M&G MEDIA LTD AND OTHERS v 2010 FIFA WORLD CUP ORGANISING COMMITTEE SOUTH AFRICA LTD AND ANOTHER 2011 (5) SA 163 (GSJ) A

2011 (5) SA p163

Citation	2011 (5) SA 163 (GSJ)
Case No	09/51422
Court	South Gauteng High Court, Johannesburg
Judge	Morison AJ
Heard	May 24, 2010
Judgment	June 8, 2010
Counsel	*GM Budlender SC* (with *KS Hofmeyr*) for the applicants. *APH Cockrell SC* for the respondents. *A Gotz* (with *K Millard*) for the amicus.
Annotations	Link to Case Annotations

B

Flynote : Sleutelwoorde

Administrative law — Access to information — Access to information held by public body — Public body — What constitutes — FIFA World Cup Organising Committee — Board members including cabinet ministers — Public funds C expended in course of activities — Onward disbursement to third parties — No clear evidence to distinguish public and private funds among various transactions — Transparency and accountability to follow government funds — Organising Committee acting in terms of legislation when records in respect of tenders brought into existence — Promotion of Access to Information Act 2 of 2000, s 1 sv 'public body' (b)(ii). D

Administrative law — Access to information — Access to information held by private body — Right to freedom of expression — Press and other media — Seeking access to tender records of FIFA World Cup Organising Committee — Duty to disclose arising from acceptance of public funds — Access to information constitutionally entrenched right — Refusal a limitation that had E to be regarded as the exception — Harm to public from keeping records secret outweighing harm of publication — Promotion of Access to Information Act 2 of 2000, s 50(1)(a) and Constitution, s 16(1).

Headnote : Kopnota

The *Mail & Guardian* newspaper sought access under the Promotion of Access to Information Act 2 of 2000 (PAIA) to certain records relating to the tender F processes engaged in by the 2010 FIFA World Cup Organising Committee South Africa Ltd (the committee). A 'public body' is defined in s 1 of PAIA as:

'. . .
(b) any other functionary or institution when —
(i) . . . G
(ii) exercising a public power or performing a public function in terms of any legislation.'

The public-body request

According to the applicants the records were those of a public body because the committee's function was to host the 2010 World Cup, a public activity involving the entire country. The respondents argued, on the other hand, H that the function of the committee had been to run a private tender process involving only the tenderers and the committee, and that the records were thus those of a private body. The respondents proposed an approach that did not consider the overall function or activity of the committee — the organisation of the 2010 World Cup — but rather the specific nature of its function when the record was created or acquired, namely conducting a I private tender process.
Held, that the committee's award of tenders could not be said to have happened in isolation from government: on the contrary, the presence of eight Cabinet Ministers on its board weighed heavily in favour of a conclusion that its activities were those of a public body. (Paragraphs [230] – [235] at 201G – 202E.) J

A *Held*, further, that the critical question *in casu* was whether the committee had disbursed public funds. If so, it would make no difference if it had conducted a tender for privately funded disbursements or intended to conclude a private contract without any tender process preceding it: the fact that it had been in receipt of and disbursed public funds was sufficient to make its activities public, and such activity did not cease being 'public' just B because it could also be performed by private bodies. (Paragraphs [240] – [242] and [246] at 203B – E and 204C – F.)
Held, further, that the origin of the funds was significant since an entity that received and disbursed public funds was either exercising a public power or performing a public function. If it received both State and private funds, then it acted as a public body in respect of the former. To draw too fine a C distinction between the entity's public and private-funded activities would place too much trust in its accounting practices. There was therefore no reason why the public should have to limit its rights under PAIA to anything less than a full disclosure of the records, and if this involved some invasion of privacy, it was a cost that had to be paid in the greater public interest. (Paragraphs [259] – [260] at 206G – I.)
D *Held*, further, that when public funds passed directly or indirectly into the control of an entity for onward payment to others, it performed a public function or exercised a public power irrespective of whether the function performed or the power exercised was typically governmental or subject to government control. Subject to certain limitations, where government funds were being disbursed by a 'private' corporate entity, the right to access to information E applied to all records relating to such expenditure. (Paragraphs [263] and [267] at 207C – D and 207I.)
Held, accordingly, that the receipt of public funds by the committee for onward disbursement to third parties constituted the performance of a public function or the exercise of a public power. (Paragraph [277] at 210D.)
Held, further, that it was in the present case impractical to distinguish between F the committee's disbursement of public versus private funds. Once a body accepted the responsibilities that came with receipt of public funds and the duty to disperse them to others, the reach of a public-body information request could no longer be limited to records relating only to those funds unless it was clear — which it was not in the present case — that public funds were kept separate from other funds handled by that body. (Paragraph [278] at 210E – H.) G
Held, further, that government was found wherever its funds went, and that transparency and accountability had to follow. The agency and object of the distribution were irrelevant: if the funds emanated from the public, the agency was performing a public function or exercising a public power. (Paragraph [282] at 212A – B.)
H *Held*, accordingly, that the committee had performed public functions in relation to its tender records. (Paragraph [286] at 213B.)
In terms of legislation
Held, that whether the committee had performed a public function or exercised a public

power was not, however, decisive. To qualify as a public body, it had to have exercised public power or performed a public function 'in terms I of legislation' when it invited and awarded tenders. (Paragraph [292] at 213H.)
The 2010 FIFA World Cup South Africa Special Measures Act 11 of 2006 was enacted to give effect to the Organising Association Agreement between FIFA and SAFA and to the guarantees issued by the government to FIFA for the hosting and staging of the 2010 FIFA World Cup South Africa; and to J provide for matters connected therewith. The Minister of Trade and

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Industry, acting in terms of s 15A of the Merchandise Marks Act 17 of 1941, A issued a protected event notice designating the World Cup as a 'protected event'.
Held, that the committee had, by enjoying the protection of the protected event notice and the Act, acted in terms of that legislation by staging the very event that was the subject of the notice. (Paragraph [313] at 218G.) B
Held, further, that the intention of the legislature in promulgating the protected event notice was to bind the committee to observe the provisions of the procurement statute. (Paragraph [315] at 218J – 219C.)
Held, further, that the committee had acted in terms of legislation when it exercised its powers under the bylaws passed by the Johannesburg and Tshwane Local Authorities to restrict the right of access to ordinarily public spaces. (Paragraphs [316] and [318] at 219D – E and 219I – J.) C
Held, further, that it was, in addition, a condition of the 'protected event' status of the Word Cup that the committee had to act in accordance with the legislation referred to in the Government Notice. (Paragraph 325 at 221C.)
Held, accordingly, that the committee had acted in terms of legislation, or as a 'public body' as intended in s 1*(b)*(ii) of PAIA, when the records in respect of its tenders were brought into existence. (Paragraph [326] at 221D – E.) D
The private-body request
Section 50(1)*(a)* of PAIA provided that 'a requester must be given access to any record of a private body if . . . that record is required for the exercise or protection of any rights'.
Held, that PAIA required requesters to show a need to know the information — a E connection between the information requested and the protection and enforcement of rights — but that the degree of connection required could not be such as to frustrate the very purpose of PAIA. This meant that the words 'required for the exercise or protection of any rights' had to be interpreted so as to enable access to such information as would enhance and promote the exercise and protection of rights. (Paragraph [354] at 227F – G.)
Held, further, that the main question was whether the requested records were F reasonably required for the exercise of the constitutional right to freedom of expression in s 16(1) of the Constitution: s 16(1)*(a)* guaranteed the freedom of the press and other media, while s 16(1)*(b)* protected the freedom to receive or impart information or ideas, and underpinning both of these was a recognition of the public's right to know. (Paragraphs [366] – [368] at 230D – F.) G
Held, further, that a general appeal to the essential role of the print and electronic media in our society did not suffice since the fact remained that it had to be shown that the records were required for the exercise or protection of the s 16(1) right. The critical enquiry was whether the public had a 'right to know' the information contained in the records in question. Since the H public was the indirect source of a significant portion of the funds spent, it had a right to know how the disbursement had proceeded, which right correlated with a duty on the part of the committee to provide the requested information. (Paragraphs [372] – [377] at 231B – I.)
Held, accordingly, that the applicants had satisfied the requirements of PAIA for access to the records of a private body. (Paragraph [388] at 233D.) I
Grounds for refusal under PAIA

Held, that the harm that would be incurred from publication would be far less than the harm done to the right to access to information if these records were to be kept secret. FIFA's business model was of its own making: it had awarded the 2010 World Cup to South Africa with full knowledge of its status as a constitutional democracy in which access to information was a guaranteed right. (Paragraph [398] at 235E – F.) J

A *Held*, further, that any limitation of access to information constituted a limitation of a constitutional right, and thus had to be approached as the exception rather than the rule. The committee's stance in seeking to keep its conduct hidden from public scrutiny was insupportable since by doing so it could keep from the public documents tending to disclose corruption, graft or incompetence in the organisation of the World Cup, and prevent any B enquiry into these matters, a result that was inconsistent with the principles of transparency and accountability that underpinned the Constitution and were given effect to in the right of access to information contained in the Constitution and in PAIA. (Paragraphs [414] – [417] at 237G – 238B.)
The committee was accordingly ordered to supply the requested records.

Cases Considered

C **Annotations:**

Reported cases

Southern Africa

*Barnard v Jockey Club of South Africa*1984 (2) SA 35 (W): referred to

*Bekker v Western Province Sports Club (Inc)*1972 (3) SA 803 (C): referred to

D *Bernstein and Others v Bester and Others NNO*1996 (2) SA 751 (CC) (1996 (4) BCLR 449): referred to

*Brümmer v Minister for Social Development and Others*2009 (6) SA 323 (CC) (2009 (11) BCLR 1075): dictum in para [63] applied

*Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026): dictum in para [28] applied

E *Chirwa v Transnet Ltd and Others*2008 (4) SA 367 (CC) ((2008) 29 *ILJ* 73; 2008 (3) BCLR 251; [2008] 2 BLLR 97): discussed

*Claase v Information Officer, South African Airways (Pty) Ltd*2007 (5) SA 469 (SCA): dictum in paras [7] and [8] applied

*Clutchco (Pty) Ltd v Davis*2005 (3) SA 486 (SCA) ([2005] 2 All SA 225): referred to

F *Cronje v United Cricket Board of South Africa*2001 (4) SA 1361 (T): referred to

*Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others*1980 (4) SA 156 (W): dictum at 163D – G applied

G *Government of the Republic of South Africa v Sunday Times Newspaper and Another*1995 (2) SA 221 (T) (1995 (2) BCLR 182): dictum at 227I applied

*Greater Johannesburg Transitional Metropolitan Council v Eskom*2000 (1) SA 866 (SCA): referred to

H *Institute for Democracy in South Africa and Others v African National Congress and Others*2005 (5) SA 39 (C) (2005 (10) BCLR 995): referred to

*Khumalo and Others v Holomisa*2002 (5) SA 401 (CC) (2002 (8) BCLR 771): dictum in paras [19], [22] and [24] applied

*Korf v Health Professions Council of South Africa*2000 (1) SA 1171 (T): referred to

I *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*2004 (4) SA 125 (CC) (2004 (7) BCLR 775): dictum in para [41] applied

*Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd*2002 (3) SA 30 (T) ([2001] 2 All SA 388): referred to

*Magajane v Chairperson, North West Gambling Board and Others*2006 (5) SA 250 (CC) (2006 (2) SACR 447; 2006 (10) BCLR 1133): referred to

J *Marlin v Durban Turf Club and Others* 1942 AD 112: referred to

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Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape) A 2007 (5) SA 540 (SCA) (2007 (9) BCLR 958; [2007] 3 All SA 318): referred to

*Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*2006 (2) SA 311 (CC) (2006 (1) BCLR 1): dictum in paras [100], [446] and [451] applied B

*Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*2001 (3) SA 1151 (CC) (2001 (7) BCLR 652): referred to

*Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo*2007 (1) SA 66 (SCA): applied

*National Media Ltd and Others v Bogoshi*1998 (4) SA 1196 (SCA) C (1999 (1) BCLR 1; [1998] 4 All SA 347): dicta at 1209H/I – J and 1212G – H applied

NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae) 2007 (5) SA 250 (CC) (2007 (7) BCLR 751): referred to

*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*1984 (3) SA 623 (A): dictum at 634H – 635C applied D

*South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*2007 (1) SA 523 (CC) (2007 (1) SACR 408; 2007 (2) BCLR 167): referred to

*Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere*1976 (2) SA 1 (A): referred to

*Transnet Ltd v Goodman Brothers (Pty) Ltd*2001 (1) SA 853 (SCA) (2001 (2) BCLR 176): E referred to

*Turner v Jockey Club of South Africa*1974 (3) SA 633 (A): referred to

*Unitas Hospital v Van Wyk and Another*2006 (4) SA 436 (SCA) ([2006] 4 All SA 231): applied

*Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*2009 (1) SA 337 (CC) (2008 (11) BCLR 1123): referred to. F

Canada

Grant v Torstar Corp 2009 SCC 61 ([2009] 3 SCR 640): referred to

R v National Post [2010] 1 SCR 477 (2010 SCC 16): dictum in para [55] applied G

Rubin v Canada Mortgage and Housing Corporation (1988) 52 DLR 4th 671 (CA): compared.

