**IN THE HIGH COURT OF SOUTH AFRICA**

**LIMPOPO DIVISION, THOHOYANDOU**

Case No: A20/20

In the application of:

| | |
|---|---|
| **MEDIA MONITORING AFRICA** | First applicant for admission as Amicus Curiae |
| **SOUTH AFRICAN NATIONAL EDITORS FORUM** | Second applicant for admission as Amicus Curiae |

In the matter between:

| | |
|---|---|
| **MAKHADO MUNICIPALITY** | Appellant |
| and | |
| **ZOUTNET CC** | First Respondent |
| **ANTON JACOBUS VAN ZYL** | Second Respondent |

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**FILING SHEET**

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Document filed herewith:

1. Heads of argument for the First and Second applicants for admission as Amicus Curiae.

Dated at Johannesburg on **03 June 2022**.

Dario Milo

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**BY EMAIL & BY HAND**

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## AMICI CURIAE'S WRITTEN SUBMISSIONS

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## INTRODUCTION

1 The Municipality has appealed against the court a quo's order reviewing and setting aside the appellant's refusal to grant access to certain records under the Promotion of Access to Information Act 2 of 2000 ("PAIA").

2 These are the written submissions of Media Monitoring Africa and the South African National Editors Forum. They apply to be admitted as amici curiae in this appeal. For ease of reference I refer to them cumulatively as "**the amici**", mindful of course that they still await this Court's decision on whether they are to be admitted as amici.

3 The amici's interest in this appeal is twofold.

4 First, as explained in the founding affidavit, the amici are both non-profit organisations dedicated to ensuring that the rights to freedom of expression, access to information and a strong, independent press are realised in South Africa.

5 The PAIA request was made by journalists regarding a matter of significant public interest. The amici have an interest in placing key legal decisions and principles before this Court in order hopefully to be of assistance to the Court in ensuring that all of the issues are considered and fully ventilated.

6 On this score, the Municipality's disposal of municipal land plainly raises issues of significant public interest. This is particularly so where the respondents alleged and the Municipality concedes that the successful bidder was not the highest bidder.[1]

7 The Municipality claims, however, that it was "ignorance on the part of the [respondents] to over-emphasise one evaluation criteria when [the respondents] did

[1] Municipality's AA p 217 para 71.1.

not have insight on the tender document itself to check for all preliminary requirements".[2]

8 Precisely. The only way that the respondents (journalists) and the public could know whether the Municipality took the decision correctly is if they are given access to the information sought.

9 Indeed, the Municipality's stance – that with a full picture of the tender documents it is clear that the process was conducted lawfully – weighs in favour of disclosure, not against it.

9.1 Openness is the rule. Secrecy is the exception. The SCA and Constitutional Court have repeatedly affirmed the principle that "...open and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy."[3]

9.2 These values permeate the Constitution in various provisions.[4] For instance, section 195 of the Constitution provides that the public administration "*must be accountable*"[5] and that "*[t]ransparency must be fostered by providing the public with timely, accessible and accurate information*".[6]

9.3 As the Supreme Court of Appeal made clear in *SANRAL*:[7]

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2 Municipality's AA p 209 para 46.4.

3 *President of the Republic of South Africa v M&G Media Ltd* 2011 (2) SA 1 (SCA) ("***M&G Media***") at para 1.

4 The preamble provides that the Constitution lays the foundation for a "democratic and open society". Section 41(1)(c) requires all spheres of government and all organs of state to provide transparent and accountable government. Sections 57(1)(b), 59(1)(b), 70(1)(b), 72(1)(b), 116(1)(b), 118(1)(b) and 160(7) require parliament, the provincial legislatures and all municipal councils to conduct their business in an open, transparent and accountable manner.

5 Section 195(1)(f) of the Constitution.

6 Section 195(1)(g) of the Constitution.

7 *City of Cape Town v South African National Roads Authority Limited and Others* 2015 (3) SA 386 (SCA) ("***SANRAL***") at para 15 – endorsing and citing well established principles and dicta from courts in the United States.

> "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

9.4 The public and the media do not expect that there will not be mistakes made by public entities. Running procurement processes is complex. But the public should be informed if there were mistakes or not.

9.5 As Sutherland J held in *Right2Know*, openness actually operates in favour of public bodies:[8]

> "It is wholly unsatisfactory that political office bearers and senior civil servants should have to perform their duties under a cloud of suspicion of incompetence or dishonesty. Transparency about all the facts is necessary to either repair the rot, if any exists, or dispel the lack of confidence which the citizenry will continue to nurse if the facts are concealed." (Emphasis added)

10 Second, the appeal before this Court deals with a *particular* PAIA request made to a *particular* Municipality. But the result of this appeal has far wider significance. As the respondents have already stated in their heads of argument: the Human Rights Commission has published a report which found that municipalities fail to comply with PAIA more than any other sphere of government. The appellant is one of the non-compliant municipalities.

