65 000 payment that Majali/one of his companies [i.e. IT Lynx or a consortium member] was part of the consortium that demanded he implement the tender [i.e. SITA tender 82] it believed it had been awarded", the extent of the records requested show that the interest goes beyond this. In paragraph 20 of the founding affidavit, the applicant makes it clear that the records requested reflect "interactions between the Minister/Department and <u>others</u> relating to Tender 82, from the Department. These are detailed in Annexure A to the Notice of Motion."[56] He also states in paragraph 21 of the founding affidavit that the records to which access is sought "encompassed [but are clearly not limited to] records relating to the Department/Minister's interactions with <u>other parties</u> regarding Tender 82".[57]

108. The applicant will be at liberty to publish any matter he wishes to, provided he is not acting unlawfully. Nothing will stop him from publishing matter that would prejudice the respondents in their defence against the IT Lynx

[55] Vol 1 paras 19-20.
[56] Vol 1 p 15.
[57] Underlining reflects our emphasis.

claim as long as he stays within the bounds of the law. However, even if he stays faithful to the law, his publications could very well compromise the respondents' defence in the trial – especially as regards the process and the reasons for the decision not to award the SITA tender 82.

109. The consequences that the Minister fears as probable (in terms of section 39(1)(b)(iii)(ee)) are all the more likely given that the applicant has already (under oath) adopted a stance which is against the respondents' defence in the IT Lynx claim and in support of IT Lynx's claim. It is inexplicable why he has chosen to do this – but it is clear evidence of what he is likely to say in his publications if access to the records is granted.

110. As described, the records are relevant to the issues in the trial of the IT Lynx claim and are discoverable. It is not correct in respect of these documents that the Minister is hiding behind generalities as was the case in *CCII Systems (Pty) Ltd*.[58] In this case there is a class of documents which all relate to SITA tender 82. The Minister has made it clear that all the documents that relate to this tender, and to which access is sought, are relevant to the issues in the trial of the action. This is not a generality.

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[58] *CCII Systems (Pty) Ltd v Fakie and others NNO* 2003 (2) SA 325 (T) para 17. This contention was raised in the Court *a quo.*

111. In circumstances where it is clear from the applicant's affidavits that he intends to publish matters reflected in the records, and has adopted a stance (under oath) which is inimical to the respondents' defence, no further evidence is required to show that there is a reasonable basis to apprehend that harmful consequences are probable with regard to the fairness of the trial or the adjudication of the issues between the parties in the IT Lynx matter. This is the case once it is accepted that all the records to which access is sought are relevant to the issues in the trial.

112. In these circumstances, the applicant's right of access to the records should yield to the interests of the respondents. This balance is struck by the ground of refusal in 39(1)(b)(iii)(ee). Upholding this balance by allowing the refusal of access in the present circumstances does not undermine good government. The IT Lynx trial is still to take place in the future unless it is withdrawn. If it takes place, the documents to which access is sought will become part of the public record and the constraints imposed by section 39(1)(b)(iii)(ee) will be removed upon the conclusion of the trial, or if the matter is withdrawn from the courts by IT Lynx. On the other hand, the probable harmful consequences to the defendants in the trial will be permanent if disclosure takes place and publication follows which impairs the fairness of the trial or the adjudication of the issues between the parties.

113. The *Certification* judgment makes it clear that freedom of information could be suspended at the time precisely because it is not a fundamental right or one of the basic structural requirements for the new dispensation.[59] Thus in the context of section 39(1)(b)(iii)(ee) freedom of access to information yields to the interests of litigants in civil proceedings, such as the defendants in the IT Lynx case, subject to the requirements of the section.

114. We therefore submit that the reasoning of the Court *a quo* was correct that the Minister has proved the ground of refusal in terms of section 39(1)(b)(iii)(ee) as required by the provisions of the PAIA.[60]

THE REMEDY IN TERMS OF SECTION 80

115. The applicant does not seem to persist with this contention in his written argument but we address it in case it is still his case.