England

Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry

Workers Union) and Others [H] [1971] 1 All ER 1148 (CA) ([1971] 2 QB 175): referred to

McCartan Turkington Breen (a firm) v Times Newspapers Ltd [2000] 4 All ER 913 (HL): dictum at 922*b – c/d* applied

R v Advertising Standards Authority, ex parte The Insurance Services plc [1990] COD 42: referred to

R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan [I] [1993] 2 All ER 853 (CA) ([1993] 1 WLR 909; [1992] EWCA Civ 7): referred to

R v Football Association Ltd, ex parte Football League Ltd; Football Association Ltd v Football League Ltd [1993] 2 All ER 833 (QB): referred to

R v Panel on Take-Overs and Mergers, ex parte Datafin plc and Another (Norton Opax plc and Another intervening) [1987] 1 All ER 564 (CA) ([1987] 1 QB 815): referred to. [J]

Morison AJ

[A] European Court of Human Rights

Társaság a Szabadságjogokért v Hungary [2009] ECHR 618: dictum in paras [38] – [39] applied.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa, 1996, s 16(1): see [B] *Juta's Statutes of South Africa 2010/11* vol 5 at 1-28

The Promotion of Access to Information Act 2 of 2000, s 1 sv 'public body' *(b)*(ii) and s 50 (1)*(a)*: see *Juta's Statutes of South Africa 2010/11* vol 5 at 1-228 and 1-240.

Case Information

[C] Application for access to information.

GM Budlender SC (with *KS Hofmeyr*) for the applicants.

APH Cockrell SC for the respondents.

A Gotz (with *K Millard*) for the amicus.

[D] *Cur adv vult.*

Postea (June 8).

Judgment

Morison AJ:

[E] Introduction

[1] This is an application by a company that publishes a newspaper, the *Mail & Guardian*, its editor Nicholas Adrian Michael Dawes (Dawes), and one of its investigative journalists, Adriaan Jurgens Basson (Basson).

[F] [2] These applicants apply for access to certain records relating to the procurement or tender processes applied by the company responsible for organising the 2010 Soccer World Cup in South Africa.

[3] That company, the first respondent, is the 2010 FIFA World Cup Organising Committee South Africa Limited (an Association Incorporated [G] under s 21) (LOC).

[4] The second respondent is the LOC's chief executive officer, Daniel Alexander Jordaan (Jordaan). He is cited in his official capacity as the information officer or head of a private body, in terms of the Promotion H of Access to Information Act 2 of 2000 (PAIA).

[5] I refer to the LOC interchangeably as the first respondent, the organising committee, or simply as the LOC. Although it calls itself a committee, it is a company, one incorporated under s 21 of the Companies Act 61 of 1973 (the Companies Act).

I Events giving rise to the application

[6] In the last week of May 2009, Basson, the investigative journalist in the employ of the *Mail & Guardian* newspaper, wrote to the chief communications officer of the LOC, and requested certain information regarding tenders which the LOC had awarded in relation to the J Confederations Cup.

Morison AJ

[7] The chief communications officer responded that the general policy A of the LOC is 'not to release the names of companies awarded tenders, we are not in a position to disclose the names of preferred suppliers'.

[8] On 3 June 2009 the applicants' attorneys, Webber Wentzel, wrote to the LOC and reiterated the request for access to the documents. They explained that Basson required access to the records to write an article, B and thus exercise the right to freedom of expression and the media.

[9] The LOC's attorneys, Edward Nathan Sonnenbergs, responded by denying that the LOC was a public body, and stating that, if the applicants wished to pursue their request for access, they should do so in terms of PAIA. C

[10] The applicants did not accept the LOC's denial that it was a public body as defined in PAIA. They submitted a 'public body' request in terms of PAIA for access to the information regarding the LOC's tenders. Basson alone was reflected as the requester. D

[11] On 23 July 2009 the LOC refused the request on the basis that it was not a public body.

[12] Given this refusal, the applicants submitted a 'private body' request for access to the documents, even though they still maintained that the LOC was a public body. E

[13] The private-body request included reference to the fact that the applicants required access to the records, in order to exercise their right to media freedom, and to vindicate the right of the public to receive information on matters of public interest. F

[14] The private-body request was refused by the LOC. The LOC asserted that the applicants had failed to establish that they required access to the records in order to exercise or protect their rights. The LOC did not rely on any other grounds of refusal under PAIA for dismissing the request.

[15] Having received these two refusals, the applicants launched the G present proceedings in terms of s 78 and s 82 of PAIA. Section 78 sets out by whom and how such applications are to be brought. Section 82 sets out the powers of the court if it should grant a s 78 application.

[16] On receipt of the present application, the LOC gave detailed H consideration to the records sought by the applicants, and in its answering affidavit again refused the request for access in totality, but added an additional ground for refusal, ie that disclosure of the records would be likely to harm the commercial interests of the LOC.

[17] Applicants apply to this court for an order directing the LOC to give I applicants access to the records of the LOC's tenders, ie the records created in the process of the

LOC selecting and contracting with providers of goods and services when organising the Confederations Cup and World Cup soccer tournaments in South Africa in 2009 and 2010, respectively. J

Morison AJ

A [18] The respondents' opposition is based on: *(a)* a challenge to the locus standi of the *Mail & Guardian* and Dawes, as they do not qualify as 'requesters' under PAIA; *(b)* an interpretation of PAIA that would mean that the provisions of this Act do not apply to the LOC in regard to its tender records; and *(c)* if PAIA does apply, certain of its provisions nonetheless afford the LOC protection against having to disclose its B records, for to do so would damage its commercial interests.

[19] To demonstrate that Basson has written articles on the subject of the public interest regarding allegations of corruption relating to public funds, the applicants attached to the replying affidavit copies of numerous articles previously published on the subject of corruption in relation C to, in particular, the award of contracts to provide security services to the LOC.

In limine — locus standi of first and second applicants

[20] – [30] [Eds: The judge discussed the point in limine on locus standi D and dismissed it as being purely technical.]

The records

[31] – [33] [Eds: The judge discussed the manner in which the records requested by applicants was narrowed.]

E [34] Applicants have thus limited their claims for records to only:

> '16.2 documentation issued by the First Respondent in respect of the Tenders, including advertisements and letters of award;'

and

> F '16.6 all records relating to the award of the Tenders, including but not limited to the service providers it was awarded to, the price to be paid and the contracts between the First Respondent and service providers.'
>
> [Collectively 'the records'.]

[35] In short, the applicants want to know what tenders were invited, G how the tenders were invited, on what terms the tenders were invited, and, correspondingly, what tenders were awarded, to whom, at what prices, and on what terms. Applicants indicated that they might be prepared to narrow their request for records further if furnished with greater particularity of the LOC's tenders. In response to this invitation H the LOC provided information of the sort requested. It did so in a letter which was attached to an affidavit handed up at the commencement of the hearing.

[36] The respondents' attorney's letter sets out the tenders which the LOC called for, those relating to: eg Office Furniture, VIP and Static I Protectors Programme Management System, Manufacturing of Fencing Travel Services Supply, Transportation of Fencing Technical Team Consultancy, Event Transport Management Brokers/Advisors for Event Insurance, Infotainment, Above-The-Line Advertising Services, Stewards and Guards, Legal Services, Fencing Transportation, Canteen, Access Control Equipment, Cleaning, Internal J Catering Couriers, IBC Catering, HR Recruiting, Interior and Décor Consulting, Schools

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Morison AJ

Campaign, Volunteer Accommodation, Security Guards for SAFA A House, Team Base Camps-Pitches, Charters and Helicopter Event Travelling Services, Radio Communication Systems, Signage and Branding, Team Base Camps, Flood Lights Opening, Closing and Award Ceremonies, Event Management and Production Services, Volunteer Accommodation, Luxury and Semi-Luxury Coaches, Legacy B Pitches, Freight and Logistics, Event Management Preliminary Draw, Medical Support, Audio-Visual Equipment, SAFA House, Event Transport Management, Programme Management System, Backup Power, Two-Way Communication System IT and IT Services for the Four Stadiums for the Confederations Cup, Print Copy Fax, Preliminary Draw, CATV for the Four Stadiums for the Confederations Cup, C Transport Management Preliminary Draw, Broadcast Compounds for the Four Stadiums for the Confederations Cup, Safety and Security Advisory, Media and Broadcast Operations for the Confederations Cup, Car Rental Services, Luxury Buses, International Broadcast Centre, Scan Partner, PCSF Services For Prelim Draw, Steward Recruitment D and Management Services for the Confederations Cup 2009 in Bloemfontein, Radio Supply For Preliminary Draw, Steward Training, Access Control, SAFA House Office Furniture, Transport Planning, and Final Draw.

[37] There was no further narrowing by the applicants of the scope of the E documents or records, although the applicants did indicate at the hearing that they require the records only in electronic form.

[38] This application is accordingly concerned with the records in the LOC's possession in relation to the 59 tender processes listed above.

The local organising committee F

[39] Following the award of the hosting rights to the South African Football Association (SAFA), that association's rights and obligations were transferred to a separate company, the LOC.

[40] SAFA did so in order to ensure that there was a single body G dedicated to performing the obligations required to stage and host the 2010 FIFA World Cup, and to separate the administrative activities associated with the 2010 FIFA World Cup from the general operational functions of SAFA.

[41] The 2010 FIFA World Cup Organising Committee was incorporated H as a company incorporated in terms of s 21 of the Companies Act 61 of 1973 (as amended) on 29 August 2005.

[42] SAFA assigned its rights and obligations under the organising association agreement to the organising committee.

[43] As a result of this assignment, whatever SAFA was obliged to do I under the organising association agreement became an obligation of the LOC, and whatever rights SAFA had under the Organising Association agreement became rights of the LOC.

[44] By operation of the assignment, the LOC had stepped into the shoes of SAFA for purposes of the organising association agreement. J

Morison AJ

A [45] The organising committee is the body ultimately responsible for the operational matters pertaining to the 2010 FIFA World Cup. The role of the organising committee includes ensuring that the venues, and the operational elements which will go into making the venues work, are planned and delivered on time.

B [46] There are two types of companies recognised in the Companies Act:

(a) a company having a share capital; or

(b) a company not having a share capital, and having the liability of its members limited by the memorandum of association (a company C limited by guarantee).[1]

[47] The LOC is the latter type of company, ie a company limited by guarantee. It does not have a share capital, but it does have members. In terms of the Companies Act the names of the members of the company are to be kept in a register of members[2] and the register of members may be inspected by members of the public.[3]

D [48] All companies limited by guarantee are deemed to be public companies for the purposes of the Companies Act.[4] The LOC is a public company. This is not to be confused with a company listed on an exchange. Many public companies are not listed on exchanges.

E [49] In terms of s 302(4) of the Companies Act a public company is obliged to send a certified copy of its annual financial statements to the registrar of companies. Documents lodged with the registrar of companies may be inspected in terms of s 9 of the Companies Act.

F [50] There will thus have to be a degree of public disclosure of the LOC's affairs, simply because of the above referred-to provisions of the Companies Act.

[51] The LOC is not, in form at least, a governmental agency; it is not part of national, provincial or local government.

G [52] The board of directors is usually responsible for the government of the company.

[53] The respondents point out that a number of cabinet ministers in their official capacities are members of the board of directors of the LOC. The cabinet ministers serving on the LOC are the Minister of Human H Settlements, Tokyo Sexwale; the Minister of Home Affairs, Nkosazana Dlamini Zuma; the Minister of Justice, Jeff Radebe; the Minister of Sport, Reverend Makhenkesi Stofile; the Minister of Co-Operative Governance and Traditional Affairs, Sicelo Shiceka; the Minister of Mining, Susan Shabangu; the Deputy Minister of Finance, Nhlanhla Nene; I and the Deputy Minister of Foreign Affairs, Sue van der Merwe.

Morison AJ

These eight cabinet ministers serve on the LOC as 'cabinet ministers A responsible for specific portfolios within government'. That means, as I understand it, that these senior members of government are performing their duties as cabinet ministers in serving on the board of directors of the LOC. There would appear to be good reason for dedicating some of the country's most senior leaders to serve on the LOC's board of directors. B

As will emerge later in this judgment, the South African government has bound the country in many and varied ways to provide to FIFA that which FIFA requires for the World Cup to be staged here. It would seem altogether sensible for those who are responsible for honouring the C country's guarantees and undertakings to be part of the decision-making body that is charged with delivering on those promises.

The use of a separate company to carry out the combined obligations of SAFA and government, which company is the LOC, seems sensible in that it enables government to be represented within the organising structure of the World Cup. D

The second respondent, Jordaan, the deponent to the LOC's answering affidavit, describes the reasons for the involvement of the cabinet ministers in the LOC as follows.

> '8.3 In sum, each of FIFA, the organising committee and the three E spheres of government have specific roles and responsibilities. However, the co-ordinating function falls within the scope of operation of the organising committee. The organising committee liaises with FIFA and government to ensure the implementation of FIFA's requirements by government. The organising committee itself does not perform the government-specific obligations. F Rather, government

> assumes the responsibility of putting in place the institutional framework for delivery of its obligations. At all times each party remains responsible for its individual obligations. . . .
>
> 8.4 It is for the reasons given above that cabinet members responsible G for specific portfolios within government were invited to participate on the board of the organising committee. The appointment to the board of the organising committee was by virtue of the position held within government by the relevant minister, and was not linked to a particular cabinet member. The governmental activities associated with, for example, sports and recreation necessitated that the minister representing such portfolio be H appointed to the board of the organising committee.'

[58] It strikes me that there are some significant legal difficulties with appointing government ministers to directorships of companies in order to protect the interests of government, and these may not be wholly irrelevant to this application. I

[59] It is sufficient to point out that a director of a company owes a duty first to the company, and that it is inconsistent with his or her responsibilities as a director to serve another in a manner that may conflict with the interests of the company. In *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development* J

Morison AJ

A *Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others*1980 (4) SA 156 (W) at 163D – G Margo J held:

> 'A director is in that capacity not the servant or agent of the shareholder who votes for or otherwise procures his appointment to the board. . . . The director's duty is to observe the utmost good faith towards the B company, and in discharging that duty he is required to exercise an independent judgment and to take decisions according to the best interests of the company as his principal. He may in fact be representing the interests of the person who nominated him, and he may even be the servant or agent of that person, but, in carrying out his duties and functions as a director, he is in law obliged to serve the interests of C the company to the exclusion of the interests of any such nominator, employer or principal. He cannot therefore fetter his vote as a director, save insofar as there may be a contract for the board to vote in that way in the interests of the company, and, as a director, he cannot be subject to the control of any employer or principal other than the company. On the general principles, see *R v Milne and Erleigh (7)*1951 (1) SA 791 (A)*per* Centlivres CJ at 828D. . . .'

D I cannot see how a cabinet minister can ever make his or her duties as a cabinet minister secondary to those of a company.

[60] Jordaan criticises the applicants for blurring or 'eliding' in its founding papers the different roles of FIFA, government and the LOC. E Given that there are eight cabinet ministers serving on the LOC's board of directors, and given that FIFA has extracted onerous commitments on a national scale from government, and as the LOC has undertaken to cause government to deliver on these undertakings, perhaps the applicants can be forgiven for not drawing too clear a line between these role-players.

F [61] That the LOC is a temporary edifice created for the short term (the role of discharging the obligations of SAFA under the organising association agreement), is evident from the content of the respondents' application for the condonation of the late filing of their answering affidavit.

G [62] The following appears as part of the explanation:

> 'There is no consolidated record of procurement processes conducted by the organising committee. The reason for this is that according to organising committee policy, the manner of procurement of goods and services, and the organising committee officials who have delegated H authority to procure goods and services, differs depending on the nature and value of the goods and services to be procured.
>
> For example, procurement of goods and services with a value exceeding R25 million requires the approval of the board of directors. Procurement of goods and services with a value exceeding R15 million but less I than R25 million requires the approval of the finance and procurement committee. Procurement of goods and services with a value of less than R15 million requires the approval of either the CEO, the COO, the Finance Director, or a head of department, depending on the value of the particular acquisition.
>
> *The offices from which the organising committee operates are not intended to* J *be used in the long-term by the organising committee, and the staff are not*

Morison AJ

> *intended to be retained much beyond the event itself. The information* A *management, storage and record-keeping systems that would be well-established and well-known in a permanent business do not exist at the organising committee, and there are no personnel who are dedicated to creating and retaining efficient systems for storage, record keeping and information management.*' [Emphasis provided.]

[63] It is of some concern that the information management, storage and B record-keeping are not as would be expected in a permanent business. The LOC has been placed, via the organising association agreement discussed below, and various other undertakings and actions of government, in a position where it binds the credit of the country; it is using the assets of the country to stage the World Cup. As these assets do not C belong to it, I would expect the record keeping to be of the highest order, so that it can in due course account to the country for that which it has done with the country's assets whilst entrusted to the LOC's care. The temporary nature of the LOC is another reason why the record keeping procedures and management should be of the highest order. D

[64] During the argument of this matter I raised with Mr *Cockrell*, who appeared for the respondents, that it would appear to be part of the intention behind SAFA's assignment of its rights and obligations under the organising association agreement that, once the LOC is dissolved or wound up after the World Cup soccer tournament the assets will be E transferred to SAFA in accordance with s 21(2)*(b)* of the Companies Act. Counsel did not suggest that I was wrong in drawing this inference. The LOC (or those entrusted with its dissolution, whatever form that may take after the World Cup) will thus have to account to SAFA too. Good record keeping would seem to be essential for this purpose too. F

[65] The scale of the liquid assets involved in the World Cup, to say nothing of the illiquid and human assets, is on a national scale. In brief, the government-budgeted expenditure relating to the World Cup is set out by respondents as follows: department of public transport infrastructure, over seven years: R20,9 billion; department of sport and recreation, G allocated to host cities for the stadiums: R11,5 billion; department of communication: R1,5 billion for infrastructure. Total government budget: R33,9 billion.

[66] The LOC is to receive approximately 0,54% of the government's budgeted expenditure, which on the above total, is approximately H R181 million.

[67] The LOC's expense budget given to it by FIFA is US$423 million. At seven rands to the dollar the LOC is going to spend R2 961 000 000 if it stays within this budget. I

[68] The LOC will thus spend R2,961 billion sourced from private origins, and at least R181 million in 'public' funds.

[69] The privately sourced funds are made up of private funding from FIFA of US$20 million, and income from ticket sales and entities labelled 'national supporters', the meaning of which term is unclear. J

Morison AJ

A [70] The respondents state that none of the LOC's income, other than that disclosed in the answering affidavit, comes from government.

The host cities and the stadium authorities

[71] The respondents' answering affidavit reveals that the organising B committee does not own the stadiums that will be used for the 2010 FIFA World Cup. Indeed, the organising committee was not even responsible for choosing the match venues.

[72] The host cities formulated their own proposals, and included them in a binding offer to the organising committee and FIFA. The organising C committee then considered the

relative strengths of each option, and decided which match venues would be included among the final list of ten to be submitted to FIFA for its endorsement. In short, FIFA chose the host cities.

[73] The organising association agreement obliged SAFA (and, after its incorporation and the assignment of SAFA's obligations, the organising D committee) to sign stadium agreements with the host cities or stadium authorities.

[74] The stadium agreements embodied a commitment by the host city, the stadium owner or the stadium operator to provide a stadium which E met FIFA's specifications.

[75] In some cases, government has provided funding to the host cities and the stadium authorities. In such cases the national government has made contributions to the host cities to build or renovate their stadiums, and to pay for many other aspects of the hosting of the World Cup. This F funding has *not* been provided to the organising committee. As indicated above, the organising committee is a legal entity that exists independently, at least insofar as it is a separate legal entity, of the host cities and the stadium authorities.

FIFA

G [76] The Fédération Internationale de Football Association (FIFA) is the governing body and the owner of all rights in respect of FIFA World Cup.

[77] FIFA is a voluntary association registered in Switzerland. It is, in effect, a club. It does not form part of government, and it is not created by statute.

H [78] It is the governing body of the member associations, of which the South African Football Association (SAFA) is one.

[79] On a four-yearly basis FIFA grants to a member association the right to host a FIFA World Cup within its territory. FIFA imposes various standards (as regards construction, infrastructure, safety, etc) with which I the host nation must comply.

[80] This is apparently done to ensure that the FIFA World Cup runs smoothly, safely, and on time; that the pitches are conducive to football of the highest quality; and that the stadia facilitate the viewing of matches, both by a sizeable number of local spectators and a global J audience.

Morison AJ

[81] The imposition by FIFA of various standards and obligations is also A done to protect the FIFA World Cup brand, in which FIFA has made a considerable investment.

[82] FIFA retains the power to finally approve the Host City and Stadium Use Agreements, in order to ensure that those standards are met. B

[83] The respondents allege that FIFA's requirements are of a general nature. FIFA affords the organising committee of the member association fortunate enough to be selected for this purpose some latitude in relation to how to comply with its technical requirements, and how the FIFA World Cup should be organised and operated within the host nation. C

SAFA

[84] In South Africa, the South African Football Association (SAFA) is responsible for co-ordinating all football-related activities, and is a member association of FIFA. D

[85] As an African member association, SAFA was entitled to submit a bid for the hosting of the 2010 FIFA World Cup. The bidding process for the 2010 World Cup was limited by FIFA for this World Cup to African nations.

[86] SAFA's bid for the 2010 World Cup was supported by various E guarantees given by the government of South Africa. The guarantees given by government relate to matters

such as health services, transport, safety and security, taxes, exchange control, immigration and so forth.

[87] In August 2003, SAFA contractually committed to FIFA that it would deliver the 2010 FIFA World Cup. F

[88] The contract between SAFA and FIFA was recorded in a document known as the *organising association agreement*. It is discussed separately elsewhere in this judgment.

[89] The organising association agreement stipulated the general obligations to be assumed in preparation for the 2010 FIFA World Cup. G Amongst the contractual terms agreed to by SAFA was an obligation to establish an organising committee, which would undertake the activities required to organise, stage and host the 2010 FIFA World Cup.

Government

[90] Government exists at three levels: national, provincial and local. H This application concerns primarily the national level of government. It is concerned to a lesser extent with local-authority government.

[91] The respondents point out that the 2010 FIFA World Cup is a commercial venture involving FIFA, SAFA and the organising committee. I The staging of the event is not the role of government, according to the respondents, although government has many responsibilities relating to the staging of the event. Government has provided a wide range of guarantees relating to FIFA, in relation to the staging of the event in regard to: safety and security; transport; telecommunications; customs; taxes; ambush-marketing, and has undertaken, if necessary, to freeze J

A hotel prices. These are matters that will receive greater attention later in this judgment.

[92] It is common cause that the 2010 FIFA World Cup is a massive event for South Africa as a country, and that the government wishes it to B be a success. It has passed legislation, as have certain of the host cities, specifically for the tournament. These items of legislation are considered separately later in this judgment.

[93] The respondents submitted that government needs to ensure that normal State functions are performed in a manner that will reflect to the C credit of South Africa; this submission is no doubt correct. The respondents give the example of the provision of policing as a function of government (not of the LOC), and point out that government will need to provide extra policing and traffic-control measures, in order to cope with the influx of foreign visitors.

D [94] There is, in effect, the respondents point out, a symbiotic relationship between the organising committee and government. The organising committee interacts with government, but does not perform the obligations of government. It is government that has assumed the responsibility of putting in place the institutional framework for delivery of its E obligations.

[95] I now proceed to summarise and give examples of the guarantees[5] furnished by different national government ministries to FIFA, before and after the conclusion of the organising association agreement.

F [96] The government guarantees illustrate the extent to which government committed itself to FIFA to ensure that the 2010 World Cup is a success.

[97] I consider it appropriate to reproduce a few examples of these G guarantees to convey in visual form the official nature of these undertakings, which were documents of great significance to the country, which emanated from very senior members of

government, and set out undertakings dedicating national assets (human, legal, financial and physical), to FIFA, and FIFA's requirements. I do not reproduce each of H the guarantees; only a few examples need be reproduced visually, which I consider would better convey the importance of the documents.

[98] On 16 July 2003 the Minister of Safety and Security addressed a I letter to the president of FIFA, a copy of the first page of which reads:

Morison AJ

[zPicz]

DEPARTMENT: SAFETY AND SECURITY
REPUBLIC OF SOUTH AFRICA
Private Bag X463, Pretoria, 0001. Tel: (012) 393 2000, Fax: (012) 393 2020
Tilbault Arcade, 231 Pretorius Street, Pretoria
ncsinfo@saps.org.za

Reference: 3/2/4(20/99)

Mr Joseph S. Blatter
The President
FIFA
FIFA House
Hitzigweg 11
P.O. Box 85
CH-8030 Zurich
Switzerland

Dear Mr Blatter

RE- SA 2010 FIFA WORLD CUP BID: GUARENTEE TO FIFA

I am acutely aware of the need for the peaceful and orderly running of the 2010 FIFA World Cup. I have directed the National Commissioner of the South African Police Service to make all the necessary arrangements reasonably possible to provide adequate and reasonable security for all guests of the 2010 FIFA World Cup in South Africa.

The Government guarantees to undertake all security measures necessary to guarantee general safety and personal protection, especially at airports, inside and outside hotels, stadiums, training grounds, the International Broadcasting Centre, media Centres, any official areas and other areas where accredited persons and/or spectators are present.

The Department also guarantees safety and security to the FIFA delegation, media representatives and all accredited persons before, during and after matches, and while travelling in the country

We further guarantee that a detailed written security plan will be developed and implemented in conjunction with SAFA, taking into consideration the experience gained at previous major sporting events, as well as national security guidelines

Police escorts will be available for the use of teams, referees and members of the FIFA delegation. The precise number and types will be finalised at a later stage in accordance with FIFA's instructions.

[99] The above guarantee from the Department of Safety and Security was supported by a letter of undertaking addressed to the president of FIFA on 21 July 2003 by the then National Commissioner of Police, who A undertook, on behalf of the South African Police Service, to ensure the safety of those attending the World Cup.

[100] On 24 March 2004 the then Minister of Home Affairs, in his capacity as such, addressed a guarantee to the president of FIFA which contained the following passage: I

> 'My department guarantees the provision of priority treatment for the teams and the FIFA delegation as well as for all accredited persons for the 2010 FIFA World Cup through the provision of special immigration procedures.'

[101] On 31 March 2004 the then minister of Finance bound the Republic of South Africa to provide FIFA and others with the highest J

Morison AJ

A level of administrative assistance and support, with regard to the handling of any customs clearance and importation issues related to the organisation of the 2010 FIFA World Cup.

[102] In terms of this guarantee the Republic of South Africa warranted, B guaranteed, covenanted, assured and procured that the organisation, staging and performance of the 2010 FIFA World Cup would not be hindered or delayed by any handling procedures at any time. FIFA was assured by the Republic of South Africa that the competent authorities would grant highest priority treatment, and would, if required by FIFA, cause the National Treasury and the South African Revenue Service to C issue in advance unconditional and binding customs clearance, importation and tax rulings relating to FIFA and FIFA's subsidiaries.

[103] This guarantee, which contains a number of other undertakings, was co-signed by the Commissioner, South African Revenue Services. Other guarantee letters, in similar terms, were addressed by the then Minister of Finance to FIFA, and co-signed by the then Governor of the D Reserve Bank.

[104] A further guarantee from the Ministry of Finance, signed by the then minister of Finance, effectively cast South Africa as FIFA's insurer for all claims against FIFA, other than those arising from the negligence E or fraud of the FIFA representatives and associates. The terms of the indemnity appear from the document itself as reproduced below.

[zPicz]

MINISTRY: FINANCE
REPUBLIC OF SOUTH AFRICA
Private Bag X115, Pretoria, 0001. Tel: +27 12 323 8311. Fax: +27 12 323 3262
PO Box 29, Cape Town, 8000. Tel: +27 21 464 6100. Fax: +27 21 461 2934

I, Trevor A Manuel, in my capacity as Minister of Finance of the Republic of South Africa, and on behalf of the Government, indemnify FIFA and defend and hold it harmless against all proceedings, claims and related costs (including professional advisor fees) which may be incurred or suffered by or threatened by others against FIFA in relation to the organisation and staging of the 2010 FIFA World Cup.

This indemnity shall not apply to any damages, claims or losses caused by the negligent or fraudulent conduct on the part of the members of the FIFA delegation, its employees or associates.

Signed at Pretoria on this 24 day of March 2004

TREVOR A MANUEL, MP
MINISTER OF FINANCE

2011 (5) SA p181

Morison AJ

[105] On 18 August 2003 the then Minister of Communications A addressed a letter to FIFA guaranteeing that the telecommunications infrastructure would conform to the highest standards and requirements applicable at the time of the staging of the 2010 World Cup, and would conform to the specific requirements that FIFA may require from time to time. B

[106] The then Acting Minister of Transport provided certain guarantees in respect of the efficient and safe transportation of WorldCup visitors on behalf of the Ministry of Transport.

[107] The then Minister of Environmental Affairs and Tourism gave the undertakings set out in the letter reproduced below entitled 'Guarantee C to FIFA', which included an undertaking to pass laws to fix the hotel prices for the FIFA delegation at 20% below the January 2010 prices for the FIFA delegation, representatives of FIFA Commercial Affiliates and others.

[zPicz]

MINISTRY: ENVIRONMENTAL AFFAIRS AND TOURISM
REPUBLIC OF SOUTH AFRICA
Private Bag X447, Pretoria, 0001, Tel: (27-12) 310 3611, Fax: (27-12) 322 2682
Private Bag X9154, Cape Town, 8000, Tel: (27-21) 465 7510/12, Fax: (27-21) 465 3216

GUARANTEE TO FIFA

I, Mohammad Valli Moosa , in my capacity as Minister of Environmental Affairs and Tourism of the Republic of South Africa, hereby commit my department's support to ensure that all required needs are met to successfully host the 2010 FIFA World Cup. I pledge that my department in the event of the Republic of South Africa being selected to host the 2010 World Cup will take all measures, including passing the necessary laws, to ensure that hotel priced for FIFA Delegation, representatives of FIFA's Commercial Affiliates, the Broadcaster, and accredited media shall be frozen as of 01 January 2010.

My department together with South African Tourism will, in conjunction with SAFA, ensure that the hotel prices for the FIFA Delegation are 20% less than the frozen rate on 01 January 2010.

I guarantee that FIFA Delegation will be charged only for the actual number of hotel room nights used and that no minimum stay requirements will be imposed (except for the final match, where a minimum of three nights may be required).

Signed at _____ on the 29 day of August 2003

_____

Minister of Environmental Affairs and Tourism

[108] The then Minister of Trade and Industry, on behalf of the Republic of South Africa, represented, undertook, guaranteed and J

2011 (5) SA p182

Morison AJ

A ensured to pass, to the extent necessary, special laws designed to prevent 'ambush marketing'[6] of the 2010 FIFA World Cup in South Africa, and undertook to provide FIFA with the support of officers or relevant authorities, such as police and customs, to assist in the protection of the marketing rights, broadcast rights, marks and other intellectual property B rights. Other commitments were made by this ministry on behalf of the country. That guarantee was expressed to be binding on the country, regardless of whether there was a change of government.

[109] It seems as if that which was required by FIFA in the form of C government guarantees in this regard was delivered by the LOC.

[110] Guarantees alone were, however, not all that was required. Once the guarantees had been given, government had to deliver on them. As illustrated, this included passing legislation, providing telecommunication infrastructure, providing transport infrastructure, funding the building of stadiums, providing police and related security personnel, providing D tax, customs and immigration services, as well as insurance.

[111] In summary, government's role included providing infrastructural, financial,

legislative and executive (members of cabinet) support to the LOC.

E The organising association agreement

[112] The organising association agreement was concluded between SAFA and FIFA in August 2003.

[113] SAFA's rights and obligations have since been transferred to the LOC F by means of an assignment.

[114] [Eds: The judge quoted from certain provisions of the organising association agreement relating to guarantees.]

[115] The LOC was obliged to obtain from government a wide range of G commitments for FIFA. As noted in the discussion regarding the guarantees above, it did so.

[116] [Eds: The judge quoted from certain provisions of the organising association agreement relating to security services.]

H [117] It will be noted once again that the LOC is obliged to ensure that the government provide guarantees of safety and security. The obligation to ensure the safety of the FIFA delegation is particularly phrased, and it is the country, not FIFA, which carries much of the risk associated with the tournament.

Morison AJ

[118] The agreement obliges the LOC to engage the government's A law-enforcement agencies to prevent 'ambush marketing', ie any commercial activity which seeks to benefit from association with the World Cup without FIFA's permission. The clause reads:

[Eds: The judge quoted from certain provisions of the organising association agreement relating to ambush marketing.] B

[119] The legal mechanism evident in the quoted passages of the agreement is a commitment by the LOC that it will get government to provide what FIFA requires.

[120] Given what it is that FIFA requires, it is hardly surprising that it is C government, and no other entity, that must provide. The LOC could not provide many of FIFA's requirements, as no company has authority over the country's legislative mechanisms, competition authorities, police departments, trading standards, customs, fiscal and other such departments. These are components of society which fall under government's authority. D

[121] FIFA has, in effect, used the LOC to get government to provide much of what FIFA requires.

[122] The agreement contains a definition of 'Controlled Access Sites' meaning: *(a)* the locations of the matches and other events, such as E (without limitation) stadiums and their fences and the aerial space above the stadiums, the stadium perimeters; *(b)* all other locations, such as, without limitation, stadium press centres, accreditation centres, . . . , the designated hotels, hospitality areas and centres for the FIFA delegation, and other areas to which admission is regulated by the organising association's issued accreditation; and *(c)* surrounding and adjacent F areas to the locations described hereinabove.

[123] These provisions in the agreement are material to this judgment for, as shall be seen later, the legislation passed by various legislative authorities, such as the bylaws passed by the local authorities of Johannesburg and Tshwane, gives legislative underpinning to the LOC's G obligations to FIFA. Unlike an ordinary private contract only enforceable by the parties to that contract, in this case many of the LOC's contractual obligations, having been captured in substance in legislation, have become enforceable against the public at large.

[124] Another consequence of the lawmakers of the country creating H laws to enforce the LOC's obligations is that the normal remedies provided for a breach of a term of a contract, usually only civil in nature, now have (in certain instances) the force of criminal sanction. Although this is not unique to the LOC, as the 'protected event' notice legislation[7] demonstrates, criminal sanctions for breaches of contractual rights are I

A out of the norm. Where a private contract is breached, the aggrieved contracting party can approach a civil court for enforcement of the contractual remedies against the other party or parties to the contract who may be in breach. In this case, however, as legislation has been passed encapsulating some of the LOC's contractual obligations to FIFA B (such as those relating to ambush marketing and controlled-access areas) it is the *entire populace* who is bound, and a contravention may be visited upon transgressors against those laws in the form of a criminal sanction, including imprisonment.

The Constitution

C [125] The preamble to the Constitution reads:

> 'We, the people of South Africa,
>
> Recognise the injustices of our past;
>
> Honour those who suffered for justice and freedom in our land;
>
> D Respect those who have worked to build and develop our country; and
>
> Believe that South Africa belongs to all who live in it, united in our diversity.
>
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to —
>
> E Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> F Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
>
> May God protect our people.
>
> G . . . .'

[126] That the Constitution is the supreme law of the country must inform any judgment of any court in South Africa.

[127] The applicable section of the Constitution is s 32. It deals with the right to access to information. It reads:

> H '**32 Access to information**
>
> (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 or protection of any rights.
>
> (2) National legislation must be enacted to give effect to this right, I and may provide for reasonable measures to alleviate the administrative and financial burden on the state.'

[128] As regards the final portion of s 32 quoted above, I point out that concerns about large volumes of documentation are dealt with via regulations that impose certain cost liabilities on those seeking records, J ie they must pay for what they get.

Morison AJ

[129] Section 32 of the Constitution, upon which PAIA rests, is to be A found in that Chapter of the Constitution which is called the Bill of Rights.

[130] The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country, and affirms the democratic values of human dignity, equality and freedom.[8] B

[131] That the Constitution casts the right to access to information as a fundamental right of the people of South Africa must guide the court in its approach.

[132] It is, however, not by an application of s 32 of the Constitution C alone that this case is to be decided, for Parliament has enacted PAIA, in compliance with the Constitution, to give effect to the right of access to information.

[133] It is against the provisions of PAIA that the applicant's application for access to the information in question must be measured. D

The Promotion of Access to Information Act 2 of 2000 (PAIA)

[134] PAIA is the Act that will determine the outcome of this application. It is an Act, as the title says, that promotes access to information.

[135] I have sketched the constitutional background above by, inter alia, E quoting the preamble to the Constitution.

[136] The Constitutional Court has held that the starting point of any inquiry into the meaning of an Act of Parliament which gives effect to a constitutional right, is the constitutional provision to which it gives effect.[9] F

[137] Once the constitutional provision's meaning has been determined, the Act must be taken to bear the same meaning, because it is intended to give effect to the constitutional right, and because it will be in breach of the Constitution if it does not do so. G

[138] I now quote the preamble to PAIA, for, like the preamble to the Constitution, it provides a precise summary of a number of material considerations that locate the application of PAIA in this society, including the historical and legal context of the legislation to be applied.

[139] The preamble to PAIA reads: H

'Recognising that —

- the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations; I

Morison AJ

A • section 8 of the Constitution provides for the horizontal application of the rights in the Bill of Rights to juristic persons to the extent required by the nature of the rights and the nature of those juristic persons;

• section 32(1)*(a)* of the Constitution provides that everyone has the right of access to any information held by the State;

B • section 32(1)*(b)* of the Constitution provides for the horizontal application of the right of access to information held by another person to everyone when that information is required for the exercise or protection of any rights;

• and national legislation must be enacted to give effect to this right in section 32 of the Constitution;

C And bearing in mind that —

• 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 held by a public or private body may be limited to the extent that the limitations are reasonable D and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution;
- reasonable legislative measures may, in terms of section 32(2) of the Constitution, be provided to alleviate the administrative and financial burden on the State in giving effect to its obligation to promote E and fulfil the right of access to information;

And in order to —

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

Be it therefore enacted by the Parliament of the Republic of South Africa, as follows: . . . .' [Emphasis provided.]

[140] PAIA follows the framework of s 32(1) by drawing a distinction between access to information held by the State, and information held G by private bodies. As shall be seen, PAIA extends the duty of disclosure which the Constitution places on the State to other public bodies.

The public/private-body issue

[141] The starting point of PAIA is the distinction which it draws H between a 'public body' and a 'private body'.

[142] Organs of State fall within the definition in s 1 of 'public body'. Paragraph *(b)*(ii) of the definition of 'public body' also includes within that term any functionary or institution which exercises a public power or performs a public function in terms of any legislation.

I [143] A 'private body' is defined to exclude a public body.

[144] These two mutually exclusive definitions therefore provide the governing framework for PAIA. If information is held by an institution which is a public body, then the provisions of Part 2 of the Act apply; if the institution is a private body, the provisions of Part 3 of the Act J regulate access to information held by it.

Morison AJ

[145] Following the dualistic scheme in s 32(1)*(a)* and *(b)* of the A Constitution, PAIA provides that if access is sought to a record held by a public body, access must be provided *as a matter of right*, unless a valid ground of refusal is advanced.[10]

[146] By contrast, if access is sought to a record held by a *private* body, B the requester must establish that he or she requires access to the record in order to exercise or protect a right. Once this has been shown, the requester has a right of access to the records, which may be defeated by a valid ground of refusal.[11]

[147] In any given case it is therefore critical to establish whether the C records to which access is sought are held by a public or a private body.

[148] Section 8 of PAIA provides that a body may be public in relation to certain records, and private in relation to other records. I find this section to be unhappily worded, for reasons which appear below.

[149] The proper enquiry to answer the question whether the body in D question is public or private requires an analysis of the activity or function exercised by the body when it produces the record in question.[12]

[150] In this case, urge the applicants, the function which the LOC was E performing when it issued and awarded the tenders was 'organising, staging and hosting the World Cup'. It was procuring services and goods in order to enable it to carry on that function. If one

breaks that function down into subfunctions, it includes matters such as undertaking access control,[13] security functions,[14] designating the venues for games, tending F to the infrastructural requirements of the host broadcaster of the tournament, and controlling marketing associated with the tournament. One could also have regard to the list of 59 functions set out above, as supplied by the LOC, which no doubt has a very good idea of just what is required to organise, stage and host the World Cup.

[151] The case law on the meaning of public and private body under G PAIA draws heavily on the approaches taken domestically and in other jurisdictions to the question of whether a body is subject to judicial review.

[152] In determining whether an institution is a public body in the field H of administrative law, courts have often utilised the 'control test', in terms of which an institution will be regarded as a public body where it is controlled by the State. 'Control' by the State can be established in a

---

variety of ways: ownership; regulation of conduct; veto powers; direction.[15]

[153] The SCA has held that in the determination of what is a 'public body' under PAIA, while the control test may be appropriate in some circumstances, it may not be the most suitable one in other circumstances.[16]

[154] In *Mittalsteel*, the SCA held that the control test is useful in a situation when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead. A body, which for all other purposes may be regarded as a private entity, could be converted into a public body for the time, and to the extent that, it carries out public functions.[17]

[155] Relying on English law, the SCA noted that the English courts use three tests to establish whether a body is sufficiently 'public' to permit its decisions to be subject to judicial review. These are:

(a) whether, *but for* the existence of the body, the government would itself almost inevitably have intervened to regulate the activity in question;

(b) whether the government has encouraged the activities of the body by providing underpinning for its work or *weaving it into the fabric of public regulation* or has established it under the authority of government; and

(c) whether the body was exercising extensive or monopolistic powers.[18]

[156] At first blush the LOC would seem to most admirably meet these criteria. But a more detailed consideration of the applicable legislation and legal principles is required, not least because this matter is unlikely to be finally decided by this judgment.

[157] As De Smith, Woolf & Jowell have noted in *Judicial Review of Administrative Action*:

> 'A body is performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways.'[19]

[158] The case law establishes that whether an institution qualifies as a 'public body' under PAIA will depend on the nature of the powers and

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functions it performs. Although the level of State control of these powers A and functions

may be relevant to the question of classification, it is not decisive.

[159] The central issue is whether the LOC is a public body or not.

[160] As an introduction to a central issue that emerged quite clearly in B the oral argument, I set out the litigants' submissions on the nature of the activity or function of the LOC in relation to the records in issue.

[161] Mr *Budlender*, who appeared with Ms *Hofmeyr* for applicants, urged that the activity or function of the LOC in relation to the records in question is *the staging and hosting of the 2010 World Cup*, which, he C argued, is a public activity involving the whole country, and that these are the records of a public body. Applicants submitted that the Soccer World Cup is 'the most significant sporting event in the world'.[20] The LOC is responsible for 'organising, staging and hosting the World Cup'. It is a public body. If this is correct, it is not necessary to consider the private body request. D

[162] Mr *Cockrell* for the respondents urged that the activity or function of the LOC in relation to the records in question was *a private tender process,* which, he argued, is a private activity involving just the tenderers and the LOC, and hence these are the records of a private body. If this E is correct I must dismiss the public body request, and turn my attention to the private body request.

[163] Applicants brought the matter to court on the basis that, if they are wrong about the LOC being a public body under PAIA, then they are entitled to the records under the private body provisions of PAIA. I have F determined to decide the matter on the same basis. In other words, if I am wrong in my conclusion regarding the public body aspect of the matter, then the result would still be the same. As will become clear, if I should be wrong about my finding regarding the LOC being a public body, I have found that the requirements of PAIA in relation to a private body have been met by the applicants. G

The public body request

[164] In the discussion that follows it is important to bear in mind that a great deal depends on how narrowly or broadly one construes the activity or function of the LOC in relation to the records. H

[165] The definition of public body in PAIA is as follows:[21]

"'public body" means —

(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or I

(b) any other functionary or institution when —

Morison AJ

A (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) *exercising a public power or performing a public function in terms of any legislation*.' [Emphasis provided.]

[166] Much of this lengthy judgment[22] turns on the meaning of the B emphasised text above.

[167] The applicants contend that the organising committee falls within para (*b*)(ii) of the definition, ie that the LOC is a functionary or institution exercising a public power or performing a public function in terms of legislation.

[168] A meticulous investigation of what para *(b)*(ii) means, and how to C apply it to the facts of this case, was presented by all counsel, upon whose efforts this judgment is almost entirely based.

[169] It is common cause between the parties that the LOC is responsible for 'organising, staging and hosting the World Cup'. This, applicants D submit, is inherently a public, and a public interest, function.

[170] Applicants point out that the LOC is doing what is in the national interest — not in the private interest of the few people who will play in the matches, or even solely or primarily in the interest of those who will watch the matches (itself a public function). I do not think there can be any doubt about the national interest being promoted by the LOC.

E [171] Applicants argue that if this were not the case, the national, provincial and local governments would not be investing vast sums of money in the staging of the World Cup, and the government would not have deputed a substantial number of cabinet ministers to serve on the LOC. As highlighted above, the 'subfunctions' which are performed to F this end include the following: undertaking access control,[23] security functions,[24] designating the venues for games, tending to the infrastructural requirements of the host broadcaster of the tournament, and controlling marketing associated with the tournament.

[172] Applicants submit that these functions are performed in the public G interest, and are of a public character. They argue that *but for* the LOC performing these functions, they would certainly be left to the government to carry out. They point out that the LOC is authorised to carry out these functions, and to organise, host and stage the World Cup. It operates with extensive powers — a characteristic feature of public power, H and it carries out functions which would ordinarily be exercised by government. The very purpose of the LOC is to promote the public and national interest. As set out in more detail below, the operations of the LOC are underpinned by a framework of legislation, and it has been woven into the legislative framework of nation and city.

I [173] All of these features of the LOC's activities point to the conclusion that it is exercising public functions when it organises, hosts and stages

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the FIFA World Cup. In sum, applicants argue, without the LOC A performing these tasks, the most significant sporting event in the world could not be hosted by South Africa.

[174] Applicants submit that this interpretation is also in accordance with the injunction in s 39(2) of the Constitution[25] to interpret legislation B in a manner which better advances the spirit, purport and objects of the Bill of Rights.[26] Applicants submit that, because the right of access to information of public bodies is unqualified, a broader interpretation of public bodies under PAIA would better promote the Constitution's ambition of enhancing transparency and accountability in the public C sector. Simply put, the applicants invite the court to adopt an unqualified interpretation of public power, to achieve the result of more people having access to the records of bodies operating in the public realm. An invitation of so general a nature must be refused. The case must be decided on an application of legislation to the specific body under consideration. D

[175] The respondents observe that the applicants' approach is too *general*, and that the entire thrust of the founding affidavit focuses on what the organising committee does *in general terms*,[27] whereas the proper way to approach the problem is in more particular terms. E

[176] In oral argument the metaphor was used of a high altitude (general perspective, low detail) or a low altitude (particular perspective, high detail) approach to be taken by the court when considering the LOC's activities (functions or powers). If one looks at the activities of the LOC from a high altitude, then its function is probably correctly described as F simply organising and staging the World Cup. If the lower-altitude view is adopted, then one sees the individual tasks or activities that make up the larger function as separate, discrete, ones.

Morison AJ

A [177] The answer as to which perspective to adopt lies in PAIA, and in particular in s 8. The respondents submit that the relevant question is not whether the organising committee exercises a public power or performs a public function in terms of legislation 'in the air', ie without regard to the particular activity being performed by the LOC to which the B records relate. In other words, argue respondents, the correct approach is not to look at what the overall function or activity of the LOC is, (staging, hosting and organising the World Cup 2010), but what *the specific function was when the record was being created or acquired* (conducting a private tender process).

C [178] The respondents submit that the relevant question is whether the organising committee exercises a public power or performs a public function in terms of legislation *when it exercises the functions that form the subject-matter of the requested records*.

[179] The respondents support this submission by drawing attention to s 8(1) of PAIA, which makes it clear that the same institution may be a D 'public body' when it performs certain functions, and a 'private body' when it performs other functions. It provides as follows:

> '(1) For the purposes of this Act, a public body referred to in paragraph *(b)*(ii) of the definition of public body in section 1, or a private body —
>
> E *(a)* may be *either a public body or a private body in relation to a record of that body*; and
>
> *(b)* may in one instance be a public body and in another instance be a private body, *depending on whether that record relates to the exercise of a power or performance of a function as a public body or as a private body*.'

[180] Section 8(1)*(b)* is unhappily worded. The subsection appears to simply say that a public body is a public body when it is performing the acts of a public body.

F [181] I find it more helpful to simply apply para *(b)*(ii) of the definition of public body under s 1 of PAIA, which says that when a body performs a public function or exercises a public power it is a public body. It leads to the obvious next questions: what does 'performing a public function' mean, and, what does 'the exercise of G a public power' mean? Neither of these terms is defined in PAIA, so the court must now determine the ordinary meaning of the language used, taking due cognisance of the H purpose for which the legislation was enacted, the mischief that it is intended to address and the context of the words in the Act, and indeed the context into which the Act itself fits. If 'the body' (the LOC) was engaged in either of these activities ('performing a public function' or 'the exercise of a public power') then it is a public one for purposes of PAIA, provided that the activities were carried out in terms of legislation. I I shall come back to the question of what 'in terms of legislation' means under a separate subheading.

The meaning of 'public function', 'public power'

[182] Mr *Cockrell* relied on *Chirwa v Transnet Ltd and Others*2008 (4) SA 367 (CC) J ((2008) 29 *ILJ* 73; 2008 (3) BCLR 251; [2008] 2 BLLR

Morison AJ

97) paras 186 – 194, the minority judgment of Langa CJ, in which A Mokgoro J and O'Regan J concurred.

[183] This is what the former Chief Justice said regarding the same phrase as used in the Promotion of Administrative Justice Act 3 of 2000:

> '[186] Determining whether a power or function is ''public'' is a B notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard

to all the relevant factors, including: *(a)* the relationship of coercion or power that the actor has in its capacity as a public institution; *(b)* the impact of the decision on the public; *(c)* the source of the power; and *(d)* whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be C determinative; instead, a court must exercise its discretion considering their relative weight in the context.'

[184] Whilst only a minority judgment it is obviously not without significance, and I accordingly deal with it. The *Chirwa* (supra) case dealt with the Promotion of Administrative Justice Act (PAJA). That is an Act concerned with administrative actions by organs of State. It is a separate Act to the one under consideration in this application. It has a separate function and a different focus. This is how the first part of the definition of 'administrative action' reads in that Act:

"'administrative action" means *any decision* taken, or any failure to take E *a decision*, by —

(a) an organ of state, when —

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or F

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision. . . .'[28] [Emphasis provided.]

[185] It will be noted that the PAJA definition is focused on *a decision*. Caution must thus be exercised in taking guidance from cases dealing G with PAJA, even though the definitions have some common language. This judgment is concerned with the definition of a *public body* under PAIA. PAJA is concerned with *decisions* taken by the entity in question. PAIA is concerned with *the entity* itself. The former is obviously of far smaller compass than is the latter. H

[186] When applying PAJA one asks 'what was the nature of the decision?', and the court measures 'the decision' against the component parts of the definition of an organ of State to decide whether the body that made the decision is an organ of State or not.

[187] Nonetheless, one can use the criteria listed by Langa CJ I to measure the LOC's tender process, and come to what is at least a

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A provisional conclusion as to the nature of the body when conducting the tenders:

(a) the relationship of coercion or power that the actor has in its capacity as a public institution;

(b) the impact of the decision on the public;

B *(c)* the source of the power; and

(d) whether there is a need for the decision to be exercised in the public interest.

[188] As I understand the case, the applicants would apply these criteria along the following lines:

C (i) The relationship of coercion or power that the LOC has may be seen in general terms with regard to its having undertaken, *via* the organising association agreement to cause government (which is a body of considerable coercive powers of its own) to: give guarantees, pass legislation, undertake indemnities and generally put a large part of the country's human and other capital at the disposal of the LOC D for the duration of the World Cup, in the public interest.

(ii) The impact of the World Cup on the public can only be characterised as national, for the reasons given above.

(iii) The source of the power to stage the World Cup is, apart from the E funds and support provided by FIFA, government, its guarantees and support. Posed as a *sine qua non* test, it is clear that the LOC could not stage the World Cup and discharge its obligations under the organising association agreement without the government's support and contributions in the various ways detailed in this judgment, particularly the government guarantees.

F (iv) Whether there is a need for the World Cup to be staged in the public interest does not need much consideration. Government has plainly decided that this is so, for it is inconceivable that it would have gone to the lengths that the guarantees demonstrate it has gone to, were the hosting and staging of the World Cup not in the public interest.

G [189] On the other hand, the respondents would submit that the court should not apply the listed criteria to the 'staging and hosting of the World Cup', but to 'the conducting of the tenders' by the LOC, the records in respect of which the applicants have applied for in this application. They would recommend that Langa CJ's test in *Chirwa* (supra) be approached along the following lines:

H (i) The source of the coercion is simply the common law; a private body can call for and conduct tender processes with the limited powers available to a contracting party under the common law of private bodies entering into contracts.

(ii) The impact of the decision as to whom to award the tender is I minimal; it is a private affair between two ordinary contracting parties, and few contracts can be said to have much impact.

(iii) The source of the power is once again the common law.

(iv) There is no need for the tender process to be conducted in the national interest; it is a private affair involving private funding and J private contractual relationships.

Morison AJ

[190] Which of these approaches is correct? In continuing the comparison A between PAIA and PAJA, it is to be noted that the critical enquiry under PAIA is an enquiry into the nature of *an activity* (exercise of a public power, performance of a public function), rather than into the nature of *a decision* (which is the case under PAJA). Decisions may always be included in the concepts of performing a function or the exercising of B a power, but the opposite is not true, ie the performance of a function is not always a decision, nor is the exercise of a power necessarily a decision. The definition of 'public body' under PAIA depends on concepts of greater scope, greater breadth, than mere decisions.

[191] Applicants propose that the function or power under consideration C is: 'staging the World Cup' (an obviously public one) whereas the respondents submit that the functions and powers to be considered are those confined to 'conducting a tender process' (more likely to be private in nature).

[192] It was skilfully argued by Mr *Cockrell* for the respondents that, for D the reasons that follow, the organising committee did not function as a public body *when it invited and awarded tenders.* He pointed out that para (*b*)(ii) of the definition of 'public body' incorporates the following requirements:

(i) The *first* requirement is that the body must amount to a 'functionary' E or 'institution'.

(ii) The *second* requirement is that the functionary or institution must exercise a

'public power' or perform a 'public function'.

(iii) The *third* requirement is that the functionary or institution must do so 'in terms of legislation'. F

[193] I deal with each of these in turn.

A 'functionary' or 'institution'

[194] The respondents submitted that, when it awards tenders or G exercises procurement functions, the organising committee does not act 'in terms of any legislation'.

[195] If this is accepted it follows, say the respondents, that the organising committee is not a 'functionary' or 'institution' (within the meaning of the definition) when it awards tenders. A 'functionary' or H 'institution' submit the respondents, is a body that derives its powers from legislation. I do not agree. If this were so it would be unnecessary to include the requirement of 'acting in terms of legislation' at the end of the definition of 'public body' in para *(b)*(ii). To do so would be tautologous. The respondents' argument in this regard would accept that the legislature intended a tautology to be present in its definition of I 'public body' under PAIA. I do not accept this.

[196] I conclude that the phrase 'in terms of legislation' is not intended to be included in the meaning of 'functionary' or 'institution'; the phrase is added separately elsewhere in the definition. J

Morison AJ

A Public power, public function

[197] The respondents posit a test that a body exercises a 'public power' or performs a 'public function' when any of the following three scenarios is present:

B (i) Where the person or body exercises a power that is inherently governmental in character;

(ii) where the State has outsourced to a private person or body a responsibility that the State would otherwise have had to discharge; and

C (iii) where a private body is controlled by the State.

[198] The example given by the respondents of an exercise of a power inherently governmental in character is where the body or person '[carries] out functions of government',[29] performs 'what is traditionally a government function'[30] or engages in 'the affairs or service of the D public'.[31]

[199] So, for example, pointed out respondents, the power to punish is inherently a governmental function.

[200] Mr *Budlender*, for applicants, also used punishment as an example of an *inherently public* function. His gave the example of a private security E company operating a prison under contract to the government. Prisons provide good examples of what is a traditional or typical or inherently government function. The courts have held that private bodies exercise a public function *when they exercise powers of punishment by way of disciplinary committees.* This is so even though there be no criminal F component — it is simply the power of punishment. For example, to exclude a member of a private body from being a member of that body, ie expulsion or disbarring.

[201] The point was made by Lord Denning in *Breen v Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union)* G *and Others* [1971] 1 All ER 1148 (CA) ([1971] 2 QB 175):

'[Institutions such as the Stock Exchange, the Jockey Club, the Football Association and innumerable trade

unions] delegate power to committees. These committees are domestic bodies which control the destinies of thousands. They have quite as much power as the statutory bodies of which I have been speaking. They can make or mar a man by their H decisions.' [1154*b* – *c* (All ER) and 190 (QB).]

It is for this reason that the South African courts have consistently held that the conduct of a committee of a voluntary association that

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2011 (5) SA p197

Morison AJ

investigates a complaint against members which may result in disciplinary A action (punishment) falls within the reach of administrative review.[32]

[202] The examples given by respondents of the second situation (where the State has outsourced to a private person a responsibility that the State would otherwise have had to discharge) are (i) the prison B example — if the State were to outsource to a private company the operation of a prison to supervise the incarceration of prisoners — and (ii) where a private company is engaged by government to pay State pensions.[33]

[203] Olivier JA made the same point in regard to the provision of a C transport infrastructure, which may be said to be a responsibility of the State, in *Transnet Ltd v Goodman Brothers (Pty) Ltd*2001 (1) SA 853 (SCA) (2001 (2) BCLR 176) para 38, when he stated that Transnet was an organ of State since it was 'exercising the public powers and performing the public functions . . . *of or on behalf of a government department*' [emphasis added]. D

[204] The third situation posited by Mr *Cockrell*, as a situation where a court should treat a notionally private body (such as a company) as a public body under PAIA, is where a private body is controlled by the State. He gave the example of a company whose sole shareholder is the E government and whose entire board of directors is appointed from the ranks of government. [Eds: see *Airports Company South Africa Ltd v ISO Leisure OR Tambo (Pty) Ltd and Another*2011 (4) SA 642 (GSJ).]

[205] In companies the shareholder(s) hold the power to appoint the directors and the directors owe a fiduciary duty to the company. The F duty borne by the directors may require them to conduct the business of the company in a manner that does not advance the interests of one or other shareholder. As a general rule, however, unless there is a conflict of interests between the interests of the company and that of its shareholder, the majority shareholders' interests will direct or control the actions of the company. G

[206] The Supreme Court of Appeal explained the control situation as follows in *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo*2007 (1) SA 66 (SCA) para 19:

'The control test is useful in a situation when it is necessary to determine H whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead. This converts a body like a trading

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2011 (5) SA p198

Morison AJ

A entity, normally a private body, into a public body for the time and to the extent that it carries out public functions.'

[207] The respondents submit that, applying any of these tests, the organising committee does not exercise a 'public power' or perform a 'public function' *when it invites and awards tenders* as:

B (i) The power to invite and award tenders is *not* a power that is inherently governmental in character. It is a power that 'is not unique to the Crown, but is possessed in common with other legal persons'.[34] Private persons obviously have the power to call for tenders and to enter into contracts.

(ii) The power to invite and award tenders is *not* a power that has been C outsourced by the State to the organising committee.

(iii) The power to invite and award tenders is, the respondents contend, *not* a power the exercise of which is controlled by the State. The respondents argue that the State has no control over the organising committee.

D [208] The respondents submit that the applicants have, in an effort to avoid this conclusion, sought to adopt what the respondents characterised as 'an inappropriately nebulous understanding of what is meant by a public power or public function'.

[209] The respondents criticised applicants for suggesting that, if the E public has an interest in the way in which a power is exercised, then the exercise of that power amounts to a 'public power'. The respondents submitted that this test is far too loose to determine what amounts to a 'public power'. The respondents point out that no doubt the public has an interest in the composition of the Bafana Bafana national football F team, but nobody would suggest that the selectors exercise a 'public power' when they choose the team. There might, however, not be quite so few people willing to make this suggestion if the team selectors counted amongst their number eight cabinet ministers acting in their official capacities.

[201] The respondents submit that the test formulated above in G para [197] provides a more rigorous and analytical understanding of what amounts to a 'public power'.

[211] The hallmark, submitted the respondents, of a 'public power' or 'public function' is that it is *governmental in character*. I understand this to mean that the function or power must either be inherently or H traditionally or typically performed by government or controlled by government.

[212] The respondents submitted that the powers of the organising committee to invite and award tenders are not governmental in character, and therefore do not amount to the exercise of a public power or the I performance of a public function.

Morison AJ

[213] The respondents submitted that the relevant question is not A whether the organising committee exercises a public function or performs a public function *when it organises the FIFA World Cup*.

[214] The respondents submitted that even if the question were posed as applicants would have it posed, ie is the LOC performing a public function or exercising a public power when organising and staging the B World Cup?, this question would in any event receive a negative answer in light of the following authorities.

[215] In *R v Football Association Ltd, Ex parte Football League Ltd; Football Association Ltd v Football League Ltd* [1993] 2 All ER 833 (QB) the English court was concerned with a decision of the Football C Association, a voluntary association which is the governing body of football in England. Rose J held that the Football Association was not a body which is susceptible to judicial review:

> 'Despite its virtually monopolistic powers and the importance of its decisions to many members of the public who are not contractually D bound to it, [the Football Association] is, in my judgment, a domestic body whose powers arise from and duties exist in private law only. I find no sign of underpinning directly or indirectly by any organ or agency of the state or any potential government interest . . ., nor is there any evidence to suggest that if the FA did not exist the state would intervene to create a public body to perform its functions. . . . (F)or my part, to E apply to the governing body of football, on the basis that it is a public body, principles honed for the control of the abuse of power by government and its creatures would involve what, in today's fashionable parlance, would be called a quantum leap. It would also, in my view, for what it is worth, be a misapplication of increasingly scarce judicial resources.' [At 848*h/j* – 849*c/d*.]

[216] In *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [F] [1993] 2 All ER 853 (CA) ([1993] 1 WLR 909; [1992] EWCA Civ 7) the English Court of Appeal was concerned with the Jockey Club, a body which controls horse-racing in England. The Court of Appeal held that the Jockey Club's decision to disqualify a horse from a race was not subject to judicial review at the behest of the applicant (who was [G] contractually bound to the Jockey Club's rules). Bingham MR explained the point as follows:

> '(T)he Jockey Club is not in its origin, its history, its constitution or (least of all) its membership a public body. . . . It has not been woven into any system of governmental control of horse racing . . . . This has [H] the result that while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental.' [At 867*a* – *b*/*c*.]

[217] Hoffmann LJ expressed the principle more broadly:

> 'All this leaves is the fact that the Jockey Club has power. But the mere fact of power, even over a substantial area of economic activity, is not [I] enough. In a mixed economy, power may be private as well as public. Private power may affect the public interest and the livelihoods of many individuals. But that does not subject it to the rules of public law.' [At 875*d* – *e*.]

[218] These principles were endorsed in a South African context in *Cronje v United Cricket Board of South Africa*2001 (4) SA 1361 (T) at [J]

Morison AJ

[A] 1377 – 1379. As I understand it, these cases are distinct from those which dealt with private bodies exercising powers of punishment, discussed above.

[219] It is obvious that the task of unearthing the correct meaning of 'public power' and 'public function' will be significantly advanced if one [B] can say what the word 'public' means in the phrases in the context of PAIA.

[220] The Encarta dictionary gives the following meanings of:

> 'Public: *1. concerning all members of the community* relating to or concerning people as a whole or all members of a community *4. of the* [C] *state* relating to or involving government and governmental agencies rather than private corporations or industry *8. belonging to the community* belonging to the community as a whole and administered through its representatives in government e.g. public land . . . . 15th Century : directly or via French from Latin *publicus*, an alteration of *poplicus . . .* from *populus* people.'

[D] [221] The exercise of a *public power* would, on the meanings that I have quoted, mean: the exercise of a power that concerns all members of the community; the exercise of a power that relates to or involves government and governmental agencies; and, the exercise of a power belonging to the community as a whole, and administered through its representatives in government.

[E] [222] The performance of a *public function* using the same meanings from the dictionary quoted above means: the performance of a function that concerns all members of the community; the performance of a function that relates to or involves government and governmental [F] agencies; and, the performance of a function belonging to the community as a whole, and administered through its representatives in government.

[223] In the light of the facts summarised above, it would be surprising [G] for anyone to suggest that, on these papers, the 2010 World Cup in South Africa does not concern all members of the community, does not relate to or involve government or governmental agencies, and does not belong to the community as a whole administered through its representatives in government (one thinks of the cabinet ministers serving on the LOC). This is, in essence, the position that the applicants take in these [H] proceedings.

[224] The respondents urge, however, that the question must be asked, was the LOC performing a public function or exercising a public power *when it decided on the tenders*?

[I] [225] Mr *Cockrell* submitted that, since all of the records relate to tenders advertised,

adjudicated and awarded by the organising committee, the relevant question is whether the organising committee functioned as a public body *when it invited and awarded those tenders*. In other words the way to formulate the issue, according to the respondents, is to ask whether the organising committee was functioning as a public body J '*when it decided to award the tenders to the successful tenderers*'. I have

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Morison AJ

already cautioned against narrowing the critical activity down to the level A of a *decision* when applying PAIA.

[226] In the *Chirwa* case (supra) the learned Chief Justice concluded, in a minority decision, that an individual dismissal of a public employee did not constitute the exercise of a public power or the performance of a public function on the facts of that case, but warned[35] that his reasoning B would not necessarily hold true for all such cases.

[227] Applying the different factors listed by the learned Chief Justice to the facts of this case as I have done above, and giving them due weight in context, I am driven to conclude that, even on the narrower enquiry C posed, on the facts of this case, which is on the other end of the scale from any private dismissal, it would be correct to find that the LOC is performing a public function or exercising a public function when deciding on the tenders in question.

[228] Using the respondents' formulation of what the question should D be, but replacing the word 'public' with the dictionary meanings, the question to be answered in this matter would read something like this: when deciding on the tenders, did the LOC perform a function that concerns all members of the community, a function that relates to or involves government or governmental agencies and belongs to the community as a whole administered through its representatives E in government?

[229] In deciding who was to be awarded the tenders it must be remembered that the LOC, like all companies, is controlled by its board of directors. On the LOC's board of directors serve no less than eight cabinet ministers, who serve on the board as representatives of government. F I have not been enlightened as to how many members sit on the board of directors of the LOC in total, but I have no doubt that the eight cabinet ministers comprise a significant influence on the LOC's decision- making processes.

[230] When the LOC decides whom to award any tender to, it does not G seem likely to me that it does so in a manner that can realistically be insulated from government. On the contrary, it is inherent in the composition of its board of directors that government is represented in numbers. No decision of any consequence for the LOC can be made, either at the level of the board of directors itself, or at the level of CEO H or lower, without government being involved, not as a matter of fact, but as a matter of law, for a company is in law controlled by its directors, as I have mentioned above. All those who act on the company's behalf derive their powers to do so from powers delegated, expressly or tacitly, from the board of directors. I

[231] The fact that its board of directors contains a substantial government contingent weighs heavily with me in favour of a conclusion that the activities of the LOC are those of a public body.

Morison AJ

A [232] In *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd*,[36] an access-to-information case under s 23 of the interim Constitution, the court had based its decision in large part on the fact that the board of directors was government-appointed.

[233] In the context of this case it is unnecessary to say which is the B decisive factor, but as will be appreciated, the mere presence of the eight cabinet ministers on the LOC's board is a weighty consideration indeed. It is for good reason that the authorities relied on by the amicus as argued before me emphasise that each case must be decided on its particular facts. I cannot imagine that there are many companies which are not C State-owned that have so many cabinet ministers serving on their board of directors.

[234] As regards the other tests, Conradie JA[37] quotes with approval the following passage from a foreign academic text:

> 'If the degree of [government] control is significant, the functional test D has been held to be of little or no importance.'

[235] In the present case the existence of the eight cabinet ministers on the board of the LOC is in itself probably sufficient to meet the test of 'significant control'. Hence, even if I am wrong about the public-funding component of the public body (which I am coming to), the cabinet ministers' presence on the LOC board of directors would suffice to E establish, for the reasons given, that the LOC is a public body in regard to its tender records.

[236] Conradie JA quoted[38] the following from an English textbook:

> 'A body is performing a public function when it seeks to achieve some F collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.'

[237] Mr *Budlender* submitted that government was 'embedded' in the LOC, as it was in *Mittalsteel*, where it was found that, due to various G legislative powers of control vested in government over the appellant, it was 'without a doubt, subject to the State's control, perhaps indirect, but firm all the same' (para 27).

[238] Conradie JA concluded:

> '[28] The appellant was thus, at the relevant time, and when exercising H the functions in respect of which the respondent requested records, a public body for the purpose of s 11 of PAIA. It was not seriously contended that the documents did not come into existence *in the course of Iscor's pursuing its activities*. The respondent is thus entitled to access to those records.' [Emphasis added.]

I [239] It will be noted that, in dealing with the documents coming into existence in pursuance of Iscor's activities, the Supreme Court of Appeal

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did not apply a test that was closely focused on the individual tasks (such A as conducting tenders). It appears to have been satisfied that, as long as Iscor was pursuing its activities in a general sense, all that that would ordinarily entail, was that it was sufficient for the court to order that access to those records be provided under PAIA.

[240] I have observed that, if officers of government serve on the body B itself, the question at the centre of this case is all but answered, but perhaps not conclusively so. This factor aside, in my view, on a proper application of para *(b)*(ii) of the definition of 'public body' in PAIA, a critical indicator of whether a particular scenario should fall in or outside the definition of 'public body' is whether or not public funds are being C disbursed in the course of the activity of that body.

[241] In my view, if public funds are in the hands of the body concerned, and it is entrusted with disbursing them to others, it would make no difference if the body in possession of such funds were, for purposes of disbursing the public funds entrusted to it, conducting a tender for its D privately funded disbursements or intending to conclude a private contract without any tender process preceding it. The fact that the body is in receipt of, and is disbursing public funds, is sufficient to constitute its activities as public.

[242] The activity does not lose its character of being 'public' just E because it is an activity that may also be performed by private bodies. The prisons example used by Mr *Budlender* demonstrates the point.

[243] Mr *Budlender*, for the applicants, as I have mentioned, gave the example in oral argument of a private security company awarded a F government contract to operate a prison. In operating the prison, so the example went, the security company would be exercising a public power or performing a public function in operating the prison — and would thus satisfy this element of the definition of 'public body' in para *(b)*(ii). I infer that, in such a case, the prison records regarding, for example, inmates taken into custody and released would be records that could be G inspected under PAIA as the records of a public body.

[244] Continuing his example, Mr *Budlender* pointed out that, if the same security company were to contract with an individual householder, the security company would be acting as a private body. I infer that its records in regard to that private contract would in such a case be H immune to a public-body request under PAIA. Mr *Budlender* then developed the argument by postulating that the prison-operating company, in carrying out the prison-operation contract, invites a number of catering businesses to tender to be awarded the contract to supply meals to the prison. Although the tendering process would in this example be I a private one, designed to result in a private contract, Mr *Budlender* argued that, on a proper application of PAIA, the records relating to the food-supply contract would be the records of a public body, and available for inspection as a public body's records under PAIA. In my view the reason why this is obvious is not so much because the tender process for the caterers is inherently bound up in the activity of running J

A a prison, but because it is obvious that State funds would be used to pay the caterer, a matter to which I will return.

[245] The first of Mr *Budlender*'s scenarios is of a tender process for catering suppliers conducted by the security company engaged by government to run a prison. Government funds are directly involved in B this first scenario. The second of counsel's scenarios is a tender process conducted by the same security company to engage subcontractors to provide guarding services to private clients. No government funds are engaged in the second scenario.

[246] The two scenarios are well chosen to illustrate an important C distinguishing feature of public versus private bodies. It is at least arguable that private security guards perform a function similar to the police, a patrolling and protection function that benefits more than just the clients who pay for private security services; it serves as a deterrent to criminals for all in the area patrolled by the security company, irrespective of whether all in the area have security contracts with that company, D or at all. It is not even so much in the nature of the activity or the public benefit that determines its public character. In the first scenario the funds being spent have been provided by government, whereas in the second scenario the funds have not emanated from government. In this one distinguishing feature I see the clearest difference in principle. I do not E mean to suggest that it is only where State funding is received by a body that it will be performing a public function or exercising a public power, but the fact that State funding is involved must always be a useful feature of any such enquiry and, I would venture to suggest, will incline a court to conclude that the function or power in question is public in nature.

F [247] Mr *Cockrell*, for the respondents, drew attention to *Institute for Democracy in South Africa and Others v African National Congress and Others*2005 (5) SA 39 (C) (2005 (10) BCLR 995) para 29, wherein the court determined that the records relating to the

private donations made to political parties were not to be disclosed under PAIA, in which the court explained the matter as follows:

> 'It is apparent from these provisions that the definition of public body is a fluid one and that the division between the categories of public and private bodies is by no means impermeable. *The Act recognises the principle that entities may perform both private and public functions at various times and that they may hold records relating to both aspects of their* H *existence.* The records being sought can thus relate to a power exercised or a function performed as a public body, in which event Part 2 of PAIA is applicable, or they can relate to a power exercised or a function performed as a private body, in which event Part 3 of PAIA is applicable. The language of section 8(1) makes it clear that, in respect of any particular record, a body must be either a public body or a private body; it cannot be both. *Whether it is one or the other thus depends on whether the record relates to the exercise of a power or performance of a function by that body as a public body or as a* I *private body*.' [Emphasis added.]

[248] Whilst the passage is undoubtedly correct, the reliance on s 8 in the latter part of the quoted portion of the judgment is problematic, for J the reason given above in relation to that section.

Morison AJ

[249] Applying Mr *Cockrell*'s approach to the example of the prisons A catering contract, the company's records relating to the catering contract would be protected from disclosure under PAIA, as the activity or function relating to the documentary record (the activity or function of private tendering) is a private one. But just because private people or entities can conclude private contracts or carry out private tender B processes it does not mean that, when a company enters into a contract, the act of entering into the contract is private.

[250] Tendering processes are not *inherently private*; they can equally be of a public nature. That the LOC might have intended its tenders to be private is of no relevance; the enquiry is not one of intention. C

[251] Both parties' counsel referred to *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo*2007 (1) SA 66 (SCA). In para 10 the Supreme Court of Appeal held:

> 'A body such as that described in ss *(b)*(ii) of the definition of public body in s 1 of PAIA, one exercising a public power or performing a D public function in terms of any legislation, has the attributes of a public body only when, in terms of s 8 of PAIA, it produces a record in the exercise of that power or the performance of that function. When it does not produce such a public record, it is a private body in relation to whatever record it does produce.'

[252] It is of significance that the respondents accept that the position is E different in the case of those tenders that involve the expenditure of money that has been given to the organising committee by government for a designated purpose. The respondents state in para 15.6 of their answering affidavit that:

> 'I have indicated in paragraph 7.4.1 above that the organising committee F has received funding from government for specific purposes, and that those funds have been ring-fenced for the designated purposes. For the purposes of this application, *I am prepared to accept for the sake of argument that the organising committee may exercise a public power or perform a public function when it invites and awards tenders involving expenditure of the money referred to in paragraph 7.4.1 above* [funds G sourced from government]. I point out that the organising committee has awarded only one tender that falls into this category being the tender for the opening and closing ceremony awarded to the VWV Consortium. If negotiations with the Department of Minerals and Energy are successful in relation to energy supply, a further tender will fall into this category.'

[253] In my view this concession is rightly made by Jordaan on behalf of H the LOC. When funds are disbursed from the public purse a public power is plainly exercised, a public function is plainly performed.

[254] In this case public funds were made available to the LOC to pay for I the opening and closing ceremonies. Applying the test set out in para [197] above (the respondents' proposed test), it is clear that the opening and closing functions of large sporting events are not *inherently governmental*, nor are they *government-controlled*, yet the respondents

recognise that in regard to these ceremonies the LOC is acting as a public body. The reason why this is accepted by the respondents is, as I read J

2011 (5) SA p206

Morison AJ

A their affidavit, because government funds are used to pay for these ceremonies.

[255] Public funds are collected by the revenue-collecting agencies of the State, eg the Receiver of Revenue, the Department of Customs and Excise, and, at a local authority level, the local authority's department(s) B responsible for collecting rates from property owners.

[256] It is a fundamental of these transactions (the handing-over of taxes of various sorts to the government collection agencies) that the funds collected will be used for a public, not a private, power or function. C Taxpayers do not pay taxes on the understanding that government will spend those funds privately. The taxpayer is entitled to accept as a given that the funds collected from the public will be used for the public good, in the public interest.[39]

[257] The role of public funding sheds light on Mr *Budlender*'s example D of the private security company being engaged by government to operate a prison (whose prison-related records would be open to inspection via a public-body request under PAIA), and the same security company having private contracts (the records in respect of which would not be open to inspection via a public-body request under PAIA).

E [258] It is, in my view, because government funding would be used by the private security company to run the prison and pay for the catering services to feed the prisoners that its catering-contract tender records are so obviously to be regarded as the records of a public body under PAIA. By contrast, when providing the private guarding or security service to its F private clients the same security company is being paid by those private clients. If it were to tender for a catering contract to provide food for its guards who protect the private clients, there would be little difference between the tender process for the prison and the tender process for the private guards.

G [259] In my view the origin of the funds expended by the body in question plays a significant role in guiding a court to the correct conclusion. A body receiving and disbursing public funds is either exercising a public power or performing a public function (spending State money), it matters not which. Government funds are the DNA of government: where such funds are to be found, so too is government.

H [260] If the body receives both State and private funds, then it is acting as a public body, at least in respect of the public funds, and to draw too fine a distinction between the public-funded activities and the privately funded activities of the body is to place too much trust in the body's account-keeping practices. There is no reason why the public should I have to limit its rights under PAIA to anything less than a full disclosure of the records, and if that should involve some invasion of privacy, it is a cost that must be paid in the greater public interest.

2011 (5) SA p207

Morison AJ

[2261] To look to the nature of the function or power alone is not a A reliable guide. The source of the funding required to perform the function or exercise the power must also direct the court.

[262] To focus on the act of conducting tenders is not conclusive. Even if the private security company had conducted tenders to find subcontractors to provide guarding services to private clients on its behalf, the B mere fact that the activity is the conduct of

a tender process would not make the power that it exercised, nor the function that it performed, a public one. It is when it is dealing in public funds that the character of its actions changes from private to public.

[263] When public funds pass directly or indirectly into the control of an C entity for onward payment to another or others, irrespective of whether the function to be performed or the power to be exercised is inherently traditional or typically governmental — outsourced or not — or whether it is subject to government control, it is performing a public function or exercising a public power in receiving and disbursing those funds. D

[264] This is the only basis on which the respondents' concession that its records in regard to the VWV consortium, ie that that tender was one in which the LOC was acting as a public body, is consistent with the rest of its case. But for the fact that it was public funding that was being spent by the LOC, nothing distinguishes the VWV tender from any of the other E tenders conducted by the LOC. For this one tender the LOC concedes, for purposes of argument, that the records should be produced for inspection under PAIA. As I understand it, the sole reason for the concession is because public funds were involved in this tender.

[265] In private law an agent has a duty to account to a principal for the F expenditure by the agent of the principal's funds. The logic underlying this duty informs the present enquiry. Although there is no contract of agency operative in this case, it is clear that the provider of at least some of the funds is government, and the entity charged with spending them is the LOC. G

[266] PAIA is an instrument of policy designed to hold public bodies accountable. The respondents point out that the applicants do not seek access to the VWV consortium opening and closing ceremonies tender documents specifically. In my view, this should not serve to prevent applicants from having access to at least these records, ie those relating H to the tender documents in respect of which public funds were disbursed for the opening and closing ceremonies of the FIFA World Cup.

[267] It must follow that, subject to other limitations, where government funds are being disbursed by a 'private' corporate entity (eg a company) the right to access to information applies to all records relating to such I expenditure. I do not understand the respondents to contend otherwise.

[268] Once public funds are involved, it is clear that the tests suggested by the respondents to assist in interpreting what is meant by 'public body' under PAIA are incomplete. Another leg must be added to the test, one that pays due regard to the significance of public funding in J

Morison AJ

A determining whether a body is performing a public function or exercising a public power. On their own, the three legs to the test in para [197] are inadequate to the task, and fail to produce a result that is consistent with the respondents' own concession.