10.1 This is not merely a formality. The appellant has failed to comply with its statutory reporting obligations. And the clear statutory purpose of those reporting obligations is so that systemic errors in the adjudication of PAIA requests can be detected and addressed.

10.2 The amici submit – with respect – that this particular Municipality's conduct throughout this case demonstrates a fundamental misunderstanding of how

[8] *Right2Know Campaign and Another v Minister of Police and Another* [2015] 1 All SA 367 (GJ) ("***Right2Know***") at para 45.

PAIA works and what is required of the Municipality (whether wittingly or unwittingly, which is not an issue that this Court needs to decide).

11 Before expanding on two further reasons that amplify the amici's interest in this appeal as well as key legal principles and decisions that apply to the Municipality's core grounds of appeal, I deal with condonation for the timing of the application.

**CONDONATION**

12 The amici deal with condonation in the founding affidavit at paragraphs 31 to 39 of the founding affidavit. While the amici respectfully submit that it is in the interests of justice, the media and the public that the amici be permitted to make written and oral submissions before this Court – the amici wish to participate in this matter in the manner that is least disruptive to this Court's planned hearing. The amici deal with this in detail in paragraphs 36.1 to 36.4.2 of their founding affidavit.

13 Importantly, the amici do <u>not</u> introduce any new facts into the record they merely make legal submissions and draw this Court's attention to cases that this Court would be entitled to consider on its own, or that the parties could refer to during the oral argument (even where these authorities were not relied upon in the parties' heads).

14 The amici do not seek to have the admission application determined at a separate hearing date prior to the appeal hearing. Instead, as is the common practice before High Court's considering applications for admission as amicus curiae – the application can be decided at the outset of the appeal hearing on 10 June 2022. Thereafter, this Court could immediately thereafter consider the parties' oral submissions on the merits of the appeal.[9] This would mean that there is as little disruption to the appeal being conducted as possible.

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[9] This procedure has been followed in various High Court cases, including, for example, *Mandag Centre for Investigative Journalism and Another v Minister of Public Works and Another* [2014] ZAGPPHC 226 ("***M&G Centre for Investigative Journalism v Minister of Public Works***").

15 There is significant public interest in the matter. The Constitutional Court held in *Motau*,[10] when granting condonation for the late delivery of heads of argument stated:

> "It would not be in the interests of justice to refuse condonation in this case. This is a matter of great public importance, and we should be slow to refuse argument that might provide assistance on complex issues".

16 The amici respectfully submit, further, that:

16.1 There is no significant prejudice to the appellant or respondents as their legal representatives will have sight of the legal points that the amici seeks to make more a week in advance of the hearing.

16.2 In any event, even if this Court considered that the parties had been prejudiced in any way that prejudice could be addressed by providing the parties (to the extent that they deem it necessary to do so) with an opportunity to deliver a written response to the amici's submissions after the hearing of the matter.

17 The amici submit that the need and value for the decisions referred to in these legal submissions to be considered is raised on appeal, because it is well established that an appeal lies against the order made by the court a quo, not the reasons.[11] Accordingly, this Court should be fully informed regarding other legal principles and bases that support or weigh against the order made by the court a quo.

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[10] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 24.

[11] *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 714J-715E.

## THE AMICI'S INTEREST IS AMPLIFIED BY TWO CONSIDERATIONS

### *(i) The epidemic failures by public bodies in complying with PAIA*

18 A classic example of PAIA being abused by a public body is the 6-year battle by the Mail & Guardian to access a report compiled by the two Constitutional Court justices relating to the 2002 Zimbabwe elections.

19 Two grounds of refusal, which were clearly not applicable, were relied upon by the President. Ultimately, the matter served before 22 Judges, through two rounds of SCA hearings, a full Constitutional Court hearing as well as a second application for leave to appeal being brought by the President to the Constitutional Court, which was dismissed. Not a single judge found any merit in the grounds of refusal proffered by the public body.

20 There was never any justification for withholding the report from the public, nor to use taxpayers' money to fight the case. But it took 6 years for the media, and the public for whom the media serve, to gain access to the information sought.

21 The amici submit that it is important for this Court to consider and possibly record in its judgment that these instances of public bodies simply ignoring PAIA requests are not accidental or exceptional. Quite the opposite.