116. In *CCII Systems (Pty) Ltd*[61] the Court made it clear that the provisions of section 82 of the PAIA read with section 80 thereof cover the case where there is a dispute about the question whether a document or only a portion thereof is to be disclosed and the decision of the Court is required to rule

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[59] *In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC) para 85.
[60] Judgment Vol 6 paras 42-49 pp 587 *et seq.*
[61] *CCII Systems (Pty) Ltd v Fakie and others NNO* 2003 (2) SA 325 (T).

whether a document is protected in whole or in part.[62] This is not the dispute in this case.

117. The Minister and the D-G in this case contend that all of the records to which access is sought are protected in whole in terms of the provisions of section 39(1)(b)(iii)(ee) of the PAIA. The applicant has not made out a case as to which specific documents are not protected in whole or in part. The applicant could have made out such a case for purposes of section 80 as he has had access to the Public Protector's report.[63]

118. We submit, with respect, that the applicant has not made out a case for the application of section 80 as contemplated in the *CCII Systems (Pty) Ltd* case.

119. If the Court were to find that the provisions of section 80 of the PAIA are applicable, it would be appropriate for it to permit the Minister and the D-G to make *ex parte* submissions in relation to each of the documents or categories of documents to be presented to the Court in terms of section 80 for the Court to determine whether such documents or parts thereof are protected from disclosure in terms of section 39(1)(b)(iii)(ee) of the PAIA.

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[62] See para 16.
[63] Vol 2 annexure "SCB21" p 126.

RETROSPECTIVE EFFECT OF THE FINDING OF INVALIDITY OF SECTION 78(2)

120. This issue did not arise in the Court *a quo* due to the concession made by the respondents on the power of the Court to condone non-compliance with the 30 day time period.

121. If the Court concludes that section 78(2) is unconstitutional as the applicant contends, applications to Court in terms of the section will not be regulated by any time period provided for in the PAIA. The 3 year prescription period applicable to civil actions would then apply. Section 81(1) of the PAIA makes it clear that applications to Court in terms of section 78(2) are civil proceedings. This situation would be undesirable as it is clear that the legislature intended distinct time periods to apply to applications in terms of section 78(2).

122. It would be desirable in the circumstances for the Court to exercise its powers in terms of section 172(1)(b) to limit the retrospective effect of the declaration of invalidity; and to suspend such an order to give parliament an opportunity to introduce a constitutionally compliant time period in the place of the 30 day time period. As the respondents have not filed answering affidavits in the application to this Court, any period that the

Court finds justifiable, ordinarily a period of one and half years to two years, would appear to be justifiable.

CONCLUSION

123. For all the reasons set out above, we submit that the application for leave to appeal directly to this Court and the confirmation should be dismissed.

MTK MOERANE SC

NH MAENETJE

Chambers
Sandton and Durban
19 May 2009

LIST OF AUTHORITIES

1. *CCII Systems (Pty) Ltd v Fakie and others NNO* 2003 (2) SA 325 (T)
2. Currie & De Waal *The Bill of Rights Handbook* 2005
3. *Eke v Sugden* 2001 (2) SA 216 (E)
4. *In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC)
5. *Institute for Democracy in SA v ANC* 2005 (5) SA 39 (CC)
6. *Majiedt, Engelbrecht v Road Accident Fund and another* 2007 (6) SA (CC)
7. *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC)
8. *Minister of Home Affairs, Namibia v Majiedt and others* 2008 (5) SA 543 (NmS)
9. *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC)
10. *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering Gauteng* 2001 (11) BCLR 1175 (CC)
11. *SA Metal & Machinery Co (Pty) Ltd v Transnet Ltd & another* [2003] JOL 11882 (T)
12. *Transnet Ltd & another v SA Metal Machinery Co (Pty) Ltd* [2006] 1 ALL SA 352 (SCA)
13. *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC)