REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10/10063

DATE:05/08/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

JAN GEORGE DE LANGE First Applicant

MEDIA 24 LIMITED Second Applicant

and

ESKOM HOLDINGS LIMITED First Respondent

BHP BILLITON PLC INCORPORATED Second Respondent

HILLSIDE ALUMINIUM (PTY) LTD Third Respondent

MOTRACO-COMPANHIA DE TRANSMISSO DE MOZAMBIQUE SARL Fourth Respondent

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Fifth Respondent

---

J U D G M E N T

KGOMO, J:

INTRODUCTION

[1] This is an application in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000), as amended. It arises out of or from a request for information made by the first applicant, a financial journalist, and the second applicant, his employer, to Eskom (the first respondent).

[2] For ease of reference and for the sake of convenience the following references or terms will be used interchangeably throughout this judgment:

- PAIA or Promotion of Access to Information Act 2 of 2000;
- Mr de Lange or first applicant;
- Media 24 Ltd or second applicant;
- Eskom or first respondent;
- BHP Billiton or second respondent;
- Hillside Aluminium or third respondent;
- Motraco-Companhia or fourth respondent;

- The Minister or fifth respondent.

[3] The request relates to the contracts that Eskom has with two companies in the BHP Billiton group of companies, namely, Hillside Smelter in Richards Bay, South Africa and Mozal Smelter in Maputo, Mozambique, for the supply of electricity.

[4] The request was made on 18 September 2009 and the details thereof were for –

- all documents evidencing the formula for and/or manner of the determination of the price for the supply of electricity by Eskom to the two smelters;

- all documents evidencing the identities of all signatories to all written agreements between Eskom and BHP Billiton or its affiliates for the supply of electricity to the two smelters; and

- all documents evidencing the date of commencement and the date of termination of written agreements between Eskom and BHP Billiton or its affiliates for the supply of electricity to the two smelters.

[5] Before this present application was brought the applicants brought a first application for access to information under PAIA on 30 June 2009 to Eskom. In that application the applicants sought –

- the bulk purchase agreement for the supply of electricity by Eskom to Hillside Aluminium Smelter in Richards Bay;

- the bulk purchase agreement for the supply of electricity by Eskom to the Mozai Aluminium Smelter in Maputo, Mozambique; and

- the total and final invoices containing the amounts due by BHP Billiton to Eskom in respect of the electricity for the two smelters for a period of three years.

[6] The above request, which I will henceforth refer to as "*the initial request*", was refused by Eskom on 29 July 2009. The reasons advanced for the refusal were advanced in the notice or letter or refusal. For purposes of this judgment it is not necessary to regurgitate them in full, save to state that they can be summarised as –

- Eskom not being permitted to disclose the Bulk Purchase Agreements on the grounds set out in sections 36(1)(b) and (c), 37(1)(a) and 42(3)(b) and (c) of PAIA and that

- the Bulk Purchase Agreements contain both general and specific commercial, financial and technical information of a highly confidential nature belonging to the BHP Billiton Group, the disclosure of which will cause significant harm to the commercial and financial interest of the group, thereby putting it (BHP Billiton) at a disadvantage in its contractual negotiations, both in South Africa and Mozambique as well as prejudice it in commercial competition.

[7] It is the applicant's case that notwithstanding the fact that they considered Eskom's refusal to be unlawful and incorrect, they ultimately took a view that it would be more appropriate and prudent that a narrower and more specific request for information be filed. That was when they filed the application dated 18 September 2009 which is the object of this judgment.

[8] It is my considered view that it would be proper and appropriate that the complete request be reproduced hereunder to put issues in their proper perspective. The application sought the following records, data or documents:

"*1. All and any documents, or relevant extracts of documents, evidencing the formula for and/or manner of the determination of the price for the supply of electricity by Eskom Holdings Limited or its affiliates to:*

(a) BHP Billiton plc or any of its affiliates or Hillside Aluminium Limited Smelter in Richards Bay, South Africa; and

(b) BHP Billiton plc or any of its affiliates or Mozambique Transmission Company SARL or Mozal Smelter in Maputo, Mozambique.

2. *All and any documents or relevant extracts of documents, evidencing the identities of all signatories to all written agreements between Eskom Holdings Limited or its affiliates and any other party, for the supply of electricity to:*

   (a) BHP Billiton plc or any of its affiliates or Hillside Aluminium Limited for the operation of the Hillside Aluminium Smelter in Richards Bay, South Africa; and

   (b) BHP Billiton plc or any of its affiliates or Mozambique Transmission Company SARL or Mozal SARL for the operation of the Mozal Aluminium Smelter in Maputo, Mozambique.

3. *All and any documents or relevant extracts of documents, evidencing the date of commencement and termination of all written agreements between Eskom Holdings Limited or its affiliates and any other party, for the supply of electricity to:*

   (a) BHP Billiton plc or any of its affiliates or Hillside Aluminium Limited for the operation of the Hillside Aluminium Smelter in Richards Bay, South Africa; and

   (b) *BHP Billiton plc or any of its affiliates or Mozambique Transmission Company SARL or Mozal SARL for the operation of the Mozal Aluminium Smelter in Maputo, Mozambique.*"

[9] On 20 October 2009 Eskom decided to extend the period in which it had to reply to the request for access to information by a further period of 30 days.

[10] This extension was done unilaterally and the applicants did not then and do not now, have any qualms with that unilateral decision. Maybe because they recognised they needed to apply their minds to the application.

[11] On 13 November 2009, the applicants received a letter from Eskom containing a decision on their request for access to information. A copy of this letter is attached marked Annexure "JD8". The letter stated as follows:

"*SECTION A: GRANTING ACCESS*

Upon consideration of your request for access to information on behalf of Media 24 (trading as Sake24), we have decided to grant access to the following record(s):

1. Identities of all signatories

1.1 The signatories to the electricity supply agreement for Hillside are Eskom Holdings Limited and Hillside Aluminium Limited.

1.2 The signatories to the electricity supply agreement for Mozal are Eskom Holdings Limited, Mozambique Transmission Company (Motraco), Electricidade de Mocambique E.P and Swaziland Electricity Company.

SECTION B: REFUSAL

Upon consideration of your request for access to information, on behalf of Media 24 (trading as Sake24), we believe that access to the following records should be refused on the ground set out below:

1. ***The formula for and/or manner of the determination of the price for the supply of electricity***

1.1 *Having applied our mind, upon consideration of your request, and after been* (sic) *declined on consent to release the information, Eskom will not disclose:*

1.1.1 any documents or relevant extracts of the documents relating to the formula and/or manner of the price determination for the supply of electricity for the operation of Hillside on the grounds set out in sections 36(1)(b) and (c) and 37(1)(a) of the Promotion of Access to Information Act No 2 of 2000 (the Act); and

1.1.2 any documents or relevant extracts of the documents relating to the formula and/or

manner of the price determination for the supply of electricity for the operation of Mozal on the grounds set out in sections 36(1)(b) and (c) and 37(1)(a) of the Promotion of Access to Information Act No 2 of 2000 (the Act).

1.2 The requested documents or the relevant extracts thereof contain both general and specific commercial, financial and technical information of a highly confidential nature belonging to the BHP Billiton Group, the disclosure of which will cause significant harm to the commercial and financial interest of the BHP Billiton Group. The BHP Billiton Group believes that the disclosure of such confidential information will put the BHP Billiton Group at a disadvantage in its contractual negotiations both in South Africa and Mozambique and prejudice it in commercial competition.

1.3 Should Eskom disclose the documents or relevant extracts of the documents relating to the formula and/or manner of the price determination, Eskom will be in breach of a duty of confidence owed to either Hillside Aluminium Limited or Motraco.

2. The date of commencement and date of termination of all written agreements

2.1 Having applied our mind, upon consideration of your request, and after been (sic) *declined consent to release the information, Eskom will not disclose:*

2.1.1 any documents or relevant extracts of the documents evidencing the commencement and termination dates of written agreements for the supply of electricity for the operation of Hillside on the grounds set out in sections 36(1)(b) and (c) and 37(1)(a) of the Promotion of Access to Information Act No 2 of 2000 (the Act).

2.1.2 any documents or relevant extracts of the documents evidencing the commencement and termination dates of written agreements for the supply of electricity for the operation of Mozal on the grounds set out in sections 36(1)(b) and (c) and 37(1)(a) of the Promotion of Access to Information Act No 2 of 2000 (the Act).

2.2 The requested documents or the relevant extracts thereof contain both general and specific commercial, financial

> *and technical information of a highly confidential nature belonging to the BHP Billiton Group, the disclosure of which will cause significant harm to the commercial and financial interest of the BHP Billiton Group. The BHP Billiton Group believes that the disclosure of such confidential information will put the BHP Billiton Group at a disadvantage in its contractual negotiations and prejudice it in commercial competition.*"

[12] In its letter of refusal Eskom offered to the applicants the use or recourse to its internal appeal mechanisms for PAIA requests. The said internal mechanisms were not required or contemplated by PAIA in this instance because Eskom falls under or within paragraph (b) of the definition of "*public body*" in PAIA and therefore sections 74 and 78(1) of PAIA do not apply to it.

POINT *IN LIMINE*

[13] Before the arguments proper could be embarked on the parties approached the court with a view to finding out whether they should first argue a point *in limine* raised by the second to third respondents before dealing with the merits or whether they should advance their arguments and submissions normally and at some stage dealing with the point *in limine.*

[14] It cannot be disputed that this application relates to matters of considerable public interest. Right at the on-set, after going through all the papers filed of record that far, I formed an impression that it was in the interests of justice and of extreme public interest that this matter not be

decided upon before all arguments and submissions have been advanced in open court. I accordingly ruled that all the parties should advance their arguments and submissions and simultaneously deal with the point *in limine*. I reserved the right to make a ruling thereon when I gave judgment herein.

[15] BHP Billiton raised a point *in limine*, that the applicants were out of time in bringing this application and have not sought condonation for non-compliance with section 78(2) of PAIA. According to them (BHP Billiton), this application and the "*initial application*" are basically or substantially the same, the difference being in the wording used to describe the records sought. They further argued that that difference was illusionary in the sense that what is sought in the application under review here is inseparably part of and included in the initial application. That the initial application sought all the terms of the Bulk Purchase Agreements while the present application seeks some, but not all, of those self-same terms. That is the reason why they raised the point *in limine* of the present application being out of time.

[16] In substantiation of this point *in limine* the second and third respondents submitted that since the present application was launched on 18 March 2010, which is more than the 180 days after the refusal of the initial request on 29 July 2009, they are out of time. They argued that the applicants ought to have lodged an internal appeal against the refusal of the first request within 60 days of the refusal in terms of or pursuant to section 75(1)(a)(i) of PAIA, alternatively, bring an application similar to the present

application in terms of section 78 of PAIA within 180 days of the internal appeal or refusal of the request in terms of section 78(2) of PAIA.

[17] The second and third respondents further argued and submitted that since it is common cause that the second request was merely a narrowing down of the first request made, it is undeniable that a refusal of the first request necessarily entailed a refusal also of the second request. In the circumstances it amounted to an abuse by the applicants of PAIA by attempting to circumvent the time periods imposed by PAIA for such an application to court to enforce their rights to access to information.

[18] They further submitted that for the applicants only to raise the issue of condonation during arguments in court was a cow-boyish or cavalier attitude that proved how the former have no respect or regard for court processes. They argued and submitted that this Court should not allow this application past this stage as a consequence.

[19] On the other hand the applicants' contention is that the 180-day time frame had not yet expired at the time this application was launched. They further submitted that they launched the present or second request well within the 180-day time limit and at a time when the period for the initial request had not yet expired. In short, so continued their contention, both applications were launched within the 180-day time limit required in terms of PAIA.

[20] The applicants further submitted and argued that the second request was a new application that was different from the initial request since it dealt with narrower and specific aspects whereas the initial request was open-ended or general. They further submitted that the reason that the grounds of refusal or partial attempt to respond to the second request was made was indicative of the two being different.

[21] They argued further that in terms of the severability principles set out in section 28(1) of PAIA it was not proper for Eskom to supply details on some aspects of the request and refuse to do so on others.

[22] Section 28(1) of PAIA provides as follows:

> "*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*."

[23] It is so that Eskom chose which parts of the request it should respond to, albeit in details that are inadequate insofar as the applicants are concerned.

[24] The fact, in my view, that Eskom found it necessary not to offer a blanket refusal of the second request and decide to furnish some details, are indicative of Eskom having regarded the second request as being a separate and independent request, separate from the initial request. I do not see any reasons why, if they regarded them as being identical or substantially the same, they should not just have repeated their previous refusal terms.

[25] What compounds this matter further is the fact that Eskom did not raise the point *in limine*. They are the instance in possession of the information sought but they are not the ones raising this extinctive point in law. It is in fact BHP Billiton who do so.

[26] In *Brümmer v Minister of Social Development and Others* 2009 (11) BCLR 1075 (CC) the court ruled among others that a court seized with a matter of this nature has the discretion to decide whether to condone a failure to abide by time frames in terms of PAIA or not.

[27] Counsel on both sides advanced cogent arguments and submissions why the point *in limine* should be upheld or dismissed. After listening to the totality of arguments and submissions herein and in the light of the high public interest this matter attracts, I have decided to rule, as I hereby do, that this application should be decided on the merits, not on a technicality. I have taken into account the second and third respondents' counsel's submission that this point *in limine* is not merely technical. It is my considered view that this point *in limine* is subservient to the points to be decided on the merits of the case and that in the interests of public interest had I have been obliged or

asked to make a decision I would have granted a condonation to the applicants so that the real issues inherent herein would be ventilated fully. Consequently, the issue of the point *in limine* should not stand in the way of a full and comprehensive ventilation of all issues inherent in this application.

THE SCHEME OF PAIA

[28] Section 32(1) of the Constitution of the Republic of South Africa, 1996 (Act of 1996), provides that:

> "*(1) Everyone has the right of access to –*
>
> *(a) any information held by the state; and*
>
> *(b) any information that is held by another person and that is required for the exercise of any rights.*
>
> *(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden of the state.*"

[29] According to writers Currie & Klaasen in *The Commentary on the Promotion of Access to Information Act*, 2002 Ed the entrenchment of the right to information in the Constitution emanates from the previous or apartheid state's obsession with official secrecy. It is also a characteristic feature of despotic, authoritarian or autocratic states that they always seek to control the flow of information in their societies. Section 32 of the Constitution

makes a decisive break with the past, entitling everyone to information held by the State. Various authorities and our higher courts have consistently held that the purpose of the right of access to information is to subordinate the organs of the state to a new regimen of openness and fair dealing with the public.

See: -*Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 850C.

-*MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) at para [21].

-*The President of RSA v M&G Media* 2011 (2) SA 1 (SCA).

[30] The Promotion of Access to Information Act 2 of 2000 (PAIA) was promulgated pursuant to the above constitutional imperatives. This Act was enacted to give effect to the right of access to information. It is said that PAIA seeks to strike a balance with other competing rights including the rights to privacy and dignity.

See: *Transnet Ltd & Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA); [2006] 1 All SA 352 (SCA) at paras [9]-[11].

[31] In the preamble to PAIA this balancing of competing rights is recognised as follows:

"*… the state must respect, protect, promote and fulfil, at least, all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa;*

…the right of access to any information which is held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution …"

[32] The preamble further states the purpose of PAIA as:

"*… to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.*"

[33] Section 9 of PAIA sets out the objects of the Act among others as:

"*… (b) to give effect to that right (in section 32 of the Constitution)*

(i) subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance; and

(ii) *in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution.*"

[34] PAIA deals with information held by public bodies differently from information held by private bodies. For public bodies, which include Eskom, the requester does not need to explain why it seeks the information, let alone why it requires it for the exercise of its rights. In terms of section 11(1) of PAIA a requester of information is entitled to the information requested from a

public body as long as it has complied with the procedural requirements set in that Act and as long as none of the grounds of refusal are applicable (my emphasis). Those grounds of refusal are set out in Chapter 4 of Part 2 of the Act.

[35] Consequently, the importance of access to information held by the state or public or state entity as a means to secure accountability and transparency justifies the approach adopted in section 32(1)(a) of the Bill of Rights and in PAIA, namely, that unless one of the specially enumerated grounds of refusal obtains, citizens are entitled to information held by the state or state or public entity as a matter of right. This is so regardless of the reasons for which access is sought and regardless of what the organ of state believes those reasons to be.

[36] Chapter 4 of PAIA provides for a range of grounds of refusal, including grounds where third party privacy and commercial interests would be harmed if information were made available to a requesting party. It is therefore crucial to determine whether any of the grounds of refusal contemplated in Chapter 4 of PAIA apply to this case. If they do not, that will be the end of the matter and the information sought must be disclosed.

[37] The grounds of refusal relied on must be understood within the legislative scheme which seeks to balance the rights of the requester to have access to information, and a third party's rights to privacy and to protect its

commercial interests in a manner which is constitutionally defensible in terms of the limitations clause.

[38] It is the second and third respondents' contention that the grounds of refusal, which are limitations to or of the right of access to information must accordingly be read or interpreted as narrowly as possible, consistent with their purpose of protecting specific rights or compellingly important interests. Access to information is a norm while refusal to disclose is an exception to the norm or general rule. However, in terms of section 2(1) of PAIA when interpreting a provision of the Act a court must prefer any reasonable interpretation of the provision that is consistent with the objects of the Act over any alternative interpretation that is not consistent with these objects.

See: *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras [46], [84] and [107].

Fraser v Absa Bank Ltd (NDPP as Amicus Curiae) 2007 (3) SA 484 (CC) at para [9] p 47.

See also: *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at paras [22]-[23].

[39] If grounds of refusal do apply it must still be investigated whether the disclosure of the information is required or justified in terms of section 46 of PAIA, i.e. where it is in the public interest to so make such a disclosure.

[40] Section 46 of PAIA provides as follows:

> "*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 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45; if*
>
> *(a) the disclosure of the record would reveal evidence of –*
>
> *(i) a substantial contravention of, or failure to comply with, the law; or*
>
> *(ii) an imminent and serious public safety or environmental risk; and*
>
> (b) *the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.*"

[41] In terms of section 78 of PAIA a requester of information or third party referred to in section 74 may only apply to a court for relief in terms of section 82 (of PAIA) after such requester or third party has exhausted the internal appeal procedure against the decision of the information officer of the public body. The powers set out in section 82 include powers to make orders confirming, amending or setting aside the decision which is the subject of the application concerned; to require from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a

period mentioned in the order; to grant an interdict, interim interdict or specific relief, a declaratory order or compensation or for an order of costs.

[42] What is of paramount importance is that the exercise at issue in a section 78(2) application is not a review or an appeal from the decision of the information officer or an internal appeal. The proceedings in section 78 are original proceedings for the enforcement of the right that the requester has under section 11(1) to be given access to a record in the absence of grounds for refusing it.

See: *President of the Republic of South Africa and Others v M&G Media Limited(supra)*

Suffice to state that the above section does not apply to proceedings of public bodies like Eskom in this case.

[43] In *Transnet Ltd & Another v SA Metal Machinery Co (Pty) Ltd (supra)* the Supreme Court of Appeal put it as follows:

> "*A court application under the Act is not the kind of limited review provided for, for example under the Promotion of Administrative Justice Act 3 of 2000. It is much more extensive. It is a civil proceeding like any motion matter, in the course of which both sides (and the third party, if appropriate) are at liberty to present evidence to support their respective cases for access and refusal. As the present matter serves to illustrate, the parties' respective cases in such an application will no doubt in most instances travel beyond the limited material before the information officer. That conclusion is reinforced by the Legislature having catered for the presentation of evidence and the resolution of disputes of fact by reference to an onus of proof. Those provisions would have been unnecessary if the suggested limitation applied.*

> *Moreover, it is unlikely that a court, acting under section 82, would be sufficiently informed so as to be in a position to make a just and equitable order were the limitation to apply.*"

[44] Section 81 of PAIA provides that court proceedings such as the present application are civil proceedings and that the burden of establishing that the refusal of a request for access complies with the provision of the Act rests on the party claiming that it so complies.

[45] In the context of this case section 78 of PAIA also assumes pride of place where there may be disputes of fact that need to be dealt with. This is so because, as stated above, the rules applicable to application proceedings apply to section 78 applications.

[46] The principles set out in *Plascon-Evans* as invoked in the *M&G Media* case above may also play an important role in the final determination of issues herein.

[47] The abovementioned aspects are neatly set out in *President of the RSA v M&G Media* 2011 (2) SA 1 at paras [11]-[16]. For convenience, I quote those paragraphs in full:

> *"[11] The 'culture of justification' referred to by Mureinik permeates the Act. No more than a request for information that is held by a public body obliges the information officer to produce it, unless he or she can justify withholding it. And if he or she refuses a request then 'adequate reasons for the refusal' must be stated (with a reference to the provisions of the Act that are relied upon to refuse the request). And in court proceedings under s 78(2) proof that a record has been requested and declined is enough to oblige the public body to justify its refusal.*

[12] The proceedings that are contemplated by s 78(2) are not a review of or an appeal from the decision of the information officer or the internal appeal. They are original proceedings for the enforcement of the right that the requester has under s 11(1) to be given access to a record in the absence of grounds for refusing it. The proceedings must be commenced on application. They are 'civil proceedings' to which '(t)he rules of evidence applicable in civil proceedings' apply. I think that that latter provision contemplates that the civil rules of evidence apply as much to the manner in which evidence is received as it does to the admissibility of evidence.

[13] The approach to evidence in application proceedings is well known and need not be repeated in full. A court will not weigh the veracity of the evidence on the papers alone. Generally, but with exceptions, a court must rely for its decision upon the facts that are alleged by the respondent, together with those alleged by the applicant that he or she cannot dispute. Where an application cannot properly be decided in that way rule 6(5)(g) confers a wide discretion on a court to hear oral evidence.

[14] In cases of this kind the public body bears the burden of proving that secrecy is justified, but the general rules that I have referred to apply as much in such cases. That burden of proof nonetheless casts an evidential burden on the public body to allege sufficient facts that will justify the refusal. The burden of proof in its true sense will come into play if the veracity of the evidence is required to be tested — in which case it is for the public body to satisfy a court that its evidence is probably true.

[15] While the ordinary rules apply generally to applications under s 78(2), there are nonetheless some aspects of such proceedings that call for special mention. The first is that true disputes of fact will seldom arise, because the material facts will generally be within the peculiar knowledge of the public body. If an application for information is not to be thwarted by that inequality of arms, I think that a court must scrutinise the affidavits put up by the public body with particular care and, in the exercise of its wide discretion that I referred to earlier, it should not hesitate to allow cross-examination of witnesses who have deposed to affidavits if their veracity is called into doubt.

[16] Secondly, it can be expected that an information officer, or other officials of a public body, will most often not have direct knowledge of facts that are material to justifying secrecy, and will necessarily be reliant upon documents and other hearsay sources. Section 3 of the Law of Evidence Amendment Act 45 of 1988 gives a court a wide discretion to admit hearsay evidence and liberal use of that section is

quite capable of overcoming difficulties that might be encountered by a public body in that regard."

[48] With the above scheme of things in mind, we can now deal with the nitty-gritty of the application itself.

GENERAL BASIS OF APPLICATION

[49] The first applicant is a specialist writer employed by the second applicant, a publishing group with a wide range of newspapers amongst whom resort Beeld and City Press as well as ordinary magazines like Fin Week and on-line publications like News24.com, Sake24.com and Fin24.com. His fields of speciality include mining and labour for the past 10 years. Among the various articles he wrote are issues that have a particular relevance in and to the contracts that the Billiton Group of companies have with Eskom for the supply of electricity to its Hillside Aluminium Smelter in Richards Bay, South Africa and its Mozal Aluminium Smelter in Maputo Mozambique.

[50] The above articles were written against the general background of electricity supply interruptions in South Africa as well as the incessant or regular tariff increases applied for and granted to Eskom. Eskom has been generating operating losses, for instance, the R3,2 million registered for the

year ended 31 March 2009. There is also a projected loss on embedded derivatives of R9,5 billion going forward.

[51] It is common knowledge that the above contracts have already been the subject of debates in Parliament and in the mass media. According to the applicants, the contracts and their effects also have a significant impact on the reliability of the public's supply of electricity by Eskom and the rates paid by the public in this regard. Furthermore, it is the applicant's contention that the two smelters consume 5,68% of Eskom's total electricity supply capacity and at rates that at present, cause substantial losses for Eskom and make profits for Billiton.

[52] There are five respondents in this application. The first is Eskom Holdings Ltd, a public company, duly registered in terms of the laws of the Republic of South Africa (RSA), with its registered address being situated at Megawatt Park 2, Sunninghill, Johannesburg; an area situated within the jurisdiction of this Court. Eskom is cited by virtue of the fact that the request for access to information by the two applicants was directed to and was refused by it.

[53] The second respondent, BHP Billiton Plc Inc (Billiton) is an external company with its local (RSA) registered address situate at 6 Hollard Street, Johannesburg. It is cited for such interest as it may have in the relief sought by the applicants. No relief was sought against the second respondent save for a costs order in the event they opposed the application.

[54] The third respondent, Hillside Aluminium (Pty) Ltd is a public company duly registered in terms of the laws of the RSA with its registered address being at 9 West Central, Arterial, Richards Bay, South Africa. It is also cited for such interest as it may have in the relief sought by the applicants. No relief is sought directly against them, save for a costs order in the event of them opposing the application.

[55] The fourth respondent, Motraco de Transmisso Mozambique SARL (Motraco), is an external company with locally registered address situate at Megawatt Park, Maxwell Drive, Sunninghill Ext 3, Johannesburg. It is cited for such interest as it may have in the relief sought by the applicants. No relief is sought directly against the fourth respondent save for a costs order in the event of opposition.

[56] The fifth respondent, the national Minister of Justice and Constitutional Development, RSA, (Minister), is cited herein by virtue of the fact that he is the Minister responsible for the administration of PAIA. The Minister is also cited because the applicants are advancing contentions as to the proper interpretation of PAIA, particularly sections 37(1)(a) and 46 thereof: In the event those contentions are upheld, no question of constitutional invalidity will arise. Should they be rejected, then the applicants contend that sections 37(1)(a) and 46 of PAIA are unconstitutional and ought to be declared as such by this Court, so argued the applicants. The above or last mentioned is the principal reason why the Minister's interest in this matter arises.

[57] In terms of the Rules of Procedure in terms of PAIA, the applicants were not obliged to formally cite the second to fourth respondents. They could have simply relied on Eskom to inform them of the application. However, for practical reasons as well as for purposes of saving time or in anticipation of any application to intervene in the proceedings by any of them, they have been cited as set out above.

[58] Eskom is basically not opposing the application: In my view they are only going through the motions, feebly advancing submissions and arguments that are indicative of them respecting and abiding by Billiton's vehement objections. They, like the fifth respondent, the Minister of Justice and Constitutional Development, will abide the ruling of this Court either way. The Minister however made an application at the beginning of arguments in this Court, for leave to supplement their heads of argument to testify their opposition to a constitutional challenge to sections 36, 37 and 46 of PAIA by the applicants in the event of this Court finding and ruling that there are valid grounds for the refusal to grant applications. I have originally reserved my ruling on this latter application, which ruling is set out hereinbefore.

ISSUES IN DISPUTE

[59] There are basically three aspects in dispute in this application, namely,

- a request for access to all and any documents or relevant extracts of documents, evidencing the identities of all signatories to all written agreements concerning the supply of electricity to the two smelters;

- a request regarding the duration of the agreements; and

- a request for documents evidencing the formula and/or manner of the determination of the price for the supply of electricity to the two smelters as well as documents evidencing the commencement and termination of the agreements.

[60] In respect of the request for signatories the respondents' refusal is based on section 34(1) and (2) of PAIA, in that such a disclosure "*might*" have implications on their right to privacy.

[61] In respect of the request for documents evidencing the start and end of the agreements, i.e. duration, the respondents rely on sections 36(1)(b), 36(1)(c) and 37(1)(a) of PAIA in their refusal.

[62] In respect of the request for the pricing formulas they also rely on section 36(1)(b) and (c) as well as section 37(1)(a) of PAIA.

[63] It is so that Eskom furnished some kind of response to the requests: In respect of the signatories, instead of furnishing the documents on which the signatures of the signatories appear, it furnished the names of the parties to the agreements. In respect of the periods of the agreements Eskom only disclosed that the agreements came into effect in the 1990's and that Mozal Smelter will receive electricity until March 2026 and Hillside until 2028.

THE RELEVANT STATUTORY PROVISIONS

[64] Due to the fact that they will be referred to regularly hereinafter I find it necessary to quote in full sections 34(1) and (2), 36(1)(b) and (c), 37(1)(a) and 46 of PAIA.

[65] Section 34 of PAIA reads as follows:

> "*(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 its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual.*
>
> *(2) A record may not be refused in terms of subsection (1) insofar as it consists of information—*
>
> […]
>
> *(f) about an individual who is or was an officer of that public body and which relates to the position or functions of the individual, including, but not limited to –*
>
> *(i) the fact that the individual is or was an official of that public body;*

(ii) the title, work address, work phone number and other similar particulars of the individual;

(iii) the classification, salary scale or remuneration and responsibilities of the position held or services performed by the individual; and

(iv) the name of the individual on a record prepared by the individual in the course of employment."

[66] The applicable provisions of section 36 of PAIA reads as follows:

(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) […]

(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."

[67] Section 37(1)(a) of PAIA provides that –

"*... the information officer of a public body … must refuse a request for access to a record of the body if the disclosure of the record would*

constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement."

[68] Section 46 of PAIA provides as follows:

"*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 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if –*

(a) the disclosure of the record would reveal evidence of—

(i) a substantial contravention of, or failure to comply with. the law; or

(ii) an imminent and serious public safety or environmental risk: and

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

[69] Nugent JA aptly summed up the situation analogous to the one we are dealing with in *President of the RSA v M&G Media (supra)*, when he stated that –

"*(1) Open and transparent government and a free flow of information concerning the affairs of the state is the life blood of democracy. That is why the Bill of Rights guarantees to everyone the right of access to any information that is held by the state …*"

[70] Ngcobo J (as he then was) put it as follows in *Brümmer v Minister of Social Development and Others* 2009 (6) SA 323 (CC) at para [62]:

> "*The importance of this right … in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'*."

[71] As stated above, Eskom purported to furnish particulars requested in respect of the signatories to the agreements but instead furnished the names of the parties to the contracts. No documents were furnished. I can state right here that Eskom in fact does not have any difficulties in giving access to this information. They are curtailed in their choices by the second to third respondents' objections. In their response they state that disclosure might have implications for their right to privacy. No specifics are given.

[72] The second and third respondents' objection or refusal is based on the signatories' right to privacy. It was incumbent on the refuser to lay the basis why it averred that such a disclosure would involve unreasonable disclosure of personal information. In all refusals the holder of the requested information must convince the court why its refusal should be upheld. It must, in its affidavit furnish cogent grounds why otherwise disclosable data or information should not be disclosed.

[73] I have not come across any instance in the papers herein where it is averred that the signatories to the agreements in issue here were not officers of Eskom, a public body, or that such signatories were not performing their functions or holding positions as such at the time they signed the agreements. The exceptions set out in section 34(2) do not apply. It is the reason why I have a problem with the respondents' reliance on section 34 of PAIA to justify their refusal to disclose the particulars of the signatories by making available the documents where they appended their signatures. The respondent's contentions are not sustainable.

THE ISSUE OF SIGNATURES

[74] It was submitted on behalf of the respondents that if the particulars of the signatories are disclosed, the latter may be harassed or subjected to public attacks. The above is a bland statement which in my view is not substantiated in any way in the papers.

[75] It is my considered view and finding that the respondents, especially the first to the third respondents, have not proved adequately that they deserve the protection of section 34 of PAIA.

THE DURATION OF THE AGREEMENTS

[76] The refusal of the request regarding the duration of the agreements also falls under the same criticism as the one in respect of the signatory issue.

Eskom was ready to disclose "*the 1990's*" as the commencement date and 2026 and 2028 as the termination dates. Nothing in the papers before me justifies why the exact dates or periods were not or cannot be disclosed. The answering affidavits do not shed any convincing light what prejudice the respondents would or could suffer if the full documents evidencing the dates of commencement and termination of the agreements are disclosed.

THE PRICING FORMULAS

[77] Section 36(1)(b) and (c) are very clear and direct as to what disclosure can be refused or under what circumstances. For emphasis I repeat the relevant parts thereof:

> *"(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) …*
>
> (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*."

[78] The procurement and/or use of information derived from confidential sources falls squarely within the ambit of the above section also. In *Financial Mail (Pty) Ltd & Others v Sage Holdings Ltd and Another* [1993] 2 All SA 109 (A) Corbett JA confirmed that in determining whether or not parties are entitled to use information derived from confidential sources, like the data Billiton supplied to Eskom during their contract negotiations in relation to the supply of electricity to the smelters, the party's right to privacy and the law relating to unfair (or rather unlawful) competition is applicable. This ruling overruled Joffe J's finding in the same case in the High Court Johannesburg that the above only applied to natural persons, not to a company.

See: *Sage Holdings Ltd and Another v Financial Mail (Pty) Ltd and Others* 1991 (2) SA 117 (W) at 131F.

[79] The respondents (i.e. second and third respondents) submitted in argument that the basis of their recommendations to Eskom to refuse to give access to the information about the pricing structures tendered by them to Eskom in confidence was not the certainty of harm to ensue but a reasonable probability of harm. In substantiation of this aspect they relied on the judgment of Howie JP in *Transnet Ltd & Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA); [2006] 1 All SA 352 (SCA), especially para 42 wherein the following was said:

> "*It follows that the difference between (b) and (c) of section 36(1) is to be measured, not by degrees of probability. Both involve a result that is probable, objectively considered. The difference, in my view, is to be measured rather by degrees of expectation. In (b), that which is likely is something which is indeed expected. This necessarily includes, at least that which would reasonably be expected. By contrast, (c) speaks of that which could reasonably be expected. The results specified in (c) are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation.*"

[80] The two protagonists in this application disagree on how the above *obiter dictum* should be interpreted and/or applied. The applicants are placing emphasis on the term "*likely*" in the portion of the section 36(1)(b) which provides for "*… likely to cause harm to the commercial or financial interests …*". They further submit that each ground of refusal under PAIA is tied to one of two standards – "*likely to*" or "*could reasonably be expected to*". Further relying on the authors, Currie & Klaaren: *The Commentary on the Promotion of Access to Information Act (2002)* at pages 102-3, they contend that the expression "*likely to*" is the more stringent of the tests applicable to the causative element of the grounds of refusal, which meant that a greater degree of probability is required where the ground of refusal uses the language, "*likely to*" rather than "*reasonably be expected to*". They submitted that a body invoking a "*likely to*" ground of refusal must therefore show, based on real and substantial grounds, that there is a strong probability that a harmful consequence will occur. Their overall submission and contention was that for Eskom or Billiton to succeed in establishing this ground, they must demonstrate that it is probable (not possible) that the disclosure would cause harm to the commercial or financial interests of Billiton. Their conclusion was

that Eskom has made no effort to establish the section 36(1)(b) ground in the papers before this Court but left it to Billiton to try to do so.

[81] Billiton's argument in turn rests on the premise that the pricing information requested is ordinarily unavailable to its competitors. It fears that its disclosure would harm its financial and commercial interests by informing other industry participants of the production costs of the smelters. It concluded that that was the reason why all aluminium producers vigorously protect information relating to their electricity costs.

[82] Billiton has proved that pricing structures of major aluminium producers can be purchased from the company Brook Hunt at around R200 000 and the respondents also attached to their papers a report and spread sheet prepared by Deutsche Bank commenting on fair value in the aluminium industry. It has also shown that the said Brook Hunt which is a specialist service provider in the aluminium industry continually update their information about the costs of aluminium smelters and allegedly do costing for 99% of global aluminium production, giving detailed costs analysis of nearly all the world's aluminium smelters as well as providing comprehensive plant by plant information of costs inputs from energy through raw materials and labour, providing a clear assessment of each operation within the industry cost curve.

[83] Instead of refuting the above assertions the applicants only countered by stating that they as SA media players, just like the average member of the

South African public cannot afford to purchase this kind of information from firms like Brook Hunt.

[84] Where a party seeks to rely on section 36(1)(b) of PAIA to resist disclosure, it does not have to prove a certainty of harm. It is sufficient if it proves a probability of harm. Proof of a probability or to be more precise, proof of a likely result on a balance of probability is something courts and litigants deal with on a daily basis.

[85] Billiton bore the *onus* to put forward evidence that it is probable that it will suffer the harm contemplated in sub-sections (b) and (c) of section 36. Should disputes of fact arise, same must be dealt with by looking at Billiton's version, on the *Plascon-Evans* test. Only where such a version is so far-fetched or clearly untenable that the court would be justified in rejecting it merely on the papers may the respondents fail in their bid to refuse to disclose.

[86] The applicants went to great lengths to set out facts and instances that arose, out of Parliamentary debates as well as the very utterances of Eskom's CEO, Mr Maroga, surrounding this issue of the agreements which point to the security of electricity supply being probably compromised as a result of, among others, the agreements entered into with the Billiton Group of companies pertaining to the supply of electricity to the two smelters. The first applicant was present at a press conference called by Eskom on 27 August

2009 where the issue of embedded derivatives amounting to R9,5 billion and which could worsen the losses were some of the issues discussed. He put specific questions to the CEO relating to whether these were related to the Billiton smelters but the latter (CEO) refused to respond to the questions. Nevertheless Creamer Media Engineering News on the same date reported that:

> "*… (the) said valuation of aluminium contracts with embedded derivatives had resulted in accounting losses of R9,5 billion and were clearly not sustainable.*"

[87] Eskom did not refute the above report. The respondents also did not explain this aspect in their answering affidavits. The perception remained that Eskom charged Billiton for electricity at its smelters based to some extent on the prevailing aluminium price on the London Metals Exchange (LME) which is linked to the aluminium price.

[88] The respondents also did not gainsay a report in the Mail & Guardian dated 20 April 2010 titled "*Going Cheap*" as well as an article in The Times newspaper dated 25 May 2010 titled "*Minister's Eskom Shocker*", - all related to the price Billiton was paying for electricity supplied by Eskom to its smelters. In the Mail & Guardian article, Eskom is reported to have responded to questions by stating among others that –

> "*… the biggest contributor to the [embedded derivatives] liability was the Mozal contract.*"

[89] The Times article reported that Billiton was paying only half of the generation costs of electricity. This newspaper also quoted the reactions of various stakeholders who voiced their outrage over the tariffs Eskom was charging the Billiton Group of companies for electricity to its smelters. Among others:

- A representative of the National Consumer Forum is quoted as stating:

> "*This is outrageous. Consumers in South Africa don't even have enough money to put food on the table but they still have to pay 41 cents/Kwh. It is totally irrational and I am outraged!*"

- Cosatu's representative is quoted therein as saying:

> "*This confirms everything we have feared. It is basic unfairness, where the poorest pay the most.*"

[90] The Times article even stated that the contract Eskom had with Mozal (Motraco) was signed in 1997 and would expire in 2025. This period differs from the one Eskom purported to give in its response. Surely some certainty is required on this aspect and it can only be obtained by seeing the relevant documents.

[91] According to the minutes of the Parliament's Portfolio Committee on Public Enterprises held on 6 October 2009 where the issue of tariffs in general

and in respect of the aluminium smelters specifically were some of the issues discussed, Eskom's CEO (Mr Maroga) is reported to have stated the following:

> "*In terms of differences in tariffs for different consumers, there were two kinds of customers. There were consumers who were subject to standard tariffs, which increased every year. The second type of consumers were subject to special pricing agreements. There was a small section in the industrial sector subject to special agreements such as the aluminium industry. On average, the industrial customers subsidised the rest of the customer base when one looked at costs to suppliers.*"

[92] From the above, it becomes clear that aluminium smelters do not pay what other users or consumers pay, inclusive of other industrial customers.

[93] The papers herein show that the issue relating to Eskom's supply of electricity to the aluminium smelters evoked a heated debate or exchanges in the Portfolio Committee. For example, an exchange between Mr Maroga and Parliamentarian Mr C Gololo went something like this:

> Gololo: The aluminium smelters are electricity guzzlers and yet they are exempt from tariff increments because the price of aluminium in the market fluctuated. He asked if Eskom found that they lost a lot of money because of this. He also wanted to know of the percentages for reserve margins regarding electricity security.

Mr Maroga's response: He stated that the aluminium contracts represented in terms of capacity, about 5% of the system. It was important that Eskom learn from this and focus more closely on long term contracts and how they reflected the reality of what was happening in the country presently (meaning the load sheddings then underway). He added that Eskom wanted to do this in a way that did not leave an impression that they could not fulfil their commitments. He further stated that the reserve margins were not where they should be and that new power stations were needed to ensure electricity supply security. He put the current reserve margin then at 10% as against the required reserve margin of 15%.

[94] The Chairperson of the Parliamentary Portfolio Committee, Ms Veitjie Mentoor is reported to have expressed herself on this aspect as follows:

> "*Mentoor cautioned Eskom and 'any other' state entity from entering into contracts with big companies or big business that they could not simply resile from in the event of things going out of hand, like economic meltdowns we are experiencing and all suffering from – and we cannot escape out of these contracts.*

> *So we want you to go and take a fine comb and go through that contract and see whether we cannot escape out of it or whether we cannot renegotiate it.*"

[95] I agree with the applicants' contention that the above also demonstrate a significant public interest in the aluminium smelter agreements.

[96] Mr Maroga also told that Parliamentary Portfolio Committee that aluminium smelters were not exempt from tariff increases. This is at variance with the fact that there are special contracts in place between it and the smelter owners which are of a fixed nature over a long period or those agreements tie the electricity price to the smelters to a number of external factors, such as the price of aluminium. These aspects were not adequately explained in the answering affidavits despite the respondents being specifically called upon to do so. Some certainty or closure is needed on these agreements or electricity supply to the smelters.

[97] What raised more concern was a report in Business Day newspaper of 7 October 2009 wherein Mr Maroga was reported to have stated that he told the Portfolio Committee that Eskom was engaged in talks to renegotiate long term aluminium contracts with the aim of declining them from the aluminium price, which had fallen sharply during the global financial crisis. He is also reported to have stated that the commodity linked contracts are being blamed for the utility's record annual loss and that Billiton was resisting the move.

[98] The then Chairperson of the Eskom Board Mr Bobby Godsell, was also reported to have said the following in an article published in Creamer Media's Engineering News of 27 August 2009:

> "*Eskom would be engaging its commodity-linked customers with a view to achieving more equitable pricing. These contracts were concluded a long time ago, under very different circumstances. These customers have long term as well as short term interests, and we will simply sit down with them and explain why these contracts are problematic, not only in price, but also because of the accounting uncertainty that they impose, that makes proper strategic management of resources very difficult …*"

[99] With regards to the R9,7 million loss Mr Godsell is also reported to have said:

> "*The scale of Eskom's financial losses is clearly unsustainable.*"

[100] It is common cause that the muted renegotiations never took place or there is no indication that they were ever embarked upon.

[101] According to the papers herein Eskom's total net base load generation capacity was 34 294 megawatts at the time. For security of supply the required reserve margin is 15%. The current reserve margin is 10%. The above situation precipitated the massive blackouts or "*load shedding*" as Eskom liked to call them colloquially, that occurred throughout South Africa in 2008. The Hillside Smelter consumed 1100 megawatts and the Mozal Smelter consumed 845 megawatts. The two smelters on their own, alone,

consumed 5,68% of Eskom's total base load capacity at the time. Taken to its logical conclusion, so argued the applicant, which argument was not convincingly refuted, if Eskom had not been supplying electricity to the smelters in terms of these two contracts in 2008, the public would have faced neither blackouts nor if they did occur, they would have been fewer or not to the same massive extent.

[102] The above, in my considered view, makes the terms of the contracts, more particularly their duration, highly relevant to the stability of the public's electricity supply. Disclosure of same therefore is in the public interest. What remains to be determined is whether the respondents' refusal to so disclose is justified by section 37(1)(a) of PAIA.

[103] In its latest financial statements for the relevant period i.e. for the year ended 31 December 2003 the following was noted:

> "*<u>Customised Pricing Arrangements</u>*
>
> *Eskom has entered into a number of agreements to supply electricity to electricity intensive industries where the price is influenced by commodity prices, foreign exchange rates and production price indices. Due to the long term nature of the contracts, relevant and reliable forward pricing data is unavailable for many of the inputs needed in determining the value. Estimates of value, given various simulations of forward prices, yield a range of values that is so variable and the possibilities of the various outcomes so numerous that the usefulness of estimates of value is negated. Disclosure has been provided to reflect the economic characteristics and inputs that are necessary in determining a range of values. The following disclosure has been provided according to the type of commodity to which the pricing agreement is linked:*

Commodity	*Pricing Component*	*Mechanism*	*Period*	*Annual Commodity Tonnage*	*% Electricity Revenue*
Aluminium	*3 months forward*	*Monthly consumption of these*	*2002*	*113 632*	*5.7*
	Aluminium price US Dollar/R	*Contracts converted at the ruling 3 months LME aluminium price converted to Rand at the then ruling spot US Dollar rate*	*2003* *2004-2012* *2013-2020* *2021-2025*	*106 500* *116 880* *200 978* *84 098*	*4.8*

"

[104] According to the above, the contracts will continue to exist until at least 2025. In fact the above indicate that Eskom's exposure in respect of the two aluminium contracts will increase in future from 116 880 tons per annum to 200 978 tons per annum for the period 2013 to 2020.

[105] Billiton confirms the above statement or situation in their 2009 Annual Report. In respect of Mozal the report states that:

> "*Mozal sources power generated by Eskom via Motraco, a transmission joint venture between Eskom and the national electricity utilities of Mozambique and Swaziland. Tariffs are fixed through to 2012 and will be linked to the LME aluminium price thereafter.*"

[106] In relation to section 36(1)(b) Billiton has put up facts to show that disclosure of the information sought by the applicants would reasonably be expected to result in some commercial harm. In a competitive environment such as the aluminium industry, competition is all about input costs. If

Billiton's electricity costs were to become publicly known, it will not be uncommon for its competitors to be able to calculate, with a high degree of accuracy, its costs of production. It would enable Billiton's competitors to predict accurately Billiton's response to fluctuations in the London Metal Exchange (LME) prices.

[107] As stated above, knowledge of Billiton's costs of production would enable Billiton's competitors to alter their commercial behaviour to take advantage of their knowledge of Billiton's position. They would then be able to engage in competitive behaviour with the advantage of knowledge which Billiton did not have of them. They may ultimately end up undermining Billiton's ability to generate a return on, and to recoup, the substantial capital investment required to engage in expansion projects.

[108] In relation to section 36(1)(c) Billiton has put up facts establishing reasonable grounds to show a probability that knowledge of their production costs would enable competitors to alter their commercial behaviour to take advantage of that knowledge of Billiton's position. There are also probabilities that Billiton's suppliers and customers would also be able to use this knowledge or information to calculate its cost of production and/or use this information in their negotiations with them.

[109] On the papers before this Court it cannot be seriously said that Billiton's version on the pricing structures is so far-fetched or clearly untenable that this Court could justifiably reject them merely on the papers.

[110] It is so that business concerns are in constant competition with one another and would normally keep their pricing structures confidential. However, it has been demonstrated in the papers herein as well as argued in this Court that the pricing structures of almost all aluminium players the world over are readily available upon payment of a fee in the region of R200 000. Deutsche Bank has aluminium values in respect of all role players and even Hillside Smelter is regarded as being too small a player to attract any envious competition or competitors. The Brook Hunt Brochure also has data of almost all pricing structures for aluminium producers.

[111] The applicants challenged the above contention. The applicants complain about the steep price for accessing this information as they plead poverty in relation to the Billiton Group.

[112] Billiton's gripe with the disclosure of the pricing formulae is that their competition would have been led in through the back door into the inner sanctity of their trade secrets. They contend further that the disclosure will cause or prompt their competitors to alter their commercial behaviour and take advantage of the knowledge they would have gained of Billiton's pricing structures.

[113] It is not uncommon that a business player would feel uncomfortable with its inner workings falling into the hands of its competition. Such discomfort may be adequate justification for the trade secret holder to resist a request for access to a document or information relying on section 37(1)(a) of PAIA.

[114] The applicants aver that the respondents' fears as aforementioned are unjustified as their pricing structures are in the public domain as same can be accessed through Brooks Hunt.

[115] In any competitive environment, competition may be all about input costs. It is so that should Billiton's electricity costs be publicly available, the possibility and probability of its competitors being able to use same to calculate and adjust their own production costs cannot be said to be remote. Their competitors may be then enabled to predict and calculate accurately, Billiton's responses to fluctuations in the LME prices, thus gaining an unfair advantage. They could also be in a position to engage in competitive behaviour with the advantage of knowledge which Billiton on the other hand did not have of them. Billiton's ability to generate a return on, and to recoup the substantial capital investment required for expansion projects may be prejudiced.

[116] On the facts placed before me I am satisfied that Billiton has established that it can justly rely on sections of PAIA to resist the request for the pricing formulas. It has shown that knowledge of its costs of production could enable its competitors to alter their commercial behaviour to take advantage of their knowledge of Billiton's position. These competitors would then be able to engage in competitive behaviour with the advantage of this knowledge, which advantage Billiton would not be having as it would be in the dark about their (competitors') states of affairs. The competitors may also use

such knowledge to calculate Billiton's costs of production and then use the information in their negotiations with it.

DISPUTE OF FACTS

[117] On this aspect there are two diametrically opposed view points, i.e. the applicants' and the respondents'. The respondents contend that in such a situation, where there is a dispute of fact on the probability of harm, such a dispute must be resolved in their favour unless their version is so far-fetched or clearly untenable that the court is justified in rejecting it merely on the papers. The principles in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) kick in, to be precise. Two questions are relevant:

1. Is there ground for refusal made out?

2. If so, has the respondents made out a case for the exception?

In answering these the respondents' case should be relied on.

[118] In cases of this kind the public body bears the burden of proving that secrecy is justified. This burden of proof casts an evidential burden on the public body to allege sufficient facts that will justify the refusal.

[119] As held in the *President of RSA v M&G Media* case, (p 7 para [15]), true disputes of fact will seldom arise because the material facts will generally be within the peculiar knowledge of the public body. However, if a genuine dispute of fact does occur the court must scrutinise the affidavits put up by the public body with particular care and, in the exercise of its wide discretion, the court should not hesitate to allow *viva voce* evidence that may entail also allowing cross-examination of the witnesses who deposed to the affidavits to ascertain the veracity of their stories. Because the officials of the public body would more often than not have direct knowledge of facts that are material to justifying secrecy, there may be instances where the applicants may rely on hearsay evidence. In such cases the court has a wide discretion to allow for the admission of hearsay evidence though the use of section 3 of the Law of Evidence Amendment Act 45 of 1988 to overcome any difficulty.

[120] After evaluating the totality of evidence before me and considering the matter I have come to the conclusion that in the light of the conclusion I am about to reach in this application, this aspect of disputes of facts have no substance. The final ruling can still be made without any prejudice to any of the parties arising out of the rejection of the issue relating to a dispute of facts. In any event whatever is supposed to be a dispute of facts can, in my view, be determined on the papers herein.

DUTY OF CONFIDENCE OWED TO THIRD PARTIES

[121] The respondents have produced and handed to the applicants copies of a confidentiality agreement between Eskom and Billiton.

[122] As stated above, section 37(91)(a) of PAIA decrees that an information officer must refuse a request for access to a record of the public body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of the agreement.

[123] The general rule is that where there is a confidentiality agreement in place and the harm of the kind contemplated in section 36(1)(b) and 36(1)(c) had not been established, this was a bar to section 37(1)(a) being applied.

[124] Both sides rely on the principles laid down in *Transnet Ltd v SA Metal Machinery Co* case (*supra*). The material part in issue is paragraph [88] thereof where Howie JP is quoted as having said the following:

> "*The respondent's right in submitting that if disclosure of the rates would not be likely to cause the harm referred to in s. 36(1)(b) (the court a quo's finding as to which is not appealed against) and could not reasonably be expected to result in probable harm of the kinds referred to in s. 36(1)(c) (which I have found to be the case) there is no basis to conclude that if Inter Waste did indeed sue the appellant for breach of confidentiality, the latter would be at any risk of an adverse finding whether as to material breach entitling cancellation or as to an award of damages. The appellant's case therefore fails in regard to sect 37(1)(a).*"

[125] The applicants contended that the above *dictum* resonated with their case and as such Eskom should be ordered to supply the information requested. On the other hand, the respondents argued and submitted that

the above *obiter dictum* was misunderstood or misapplied by the applicants. They contended that Howie JP instead held or meant that the confidentiality agreement in issue in the *Transnet* case was applicable only to the period before the tender contract was concluded and that as such there was no interest to protect.

[126] It was the applicant's further contention and argument that if all public bodies were allowed to hide behind confidentiality agreements or clauses in their agreements to avoid disclosure, that would be a negation of the spirit and purpose of PAIA.

[127] After perusing all the attachments to the affidavits it came to my knowledge that the confidentiality agreement relied on was not applicable to the agreements in issue here. They were confidentiality agreements between or relating to Hillside Smelters and Billiton before the present agreements were signed. The agreements related to the supply of electricity to Bayside aluminium pot lines.

[128] Over and above that, in its letter of refusal to disclose on the basis of confidentiality, Eskom gave no details as to the nature of this confidence, whether it arises from the agreements themselves or some other basis, what aspects of the agreements the duty of confidence covers, and whether the duty of confidence contains any exceptions, for example, in relation to disclosures required by law or pursuant to a court order.

[129] In terms of section 25(3)(a) of PAIA Eskom was enjoined or expected to provide adequate reasons for the refusal. It is my considered view that Eskom did not comply with the requirements of the above section. From Eskom's answering affidavit it appears also that Eskom only gave due regard to representations from Billiton not to grant the applicants' request for access to the information. That also falls foul of section 49(1)(a) of PAIA. Eskom are in my view being nudged from behind by Billiton to refuse to disclose and they are helplessly trudging forward or being stringed along.

SEVERABILITY

[130] From the aforegoing, at this stage it appears that we have a mixed bag of scenarios when sections 34, 36 and 37 of PAIA are applied to the facts of this case. The next question to be answered is whether, in the event of the above prevailing, there is a case made to severe those aspects in the application for disclosure that should be disclosed as of law and right from those that may be of a refusable and confidential nature, like the pricing formulas.

[131] Section 28 of PAIA provides as follows:

> "*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."

[132] Eskom did not produce or provide any document whatsoever. As a result, it cannot be determined what should be severable or what is not. What Eskom and Billiton are saying is that Eskom would have already considered this aspect when it issued out its responses which included the refusals. This Court is thus not in any position to say whether any part can be severed from any whole (document) in such a manner that it will not impugn on the tone and content of the rest of the remaining document.

PUBLIC INTEREST OVERRIDE

[133] Section 46 of PAIA has been promulgated specifically to serve or act as a mandatory public interest override provision where one or more grounds of refusal have been established. The section's requirements are mandatory: where access to a record is denied under section 36(1)(b) or (c) or section 37(1)(a), an information officer must nonetheless grant access to the record if it is in the public interest to do so.

[134] For elucidatory purposes I repeat the wording of the section:

"*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 34(1), 36(1) or 37(1) […] if –*

(a) the disclosure of the record would reveal evidence of –

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) an imminent and serious public safety or environmental risk; and

(b) *the public interest in the disclosure of the record clearly outweighs the harm contemplated in question.*"

[135] The requirements for the granting of access under section 46 are the following:

1. If the disclosure of the record would reveal evidence of a substantial breach of the law or an imminent and serious public safety or environmental risk; and

2. Where the public interest in the disclosure clearly outweighs the harm contemplated in the section.

[136] In respect of private bodies, mandatory disclosure in the public interest is governed by section 70 of PAIA whose provisions are identical to those in section 46, the only difference in both being the use of the term "*public*" in section 46 and "*private*" in section 70. The override for public bodies operates in respect of all the grounds for refusal that may be used by a public body except one – the ground of refusal relating to certain records of the SA

Revenue Service. In respect of the public interest override for private bodies, it is applicable to all the grounds of or for refusal without any exception.

[137] The override is an exception to the operation of the grounds of refusal to which it is applicable. The override is only operative once it has been determined that one or more of the grounds of refusal apply to a particular record. If none of the grounds is applicable the requested information must be disclosed. The effect of the override is that, notwithstanding the applicability of a ground of refusal, the record must nonetheless be disclosed. Where it does apply, the public interest override equals disclosure, i.e. the release of the requested record is mandatory.

See: Currie & Klaaren: *The Promotion of Access to Information Act: A Commentary,* 2002, at 108.

[138] There are two schools of thought over the applicability of the requirements of section 46. The first school of thought suggest that where the first condition, e.g., that a record reveals evidence of a substantial contravention of the law, is satisfied, then the second condition or requirement, i.e. of the public interest in the disclosure outweighing the harm that disclosure will entail, will necessarily also have been satisfied. I go along with the views of the second school of thought, who are of the view that the public interest in the disclosure of a record that reveals evidence of an imminent and serious public safety or environmental risk may not necessarily

outweigh the harm contemplated. The wording of section 46 clearly contemplates a two-part test.

[139] The term "*public interest*" in my view, may mean more than the meagre aspect specifically identified in the section. It may include the public interest in upholding the law as well as the publics' awareness of public safety or environmental risks. There may also be the public interest in furthering the general goals of the Act.

[140] In their heads of argument and arguments in court both sides engaged in academic pontifications and splitting of hairs about what is meant by "*substantial contraventions of or failure to comply with the law*" and "*… an imminent and serious public safety or environmental risk*".

[141] My view is that if given their ordinary grammatical meanings the above expressions do not need any "*arm twisting*" to understand what they imply or how they should be interpreted.

[142] The second respondent's argument and contention on compliance with the relevant statutory provisions, notably, the Electricity Regulation Act 4 of 2006 and the Electricity Act 41 of 1987 is that for the fact that Eskom or rather the Regulator has approved the pricing of the contracts in issue here, it is common cause or implied that they are not in contravention of the Acts. They

go further as to argue or contend that in any event there is no suggestion of a substantial contravention of the law.

[143] Public safety or environmental risk is defined as follows:

> "… *means harm or risk to the environment or the public (including individuals in their work place) associated with -*
>
> *(a) a product or service which is available to the public;*
>
> *(b) a substance released into the environment, including, but not limited to, the work place;*
>
> *(c) a substance intended for human or animal consumption;*
>
> *(d) a means of public transport; or*
>
> (e) *an installation or manufacturing process or substance which is used in that installation or process.*"

[144] The respondents (second and third) accept that –

> "*… it is important to remember that the requirement is such that the record itself must reveal evidence of the imminent and serious risk in question …*"

[145] The obvious flaw in the above contention is that the respondents or Eskom at the behest of the second and third respondents is refusing to make available the contracts or records from which such imminent and serious risk can be determined.

[146] It is a fact that Eskom incurred substantial losses and projects further losses due to its exposure to price fluctuations linked to the aluminium price. It is also a fact that the Billiton Group is part of the equation contributory to this through the contracts it has with Eskom. Even Eskom acknowledges this when it states that its losses do not arise "*solely*" from the contracts. The term or word "*solely*" may be interpreted to mean the contracts do form part of the loss making process, though not on their own or alone.

[147] South Africa has been experiencing power outages – the so-called "*load shedding*" since 2008. Residents face regular and sustained price increases on electricity while the Billiton Group's businesses enjoy security of supply without having to worry about increases until 2026 at the least and 2028 at the most. A few weeks earlier as at the date of this judgment a hefty price increase was implemented and a similarly hefty increase is already scheduled for next year. The applicants contend and submit that a disclosure of the terms of the agreements between Eskom and the Billiton Group of companies could shed a light on the perceptions held that the contracts contribute towards insecurity of electricity supply.

[148] Based on the figures set out above that the two Billiton smelters consume 5,68% of Eskom's total base load capacity and that Eskom's base load deficiency is almost the same percentage, the conclusions by the applicants and the general public that the extent of the rolling electricity blackouts experienced in South Africa since 2008 would have been substantially reduced or completely eliminated make sense. Such

conclusions and perceptions can be dealt with and laid to rest by a disclosure of the documents relevant to the supply of electricity to the Billiton smelters.

[149] An overwhelming majority of services and conveniences rendered to the general public is dependent on the supply of electricity. If electricity supply is unavailable to ordinary households, unhealthy power supplies like the use of coal fired stoves or braziers may be utilised. The environmental and health dangers associated with these alternative power supplies are obvious. People die from smoke or gas/fumes inhalations. Lung deceases increase resulting in unbearable pressure on health care facilities. Fatal consequences most times follow. These aspects are linked to substances released into the environment.