21.1 In *M&G Centre For Investigative Journalism v Minister of Public Works*[12] the High Court relied on the evidence put up by the South African History Archive which demonstrated the epidemic of non-compliance by public bodies with PAIA. The amici commend those paragraphs to this Court:

> "[19] SAHA is a Non-Governmental Organisation which collects, preserves and catalogues materials of historic, contemporary, political, social economic and of cultural significance and promotes the accessibility of these materials to the general public. 'In 2001 it

[12] *M&G Centre for Investigative Journalism v Minister of Public Works* at paras 19 to 22.

launched the Freedom of Information Programme dedicated to using PAIA in order to test the boundaries of freedom of information in South Africa ...and to create awareness of compliance with and use of PAIA'. Since 2001 it has launched over 1800 requests for information from predominantly government departments. Arising out of the refusals for access to information it has launched numerous applications in the High Court and as amicus curiae in one Constitutional Court matter. SAHA's interest arises out of the impact the outcome of this application will have on applications contemplated by it. The purpose is also to provide statistics on research conducted by it on requests for information and, to assist the court in appreciating the developing trend, the pervasive culture of secrecy which impacts on the 'implementation of PAIA and the enjoyment of the Constitutional right of access to information.

[20] According to SAHA limitations on the right of access to information was demonstrated in the 'culture of secrecy pervading public bodies; in the nature and the extent of the reliance by the State on apartheid era legislation' such as the 'NKP' Act and 'PI' Act and, in 'the misapplication of PAIA's security exemptions to withhold information'.

PAIA requests were routinely met with initial refusal without adequate reasons; with refusing access to all requested documents without complying with the obligation to sever material that may be disclosed' (section 28 of PAIA) and without considering the public interest override in section 46 of PAIA. Refusals were withdrawn when litigation is instituted'.

[21] In illustrating statistics on the trends displayed in the 'culture of secrecy were the 159 requests in 2012 administered by SAHA to various public and private bodies and of these 102 were outright refused or no response was received and this equated to 64% refusal rate. 'Out of 11 PAIA requests to the Office of the Presidency 10 were refused' equating to over 90% refusal rate. Two practical examples, the PAIA requests of David Forbes, a filmmaker, on the amnesty hearings into the murders of the 'Cradock 4' and the entire amnesty application by Eugene de Kock to the Truth and Reconciliation Commission ('TRC').

[22] Where apartheid era legislation was relied upon, out of the 1297 requests to public bodies between 2001 and 2011, 79 requests received refusals and out of these 16 requests were initially refused in 'full or in part on grounds relating to national

> security and, this represented 20% of refusal rate in that period. SAHA appealed in seven of the 16 requests and in some, documents were released in out of court settlements, while judgment in one was outstanding. Practical examples were, the '34 boxes case' relating to SAHA's various requests during 2001 of state records of the 'TRC' held by the National Archives and various requests between 2001 and 2004 directly to the 'TRC' archive."

22 Importantly, these systemic errors identified by the SAHA report appear, with respect, to have been made by the particular Municipality in this case. The Municipality:

22.1 failed to respond timeously, or at all, to the PAIA request;

22.2 failed to consider the internal appeal;

22.3 opposed the court application without any good grounds to do so;

22.4 failed to consider the obligations on the Municipality to sever aspects of the requested documents that could be provided, from those portions which it alleged cannot;

22.5 failed to consider the public interest override in terms of section 46 of PAIA;

22.6 appealed the findings of the court a quo, again without any cogent basis to do so;

22.7 has relied on grounds of appeal that show that the Municipality has – whether wittingly or unwittingly – fatally misunderstood what is required under PAIA. In doing so, the Municipality has frustrated the rights of the media and the public to access to information.

23 Indeed, the majority of the Municipality's appeal is based on a misunderstanding of the different tests that apply when dealing with a PAIA request made to a public body or a private body.

### *(ii) Baseless refusals frustrate the public's right to free media*

24 In *SANRAL,* the Supreme Court of Appeal neatly collated various core principles which explain the importance of access to information in the media performing its functions, which in turn empowers citizens to make responsible political decisions and participate meaningfully in public life.

> "The right to freedom of expression lies at the heart of democracy, and is one of a 'web of mutually supporting rights' that hold up the fabric of the constitutional order. Section 32(1) of the Constitution guarantees everyone the 'right of access to information held by the state'. Citizens and public interest groupings rely on this right to uncover wrongdoing on the part of public officials or for accessing information to report on matters of public importance. The Constitutional Court has noted that the media has a duty to report accurately, because the 'consequences of inaccurate reporting may be devastating.' It goes without saying that to report accurately the media must be able to access information. Access to information is 'crucial to accurate reporting and thus to imparting information to the public.' Whilst s 32 of the Constitution guarantees the right of persons to access relevant information, s 16 entitles them to distribute that information to others. Section 16(1)(b) of the Constitution provides: 'Everyone has the right to freedom of expression, which includes freedom to receive or impart information or ideas'. Importantly, therefore, the right to freedom of expression is not limited to the right to speak, but also to receive or impart information and ideas. The media hold a key position in society. Courts have long recognised that an untrammelled press is a vital source of public information (see Grosjean v American Press Co. [1936] USSC 33; 297 US 233 (1936)). Grosjean recognised that 'since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern'. In this country the media are not only protected by the right to freedom of expression, but are also the 'key facilitator and guarantor' of the right. The media's right to freedom of expression is thus not just (or even primarily) for the benefit of the media: it is for the benefit of the public. In Khumalo v Holomisa, the Constitutional Court put it thus:
>
> > 'In 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.'
>
> When justice is open, court reporting is a crucial avenue for public knowledge about what the government does. ...
>
> [21] Not all information is readily revealed by the State and even powerful media organisations sometimes face great difficulty in obtaining information in some areas. In an environment of secrecy, journalists become vulnerable to off-the-record briefings and strategic leaks by government."

25 The amici emphasise that these considerations are precisely why the African Commission on Human and People's Rights, in the *Guidelines on Access to Information and Election in Africa*, endorse an approach of proactive disclosure by public bodies.[13]

26 The Supreme Court of Appeal in *SANRAL* also emphasised (albeit in dealing with access to documents in a court file) that:

26.1 Even if a case is abandoned or settled the documents in the court file may still provide vital evidence that reveals wrongdoing and the public would be entitled to know whether a case was properly settled or not.[14] The same would be so where a review application was never brought notwithstanding evidence of unlawfulness of a process (including a self-review which public bodies are obliged to bring if they detect wrongdoing in their own processes).[15]

26.2 A blanket rule refusing access, which requires an application for access to be made to court "is an additional cost in time and money". The Court explained

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[13] African Commission on Human and People's Rights, Guidelines on Access to Information and Election in Africa, available at: http://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/guidelines_on_access_to_information_and_elections_in_africa_en.pdf

[14] *SANRAL* at paras 43 to 44.

[15] *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para 36.

further that this cost effectively may quell investigations by the media or the public and thus amounts to a prior restraint on media publication:[16]

> "[43] ... In many cases, people who otherwise have an interest in the matter may be unable to afford an application for access. While the high court attempts to paint this option as enhancing access, in reality, it may prove an insuperable barrier to many, particularly litigants with limited funds. This not only negatively affects access to justice, but it may also disadvantage courts who will be deprived of the benefit of the submissions that amici curiae make.
>
> [44] Both the rule and the high court's interpretation of the subrule thus impinge on open justice by preventing the public and media from being able to scrutinise court proceedings before a matter is heard. But there is a strong default position in our law against prior restraints on publication."

27 The amici respectfully submit that where members of the media have PAIA requests declined on the basis of deemed refusals, which require the media to approach the court for answers this equally – for the very same reasons set out in *SANRAL* – amounts to an impermissible prior restraint on the media.

28 Again, the amici emphasise that they do <u>not</u> suggest that there was any unlawfulness in the current process. As the Municipality correctly points out, the only way to determine whether there was or not (and for the Municipality to avoid a cloud over the process) is for the disclosure to be granted. As Sutherland J points out, this benefits the Municipality.

## PRINCIPLES RELATED TO THE MUNICIPALITY'S CORE GROUNDS OF APPEAL

29 Proceedings in terms of section 78 of PAIA are civil proceedings subject to the rules of evidence in such proceedings.[17] The burden of establishing that the *refusal* of a

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[16] *SANRAL* at paras 43 to 44.

[17] Section 81(1) and (2) of PAIA.

request for access complies with the provisions of PAIA, "*rests on the party claiming that it so complies*".[18]

30 The burden on the public body thus applies to the grounds of refusal *as well as* the duty to sever and apply the public interest override (which I deal with in more detail below). The Constitutional Court has explained that "neither the mere ipse dixit of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the State".[19] It held as follows:

> *"The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government."*

31 If they do not the information sought must be disclosed.

***(i) The "binding precedent" argument***

32 The Municipality contends that the respondents were required to show that the information was "required for the exercise of protection of a right".[20] The Municipality claims that the court a quo failed to apply the "binding decision" in *Cape Metro Council*.[21]

33 But that case deals with requesting information from private bodies. There is no dispute that the information is being sought from the Municipality – a public body.

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[18] Section 81(3)(b).

[19] *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) ("***President v M&G Media (CC)***" at paras 23 to 25.

[20] Municipality's heads at p 2 para 2.

[21] Municipality's heads at p 9 para 20.

34 The Municipality's own heads of argument accept that section 11 of PAIA applies to the request by the respondents.[22] Accordingly the requesting party need not show that the information was "required for the exercise or protection of a right".[23]

***(ii) The motive argument***

35 In the answering affidavit the Municipality alleged:

> "It will be submitted that it is not the intention of PAIA that the State should just furnish information to anyone. The requester must at least have an interest in the information requested."[24]

36 The Municipality recasts this argument in a variety of forms throughout its argument.[25] The Municipality sets out a series of remarks questioning the motive behind the respondents seeking the requested documents.

37 For instance:

37.1 "First Respondent is a Newspaper ... and their motivation is to pursue their commercial interest".[26]

37.2 "It is clear that the First Respondent sought an 'interesting front page headline' with the sole purpose of push [sic] their sales of their newspaper which is not the purpose of the intention of the legislature in PAIA".[27]

37.3 The request was "purely for private commercial purpose [sic] by a private commercial entity and thus not in the public interest".[28]

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[22] Municipality's heads at p 3 para 8.

[23] Municipality's heads at p 2 paras 2 to 3 and p 8 para 15.

[24] Municipality's AA at p 201 para 25.

[25] For example, see Municipality's AA at p 201 para 24.

[26] Municipality's heads at p 6 para 11.5.

[27] Municipality's heads at p 6 para 11.5.

[28] Municipality's heads at p 6 para 11.6.

37.4 PAIA is not a basis for the first respondent to "gain backdoor entrance and commercial advantage against their competition".[29]

38 The right of access to information held by public bodies is automatic. Section 11(3) of PAIA expressly states that the request does not depend upon: (i) the requester's reasons for requiring the record; nor (ii) the information officer's assessment of those reasons.[30] The question of motive is accordingly irrelevant.

***(iii) The third-party-procedure argument***

39 The Municipality argues that the respondents failed to comply with the third-party procedure.[31] And that the court a quo erred in finding that "the successful tenderers, Trendy Tiles and Sanitary Ware and Banyana Enterprises lack any substantial interest in this matter".[32]

40 The only bases referred to in the answering affidavit were sections 34 and 36 of PAIA:

> "41. At no stage did the [respondents] ask the Municipality to seek permission of the third parties to disclose their company details to him. It is therefore submitted that there are interested third parties whose privacy is recognised in terms of section 34 of the Act. It is therefore submitted that the Municipality is justified in refusing to grant this information to the Applicants without the involvement or the consent of those third parties. This application should consequently be dismissed with costs.
>
> 42. The Municipality is entitled in terms of section 36 of the Act to protect the commercial information of third parties. The particulars involving the financial capabilities and the commercial plans of the entities who are successful bidders should in terms of section 36 of the Act be protected.

---

[29] Municipality's heads at p 6 para 11.7.

[30] Section 11(3) of PAIA.

[31] Municipality's heads at p 5 paras 11.1 to 11.3.

[32] Municipality's heads at p 5 para 11.

> 43. ... [I]n addition to the legal hurdle of non-joinder the applicants have failed to show that they are entitled to have access to information that is protected in terms of the law."[33]

41 The Municipality's argument is that because the third-party process under PAIA should have been triggered by the media respondents – it follows that the bidders should have been joined as parties to the litigation.

42 That argument is without merit for four reasons.

43 First, the Municipality (not the requester) is the entity tasked with engaging the third-party procedure if that procedure were applicable. The Municipality failed to do so and cannot belatedly rely on its failure to bolster its refusal.[34]

44 Second, the Municipality plainly took a decision that the third-party was not triggered in this case. If that were not so, then the Municipality would have followed the third-party decision. There is no challenge or attempt by the Municipality to review that decision. It is trite that the decision cannot simply be ignored.[35]

45 Third, the Municipality's decision not to engage the third-party procedure was entirely correct. Section 47(1) of PAIA only requires an information officer to inform a third party if providing "access to a record that might be a record contemplated in section 34(1), 35(1), 36(1), 37(1) or 43(1)".

46 The Municipality only sought to rely on section 34 or 36. Section 34 applies to information regarding natural persons and thus has no application. Section 36(1) provides:

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[33] Municipality's AA p 207 paras 41 to 43.

[34] In *Right2Know* the High Court found at para 126 (in the context of a judicial peek): "[j]udicial examination should not be a substitute for requiring government to discharge its burden of showing that the statute's exemptions applied. Still less should it be invoked to avoid an order of disclosure when government has failed to establish its case under the statute."

[35] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA).

"(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains-

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected-

(i) to put that third party at a disadvantage in contractual or other negotiations; or

(ii) to prejudice that third party in commercial competition."

47 The Municipality has neither pleaded what information requested satisfies any of these criteria, nor how many pages of the entire request would be covered by the objection.

48 It is doubtful that it would have been able to do so. At the level of general principle, there could be no reasonable expectation of privacy in any documents submitted for a government tender. In 2022, entities that submit bids know: (i) that the rule 53 record in any subsequent review will include their bids; and (ii) that all of the documents in the rule 53 record are documents to which the public has complete access the moment the documents are filed.[36] Businesses therefore prepare their documents in a manner that does not divulge trade secrets.

49 The bids in the current process were offers to <u>buy</u> municipal land – it is inconceivable that there would be any trade secrets divulged. Moreover, the prices that each bidder offered to purchase the land for is not information "likely to cause harm to the commercial or financial interests of that third party". In many, if not most, state tenders

[36] See generally the SCA's decision in *SANRAL* at paras 44 to 48.

the prices of each bidder's offer are publicly disclosed to ensure that the process is transparent.

50 Similarly, if there were a rule 53 review brought against the process the bidders could not claim confidentiality over their prices or the terms of their offers. Even in *SANRAL*, which related to a tender regarding a controversial tolling project – the Supreme Court of Appeal held:

> "It is a matter of fundamental importance to the administration of justice that members of the public, who are directly affected by the controversial issue of tolling, be allowed access to all of the arguments, the court records and the hearing of the review. The controversy would deepen if SANRAL were to ultimately succeed in having the review application dismissed after a partially secret hearing. That would not serve the public interest or the interests of justice".[37]

51 On the facts of the current case, the PAIA request does not seek any documents that could plausibly include trade secrets or confidential documents.

52 The respondents' PAIA request included the following documents (in relation to two tenders: Tender 73 / 2018 and Tender 74 / 2018):

52.1 The full details (including company registration number) of the successful bidders;

52.2 The functionality criteria set by the Bid Specification Committee;

52.3 A copy of the Makhado Municipality's Supply Chain Management Policy;

52.4 Copies of the minutes of the meeting and recommendation of:

52.5 The Bid Specifications Committee;

52.6 The Bid Adjudication Committee.

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[37] *SANRAL* at para 45.

53 Most of the items sought were documents created by the Municipality and its officials before and during the procurement process – not the third parties.

54 The amici submits that these key principles should be considered by this Court when evaluating the merit of the Municipality's argument premised on the third-party procedure.

***(iv) The diversion of resources argument***

55 The Municipality claims that the court a quo misdirected itself because it failed to give effect to section 45(b) of PAIA which states that a request may be refused if "the work involved in processing the request would substantially and unreasonably divert the resources of the public body".[38]

56 The Municipality contends that the request "constitutes an unwarranted and unreasonable diversion of the resources of the Municipality as a public entity tasked with service delivery to the citizens".[39]

57 The Municipality, further, contends that:

57.1 "PAIA was enacted to give effect to right to access to information in the public interest without causing financial burden to the state for interest of private entities such as the First Respondent in this matter".[40]

57.2 The right to access to information "doesn't exist in a vacuum ... to the detriment of the statutory bodies and organs of the State".[41]

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[38] Municipality's heads at p 8 para 18.

[39] Municipality's heads at p 6 para 11.6.

[40] Municipality's heads at p 7 para 12.

[41] Municipality's heads at p 7 para 13

57.3 The request was being sought "at the expense of genuine service delivery concerns of the Municipality".[42]

58 First, the contention has no basis in law. PAIA enables the public entity to charge for copies made, and the time reasonable required to search for and prepare the record.[43] Once that is so – it is difficult to see how the request would "substantially and unreasonably divert the resources of the public body".

59 Second, the contention has no basis in fact.

59.1 The public entity is required to plead facts to support the contention it cannot merely mechanically rehearse the language of PAIA. It is meaningless for the Municipality to claim (in heads of argument, without any reference to any factual proposition in the appeal record) that "[t]his is clearly the case in this matter".

59.2 Before the High Court the Municipality only alleged that it was an unreasonable diversion of the resources of the Municipality because "the officials of the Municipality [would need to] leave their important posts and attend to vexatious queries [by the respondents]."[44]

59.3 The Municipality claimed that its officials would need to leave their posts to –

> "start making copies and look for information for the [respondents] as if they are part of the staff of the [respondents]. ... Instead of concentrating on service delivery, the officials of the Municipality will as a result of persistent and vexatious requests for information from the [second respondent] be kept busy looking for such information".[45]

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[42] Municipality's heads at p 9 para 19.

[43] See sections 22(1) to 22(7) of PAIA.

[44] Municipality's AA p 202 para 27.

[45] Municipality's AA p 205 para 36.

60 The amici emphasise three points for consideration by this Court.

60.1 First, public bodies are – routinely – required to make available rule 53 records of their decisions and are required by various statutory obligations to keep proper records. Thus, when public bodies are required to deliver a rule 53 record it is not a matter of the public body creating that record for the first time – the public bodies are required to keep and organise those records already. It is just a matter of copying the material.

60.2 Second, in the *M&G Centre for Investigative Journalism v Minister of Public Works* case – the public body provided documents that ran to 12 000 pages.[46] The applicants in that case argued that 12 000 pages was not all the documents that fell within the PAIA request. There was no suggestion by the Court or the parties that this request was unduly burdensome on the public bodies involved.

60.3 Third, the provision of access to information and the time spent copying records is <u>not</u> – as the Municipality suggests – an activity that detracts from service delivery. Quite the opposite: it is another vital component of <u>ensuring</u> proper service delivery. The information allows the media and the public to observe whether the processes being conducted have been lawfully conducted or not. Detecting unlawfulness, curbs future unlawfulness.

**SEVERABILITY AND THE PUBLIC INTEREST OVERRIDE**

61 Even if the Municipality had established any ground of refusal, the Municipality failed to consider and apply to further, critical sections of PAIA:

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[46] *M&G Centre for Investigative Journalism v Minister of Public Works* at para 17.

61.1 section 28 of PAIA obliges an organ of state to consider whether access to any part of the record may be granted and to disclose that portion of the record;

61.2 The final leg of the information officer's enquiry is to consider whether, despite the existence of grounds prohibiting disclosure, the records must nevertheless be disclosed on public interest grounds in section 46 of PAIA.[47]

***(i) The Municipality failed to consider if severance were possible***

62 The duty to sever is set out in section 28 (1) of PAIA, which states:

> *"If a request for access is made to a record of a public body containing information which may or must be refused in terms of any provision of Chapter 4 of this Part, every part of the record which –*
>
> *(a) does not contain; and*
>
> *(b) can reasonably be severed from any part that contains, any such information must, despite any other provision of this Act, be disclosed."*

63 The Constitutional Court has held that section 28 imposes a duty on the public body to sever the protected from the unprotected information and to disclose the latter:

> *"Section 28 of PAIA requires that any information in a record that is not protected and that can reasonably be severed from the protected parts of the record be severed and disclosed. There is no discretion to withhold information that is not protected. The unprotected material must be disclosed 'despite any other provision' of PAIA, unless it 'cannot reasonably be severed' from the protected portions."* [48]

64 Our courts have held that the onus is on the information officer to, in a similar manner to a discovery affidavit –

64.1 Identify documents falling within the request to which there is no objection to disclosure; and

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[47] *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) ("***Avusa Publishing***") at para 10.

[48] *President v M&G Media (CC)* at para 65.

64.2 in a separate schedule, to identify the documents withhold and set out the reasons and set out reasons for withholding them.[49]

65 The Municipality failed to apply its mind to the issue of severability. The blanket refusal to furnish any of the requested records accordingly appears to be unlawful and on its own would justify the court a quo's order.

***(ii) The Municipality failed to apply the public interest override in s 46***

66 Section 46 of PAIA provides for the mandatory disclosure of records by a public body in the public interest. It stipulates that:

> *"Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section ...41(1)(a)... if –*
>
> *(a) the disclosure of the record would reveal evidence of...(i) a substantial contravention of or failure to comply with the law... and*
>
> *(b)...the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."*

67 Section 46 contemplates a two-part test, involving consideration of whether disclosure of the requested information would:

67.1 reveal evidence of "a substantial contravention of, or failure to comply with, the law"; and

67.2 "the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

68 The provisions of the public interest override are mandatory. If these conditions are met and the information officer does not grant access, the court will order the public body to do so.[50]

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[49] *CCII Systems (Pty) Ltd v Fakie and Others NNO (Open Democracy Centre as Amicus Curiae)* 2003 (2) SA 325 (T) at para 16.

[50] *Avusa Publishing* at paras 10 to 11.

69 Importantly, the duty to establish the absence of public policy reasons rest upon the state.[51] The process that this Court should follow is set out in the *Right2Know*[52] case at paras 39 to 45, which dealt with the disclosure of the list of sites designated as National Key Points.

70 In *Right2Know*, the Court noted that – on the common cause facts before the Court – there were a series of questions that would remain unanswered in the absence of the documents being disclosed:

> "[42] ... Have the provisions of the Public Finance Management Act 1 of 1999 (PFMA) been breached? Does the absence of an account mean that the Minister of Police, and his predecessors, have culpably failed to recover money due from owners of key points who, by law, were required to bear the cost of the security of key points? Are key points, in truth, not being properly secured? Does a lack of security threaten the public interest? ...
>
> [45] In my view, these considerations, all rooted in unrebutted fact, serve eminently to trigger the provisions of section 46. It is wholly unsatisfactory that political office bearers and senior civil servants should have to perform their duties under a cloud of suspicion of incompetence or dishonesty. Transparency about all the facts is necessary to either repair the rot, if any exists, or dispel the lack of confidence which the citizenry will continue to nurse if the facts are concealed." *(Emphasis added)*

71 This is precisely the scenario in the current case.

72 First, there is simply no evidence that the Municipality weighed the alleged harm contemplated against the public interest in disclosure, as the Municipality was obliged to do under section 46 of PAIA. On this ground alone, the refusal to disclose the requested records falls to be set aside.

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[51] *Avusa Publishing* at para 10.

[52] *Right2Know* at paras 39 to 45.

73 Second, on the papers it is common cause that the sale was required to be made (save for a few exceptions) to the highest bidder and that the successful bidders were not the highest bidders.

73.1 On the papers the respondents squarely alleged that the information sought fell within the public interest override:

> "47. The information concerns the reasons for which municipal land in the centre of Louis Trichardt has been disposed of by the [Municipality] to parties who were not the highest bidders. The information further concerns land which, at the time of this application, is not used for the purposes as envisaged in the Council's original resolution".

74 The Municipality even concedes that the successful bidder was not the highest bidder.[53] Put differently, there are strong grounds that demonstrate that disclosure would likely reveal a substantial failure to comply with the law. As noted above, the Municipality claims it was "ignorance on the part of the [respondents] to over-emphasize one evaluation criteria when [the respondents] did not have insight on the tender document itself to check for all preliminary requirements".[54]

75 The amici submit that this is precisely the point of the public interest override in section 46 of PAIA. The only way that the respondents (journalists) and the public could know whether the Municipality took the decision correctly is if they are given access to the information sought.

76 This is particularly so when the Tender Notice itself made clear that the default position would be that the bid "will be" awarded to the highest bidder. The Tender Notice states:

> "The Municipality will not offer discount and the bid will be awarded to the highest bidder provided that all information required have been submitted

[53] Municipality's AA p 217 para 71.1.

[54] Municipality's AA p 209 para 46.4.

> together with the bid document. Bidders who offered lower than the market value as indicated above will not be considered and their bids will not be evaluated." ...

77 On the evidence before this Court, it is clear that the disclosure of the requested records is indeed required in the public interest under section 46(a)(i), which interest outweighs the harm contemplated.

78 On this score, the respondents also squarely alleged:

> "The public interest in disclosure of the information outweighs any harm that can arise from its disclosure. The land that was sold was public land and it was zoned for the benefit and enjoyment of the public. The public needs to be given the assurance that there was strict compliance with the MFMA and the regulations and, if anything untoward is discovered, the public must have the right to approach the relevant authorities to investigate the disposal of state land".[55]

79 The Municipality's only response to this paragraph is that the respondents were not permitted to "hide behind the public interest title"[56] and that the original PAIA request "nowhere in the form" did the respondents make out a case for public interest.[57]

80 But the requester need not do so. The obligation falls on the Municipality to consider section 46 of PAIA independently of what has been contained in the request. It is sufficient that the founding affidavit squarely pleaded that section 46 was applicable.

81 For all of these reasons, even if the Municipality had established a ground of refusal (which it did not) the documents still fall to be disclosed in terms of section 46 of PAIA.

**COSTS**

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[55] Founding affidavit at p 110 para 48.

[56] Municipality's AA p 218 para 71.2.

[57] Municipality's AA p 218 para 71.2.

82 As regards costs related to the amici curiae: in accordance with established principle relating to amici curiae, the amici do not seek costs against any party and should not (with respect) have any costs orders made against them.

83 As regards the respondents seeking punitive costs against the Municipality: the amici submits that when considering whether to grant punitive costs this Court should consider five features highlighted above:

84 First, our courts are empowered to punish failures to discharge duties under statutes or the Constitution with a punitive costs order and have previously done so.[58]

85 Second, the extensive duties that PAIA places on public bodies to be responsive, expedient and helpful when dealing with requests for information.

85.1 The preamble recognises that a secretive and unresponsive culture often led to an abuse of power and human rights violations.[59]

85.2 Access to records is to be provided as swiftly and effortlessly as possible.[60]

85.3 Information officers are required to offer reasonable assistance, free of charge, to requesters.[61] The information officer is required to afford the requester an opportunity to rectify a defective request before rejecting it.[62]

85.4 Where the application should have been directed to another institution, the information officer is required to assist the requester to redirect it.[63]

85.5 Information officers should take all steps to locate missing records.[64]

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[58] *Robcon Civils / Sinawamandla 2 Joint Venture v Kouga Municipality and Another* 2010 (3) SA 241 (ECP) at paras 25 to 26.

[59] Preamble to PAIA.

[60] Section 9(d) of PAIA.

[61] Section 19(1) of PAIA.

[62] Section 19(2) of PAIA.

[63] Section 19(4) and section 20 of PAIA.

85.6 PAIA attempts to enforce expeditious decisions by deeming the failure to communicate a decision in respect of a request or an internal appeal to, itself be a decision.[65]

86 Third, the epidemic failures by public bodies in complying with PAIA. Illustrated by the two reports that have been referred to above: the SAHA report and the Human Rights Commission's report.

87 Fourth, that baseless refusals by public bodies frustrate the public's rights to free media and access to information.

88 Fifth, this Court should consider whether the Municipality knew or should have known – on a proper application of the clear legal principles – that its bases for refusal and appeal were not justified in law but in any event continued with its appeal.

**CONCLUSION**

89 Accordingly, the amici respectfully submit that it is in the interests of justice for the organisations to be admitted as amici curiae and for this Court to take these written submissions into consideration when this Court seeks to reach the correct outcome based on a full consideration of all relevant issues and principles.

90 The amici would be grateful for a short opportunity at the hearing of the appeal to highlight certain key points of these written submissions as well as (of course) being available to attempt to the best of their ability – to assist this Court with any other queries related to the merits of the appeal.

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[64] Section 23(1) and (2) of PAIA.

[65] Section 27 of PAIA.

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3 June 2022