[150] Rail or commuter services are dependent on electricity. A short supply of electricity can cause enormous harm to the economy of the country as well as rolling mass actions associated with community strike actions. Workers may lose their jobs or have their earnings drastically reduced due to late reporting at work. That the above are serious public safety or environmental risks cannot be gainsaid. They are relatively imminent.

[151] It is not clear or settled whether the disclosure of the records would reveal a substantial contravention or failure to comply with the law, primarily because there are no documents to determine this. It is the words of the one party against the other. This situation brings into reckoning the issue of public

interest – whether the harm contemplated in the refusal to disclose is outweighed by the public interest.

[152] On the other hand it is my considered view and finding that the disclosure of the records would reveal evidence of an imminent and serious public safety or environmental risk.

[153] It is the law that if one or more of the requirements set out in section 46 are present, then despite the fact that disclosure could be validly refused in terms of sections 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45 of PAIA, the information officer of a public body must still grant a request for access to a record of the body contemplated.

[154] It is my finding that the applicants have made out a case for access to the information sought in terms of the above principles.

CONSTITUTIONAL CHALLENGE

[155] The applicants argued that should this Court find that a disclosure or access should not be ordered, then the provisions of sections 37(1)(a) and 46 of PAIA should be ruled unconstitutional.

[156] In my view, without making any finding thereon, the above is a strange submission indeed. However, in the light of my finding that a disclosure

should be ordered, the whole aspect becomes academic. No pronouncement or ruling is made on the constitutionality of the abovementioned sections. In the same breath I see no justification, as argued and submitted by second and third respondents, to postpone this matter for further affidavits.

COSTS

[157] Eskom, the first respondent, argues that since it abides the court's decision, at the most a costs order against it should be up to the moment it deposed to its answering affidavit.

[158] It is common cause that Eskom has to date refused to disclose information held by itself. The fact that it was egged on by the second and third respondents to do so is, in my view, immaterial. For the reasons already advanced in this judgment, Eskom cannot escape a costs order against it in the peculiar circumstances of this case. Even though they professed to abide the ruling of this Court, its counsel made a full submission and argument. In my view, Eskom wishes to make a cake and also eat it.

[159] It is rule of thumb that costs follow the suit.

[160] The fifth respondent, i.e. the Minister of Justice and Constitutional Development, confined its involvement in this matter on the constitutionality of sections 37 and 46 of PAIA. They sought leave at the start of arguments herein to file supplementary affidavits on the matter. I did not allow them to

do so outright. I ruled that I may re-consider my ruling at the end of arguments herein.

[161] Only if and when the issue of constitutionality had sufficiently raised its head during the entire arguments period or process would there have been a need to allow the filing of supplementary affidavits, not only to the fifth respondents but also to all the parties herein. At the end of the day I came to the conclusion that there was no need to file supplementary affidavits on the issue of constitutionality.

[162] Although this matter cannot be categorised as being a constitutional one it is nevertheless constitutional in nature. The principles governing the awarding of costs in cases such as this one are set out in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC): The court held among others that –

- the starting point had to be the nature of the issues. That equal protection under the law required that costs awards not be dependent on whether the parties were acting in their own interests or in the public interest, or whether they were indigent or well endowed. The primary consideration in constitutional litigation had to be the way in which a costs order would hinder or promote the advancement of constitutional justice;

- what mattered was not the nature of the parties or the causes they advanced, but the character of the litigation and their conduct in pursuit of it; i.e. whether it had been undertaken to assert constitutional rights and whether there had been impropriety in the manner in which the litigation had been undertaken;

- private parties that lost in constitutional litigation against the state should not, as a rule, be mulcted in costs; i.e. that when a private party sought to assert a constitutional right against the government and failed, each party should normally bear its own costs;

- particularly powerful reasons had to exist for a court not to award costs against the state in favour of a private litigant who achieved substantial success in proceedings against it; and

- the principle that people should not be discouraged from pursuing constitutional claims should be applied in the awarding of costs in cases where private parties sued the state for its failure to fulfil its obligation to regulate competing claims between private parties, irrespective of the number of private parties seeking to support or oppose the state's posture in such litigation.

[163] Under the circumstances cost orders should be awarded as follows in this matter:

- Against the first respondent (Eskom) – costs to be awarded up to but excluding the last day of court, i.e. date of argument. To include costs of two counsel.

- Against the second and third respondents – costs of suit which includes the costs of two counsel except for the date of argument where it should not be for two counsel, ie costs of one counsel for the last day.

- Against the fourth respondent – no order as to costs.

- Against the fifth respondent – costs including costs of two counsel up to the filing of answering affidavits.

CONCLUSION

[164] The respondents have not justified a refusal for access to the documents sought, held by Eskom, on the basis of the ground of signatures and duration of the agreements. They have however justified a refusal on the grounds of the pricing formulas and the duty of confidence owed to third parties. The severability principle cannot be applied for the reasons advanced above. Up to this far the applicants are partially successful and partially unsuccessful.

[165] However, on the basis of the public interest override in terms of section 46 of PAIA, it is in the public interests that the first respondent disclose to the applicants the information or data as well as the documents sought in this application.

ORDER

[166] The following order is made:

166.1 The first respondent's decision to refuse to fully grant or grant the applicants' request for access to information dated 18 September 2009 is hereby set aside;

166.2 The first respondent is directed to provide or furnish to the applicants all the information and records as fully set out hereunder:

166.2.1 All and any documents, or relevant extracts of documents, evidencing the formula for and/or manner of the determination of the price for the supply of electricity by Eskom Holdings Limited or its affiliates to:

166.2.1.1 BHP Billiton plc or any of its affiliates or Hillside Aluminium Limited for the operation of the Hillside Aluminium Smelter in Richards Bay, South Africa; and

166.2.1.2 BHP Billiton plc or any of its affiliates or Mozambique Transmission Company SARL or Mozal SARL for the operation of the Mozal Aluminium Smelter in Maputo, Mozambique.

166.2.2 All and any documents, or relevant extracts of documents, evidencing the identities of all signatories to all written agreements between Eskom Holdings Limited or its affiliates and any other party, for the supply of electricity to:

166.2.2.1 BHP Billiton plc or any of its affiliates or Hillside Aluminium Limited for the operation of the Hillside Aluminium Smelter in Richards Bay, South Africa; and

166.2.2.2 BHP Billiton plc or any of its affiliates or Mozambique Transmission Company SARL or Mozal SARL for the operation of the Mozal Aluminium Smelter in Maputo, Mozambique.

166.2.3 All and any documents, or relevant extracts of documents, evidencing the date of commencement and date of termination of all written agreements between Eskom Holdings Limited or its affiliates and any other party, for the supply of electricity to:

166.2.3.1 BHP Billiton plc or any of its affiliates or Hillside Aluminium Limited for the operation of the Hillside Aluminium Smelter in Richards Bay, South Africa;

166.2.3.2 BHP Billiton plc or any of its affiliates or Mozambique Transmission Company SARL or Mozal SARL for the operation of the Mozal Aluminium Smelter in Maputo, Mozambique.

166.3 The point *in limine* raised by the second and third respondents is dismissed with costs.

166.4 The applicants are awarded the costs hereof as follows:

166.4.1 Against the first respondent:

(Eskom): Costs against them up to the filing of their answering affidavit but excluding the date of argument. The costs to include the costs of two counsel;

166.4.2 Against the second and third respondents:

Costs of suit which include the costs of two counsel, jointly and severally, the one paying, the other being absolved;

166.4.3 Against the fourth respondent:

No order of costs;

166.4.4 Against the fifth respondent:

Costs including the costs of two counsel up to the filing of its answering affidavit but excluding the day of argument.

_____

N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE APPLICANTS	STEVEN BUDLENDER
INSTRUCTED BY	WILLEM DE KLERK ATTORNEYS c/o GARRAT MBUYISA NEALE PARKHURST, JOHANNESBURG TEL: 011 717 8562/37 FAX: 011 486 4506
FOR THE FIRST RESPONDENT	PAUL KENNEDY SC
INSTRUCTED BY	BOWMAN GILFILIAN INC c/o KEITH SUTCLIFFE & ASSOCIATES MELROSE ESTATE, JOHANNESBURG TEL: 011 699 9000 / 011 789 8763 FAX: 011 699 9001
FOR THE SECOND AND THIRD RESPONDENTS	KIRSTY McLEAN
INSTRUCTED BY	MERVIN TABACK INC PARKTOWN, JOHANNESBURG TEL: 011 358 7700 FAX: 011 358 7800
FOR THE FIFTH RESPONDENT	KAMESHNI PILLAY

INSTRUCTED BY	THE STATE ATTORNEY JOHANNESBURG TEL: 011 330 7660 FAX: 011 337 6200
DATE OF ARGUMENT	2011-04-11
DATE OF JUDGMENT	2011-07-29