[269] In formulating an appropriate test (or guide to interpretation of B the particular provision of PAIA) to divine what characteristic or set of characteristics makes up the exercise of a public power or the performance of a public function, one would have to formulate a test that accommodates the role of State funding when applying the definition of a 'public body' in para *(b)*(ii) of PAIA.

C [270] I do not propose to formulate such a test. I need only conclude that the respondents' proposed test (para [197] above) is insufficient as a reliable guide to adopt in approaching the task of interpreting para *(b)*(ii) of the definition of 'public body' in PAIA. Whilst the respondents' proposed test provides valuable tools in informing the D

process of interpreting the paragraph and applying it to any non-State body and its records, it is, as I think I have demonstrated, not enough to answer all of the respondents' proposed tests in the negative, to be able to conclude that the question 'Is this a public body under para *(b)*(ii) of the definition of a public body under PAIA?' should *necessarily* be E answered in the negative.

[271] One can make a finding that the power or function exercised or performed is not inherently governmental in character; that the power or function has not been outsourced by the State; and that the power or function is not under the control of the State, but still conclude, as the F VWV Consortium example shows, that the power or function is a public one, and hence that the functionary or institution that performed the function or exercised the power is indeed a public body as defined in para *(b)*(ii) (leaving aside, once again, the component of the definition that requires that the body exercise the power or perform the function *in* G *terms of legislation*).

[272] There is nothing else *but the fact that State funds are involved* that sets the LOC's tender records in respect of the VWV Consortium apart from the LOC's other tender documents. It is hard not to conclude that it is solely because State funds were disbursed via the VWV Consortium H tender process (the tender for the opening and closing ceremonies) that the LOC conceded the obligation to provide access to those records. Clearly, State funding is something of an acid test for whether the functionary or institution is a public body.

I [273] In my view, because this functionary or institution, the LOC, disbursed public funds, even though that functionary may in all other respects be a private one performing an act or acts which are in no other way governmental in character, origin or under governmental control (which is not the case here), it surely is performing a public function or exercising a public power. As the funds under its control are from the J public purse, it cannot be otherwise.

Morison AJ

[274] What does this imply for those tenders that the LOC conducted A that did not involve State funds? Must the court accept that the LOC's 'ring-fencing' of the State funds should 'ring-fence' the applicants' rights to access any other tender records of the LOC?

[275] Apart from the other grounds of the finding that the LOC is a B public body, I think the answer to this question must be in the negative. Mr *Cockrell* urged me to apply the *Plascon-Evans* test,[40] which would mean that, because the respondents say these funds are ring-fenced, a court must accept that they are. The difficulty that I have with this is that I do not know what this phrase 'ring-fenced' means, other than in the colloquial sense, ie kept separately. Does this mean that the government C funds are kept in a separate bank account? Are there preference shares issued to government in respect of these funds? Does it mean that the government funds are commixed with the LOC's ordinary funds, but dealt with on specific instructions to the LOC's bankers and accountants? Does it mean that these funds are kept in an attorney's trust account, D with the protections and accounting obligations that are associated with that? I do not see how the *Plascon-Evans* test can oblige a court to accept so vague an averment that the funds are 'ring-fenced', as constituting sufficient proof. A court would at least expect to be presented with a copy of the records, the bank statements, the accounting entries in the LOC's E books of account, the specific accounting policies applicable thereto (not some general invocation of GAAP), to support the substance of this averment. On an evidentiary basis, therefore, I do not have enough before me to merit a finding that the records of the government-funded tenders are so distinct and the activities in respect thereof are so separate that those records can practicably be treated differently from the other F tender records.

Morison AJ

A [275] Then there is the question of who the VWV Consortium is. A consortium is not a recognised legal entity. It is normally in the context of tenders a number of companies held together by the terms of an agreement, drawn specifically for purposes of obtaining the business offered in a tender process. How is the court to understand that the funds B to be paid to such an entity have been 'ring-fenced'? Does the consortium operate a single bank account; does it have a single accounting structure, an obligation to maintain accounts, an obligation to be audited? The problems of accepting the assurance that the funds are ringfenced are compounded by the variable character of a consortium. The *Plascon-Evans* test does not operate to convert a bald averment into C conclusive proof, to convert conclusions into evidence.

[277] I thus consider the receipt of public funds by the LOC for onward disbursement to third parties (which happens in this case to have apparently occurred via a tender process) to be a strong indicator that, in the conduct of its tender processes, it is to be regarded as having been D 'the performance of a public function or the exercise of a public power'. In my view, a body that receives public funds for onward payment to others is almost certainly exercising a public power or performing a public function in respect of those funds.

[278] To draw a line between those tenders which involve the disbursement E of public funds and those which involve the LOC's private funds is, on the facts of this case, impractical. In my view, once a body has accepted the responsibility that comes with receipt of public funds and the duty to disburse those funds to others, it is artificial to limit the reach of a PAIA public-body request to only those tender records that relate to those funds, unless there is clear evidence, which there is not in this case, F that the public funds have been rigorously kept separate and screened off from the other funds handled by that body. Money is a fluid thing; its ebb, flow and evaporation can be achieved in the modern day by the click of a mouse, whether intentional or inadvertent. Where the interest earned on funds received ends, and where the finance charges on moneys G borrowed begins, should not be matters that a court should be prepared to accept on anything but cogent and detailed evidence. Given the nature of the LOC's record-keeping it is perhaps not surprising that no better evidence of precisely how the VWV Consortium funding was 'ring-fenced' could be produced. Whatever the reason, I consider the H evidence presented by the LOC in this regard to be insufficient.

[279] It cannot be that just because the funding of the body comes from State coffers (from 'the people' referred to in the opening line of the preamble to the Constitution), that the recipient of those funds is automatically a public body under PAIA (I am still leaving aside the I 'acting in terms of legislation' requirement). To illustrate: a State employee would not have to account to his or her employer for how he or she spends his or her salary; a company engaged by the State to provide maintenance to public buildings would not have to make its records available under PAIA to show how much it paid its employees, materials suppliers, landlord, etc. The position would, however, be J different where the maintenance company used subcontractors. Where

Morison AJ

the recipient of State funding receives those funds *as principal* in A exchange for goods or services rendered to the State, it would not be performing a public function or exercising a public power in dealing with those funds. Indeed, the funds would lose their character as public funds the minute that they were paid to the principal. *Non constat* that this is so where the recipient of the State funds receives them, whether known to B the State at the time or not, as agent, paymaster, main contractor intending to engage subcontractors or

any other form of conduit-type function.

[280] The reason for this would seem to be obvious, and it lies in the vital role that State expenditure plays in our constitutional State. I have C drawn attention to the preamble to the Constitution, and to PAIA above. Ours is a society characterised by a history of institutionalised disadvantaging of the majority of our people. The institutions that were used to perpetrate the crime of apartheid were the institutions of State, and large amounts of State funding were used to prop up the military and security D establishments that maintained the status quo that served to advantage so few at the cost of so many. The cost to those disadvantaged was incalculable. It is immeasurable not only because of its vast scale, but because it is a cost that has currencies which do not lend themselves to counting — in the very broadest of terms: dignity, freedom, health, education, and justice. The cost of poverty is another matter altogether. E Poverty can be measured, the distance between the breadline and other points on the economic graph is finite, and real currency can be used.

[281] There are many instruments of economic policy that our government is using to alleviate poverty.

[282] One is the policy of broad-based black economic empowerment, a F policy expressed in legislation. The policy of encouraging growth of small to medium-sized enterprises is similarly legislated. The State's distribution of its spending power to reach members of previously disadvantaged communities is a complex legislative and social task. The threat of corruption makes it no easier. The remedial distribution of G State funds is a constitutional imperative, and it is one that our government is presently trying to discharge by means of the policies embodied in the legislation mentioned at the beginning of this paragraph. Our Constitution enjoins us all to take remedial measures. The Constitution casts a particularly heavy burden on the State in this regard. It is to government that South Africans turn for hope, but more H prosaically, for money. It is to its people that government turns for money. If the people haven't got money for government, government borrows money from other sources, and promises the lender that the people will pay it back. This practice of binding future generations to pay back the loans and finance charges levied by those who lend money to I the government is not unique to our country, but it is a practice that impacts far into the future on the lives of the citizens of the countries whose governments borrow in this way. Thus, whether government funds distributed in the commercial life of its people are borrowed from the people themselves or from others, eg the people of other countries, government funds have a function and a power that can readily be J

Morison AJ

A recognised as public. Government may be found wherever government funds go. Where government funds go, so too should follow transparency and accountability of those who handle those funds. It matters not who is entrusted with the task, nor for what the funds are being distributed, whether for social grants, for catering contracts for prisons, B or for opening ceremonies of the World Cup. Where the funds emanate from 'the people', the entity dealing in those funds is or should be performing a public function or exercising a public power.

[283] A further basis for my finding in this regard is based on Mr *Budlender*'s argument that the LOC is a public body because of the C extent to which the LOC's function or power is interwoven in the legislative fabric. Relying on *Mittalsteel* (supra) Mr *Budlender* urged the court to consider the 'impact and scale' of the World Cup on South African society, as disclosed in the papers before me. He submitted that in the light of the legislative enactments alone relating to the LOC and D the staging and hosting of the World Cup, to describe the LOC as anything other than a public body could not be achieved 'with a

straight face'. He drew attention to a number of legislative enactments (that various levels of South African lawmaking machinery, from the national legislature to the city governments of Johannesburg and Tshwane, have E passed into law) that have as their subject-matter the World Cup soccer tournament. These are discussed under the sub-heading 'acting in terms of legislation' below. I refer in particular to the powers and functions of the LOC to, for example, designate previously public areas as restricted or controlled areas, accredit individuals with the right to enter such areas, to exclude non-accredited individuals from such areas, to enjoy F the services of peace officers (police) in enforcing the LOC's decisions as to who can or can't enter a controlled area, and for the LOC to be protected against a breach thereof by pain of punishment comprising fines of thousands of rands or even months in prison.

[284] The control of access sites where official events (which include the G opening and closing ceremonies) take place is jointly shared by FIFA, the LOC and government. In this regard the Organising Association agreement provides as follows:

> '12.1.8The Official Events shall take place in Controlled Access Sites H provided by and under the full access *and operative control of the Organising Association in collaboration with the competent government authorities and FIFA*.' [My emphasis.]

[285] I am not persuaded by the respondents' argument that it is the police and other State agencies, not the LOC, that exercise the powers or I perform the functions inherent in this body of World Cup-specific legislation. In the above example, in the local authority bylaws, the terms of the legislation make clear that it is the LOC that is directly involved in determining what the designated or controlled areas are, and who should be accredited individuals permitted access to such areas. The penal provisions of these bylaws translate the LOC's determinations into a J material part of a criminal offence, which exists on the statute book only

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because of the World Cup, and will cease to exist after the term of the A tournament is ended. The legislation is considered in greater detail below.

[286] Having found that the LOC performs public functions in relation to its tender records, it is now necessary to determine whether it does so in terms of legislation, which is the last portion of the definition of B 'public body' in PAIA.

'In terms of legislation'

[287] The applicants submit that the phrase 'in terms of any legislation' only qualifies the phrase 'performing a public function', and does *not* C qualify the phrase 'exercising a public power', ie that on the proper interpretation of para *(b)*(ii) of the definition of 'public body', the phrase 'exercising a public power' is not qualified by the phrase 'in terms of legislation'.

[288] Thus, where an institution exercises a public power it qualifies, D applicants submit, as a 'public body', whether or not this power is exercised in terms of legislation.

[289] Applicants submit that this interpretation is supported, not only by the rules of grammar, in terms of which the qualifying phrase qualifies only the noun immediately preceding it, but also cases such as *R v Panel on Take-Overs and Mergers, ex parte Datafin plc and Another* E *(Norton Opax plc and Another Intervening)* [1987] 1 All ER 564 (CA) ([1987] 1 QB 815) (*Datafin*); and *R v Advertising Standards Authority, ex parte The Insurance Services plc* [1990] COD 42.[41]

[290] For reasons given below, the respondents take issue with this, and in this regard I am persuaded by the respondents' interpretation. F

[291] However, applicants submit that they do not need to pursue this argument here, as

it is undeniably the case that the LOC performs public functions in terms of legislation and, on this basis alone, the LOC qualifies as a public body under PAIA. For the reasons given, I agree with this latter submission. It does not matter for purposes of this judgment G whether the exercise of the public power is in terms of legislation or not. It is sufficient if the applicants show that the LOC performs a public function in terms of legislation.

[292] Whether the organising committee performs a public function or exercises a public power is not decisive. To qualify as a public body it H must exercise the public power or perform the public function 'in terms of legislation' when it invites and awards tenders.

2011 (5) SA p214

Morison AJ

A [293] The respondents submit that the LOC does not so act. They make this submission for the reasons that follow.

[294] The drafters of PAIA were alive to the distinction between law and legislation. For example, s 44(1)*(a)* refers to a decision taken 'in the exercise of a power or performance of a duty conferred or imposed *by* B *law*'. By contrast, the definition of 'public body' refers to a functionary or institution 'exercising a public power or performing a public function in terms of any *legislation*'.

[295] The respondents point out that there is no legislation that confers on the organising committee the power to procure goods and services or C to award tenders. They submit that the organising committee derives its procurement powers from the common law, not from legislation. The founding affidavit conspicuously fails to point to any legislation that confers on the organising committee the power to procure.

[296] The founding affidavit refers to the 2010 FIFA World Cup South D Africa Special Measures Act 11 of 2006. The respondents submit that that Act does not confer on the organising committee the power to procure or to award tenders.

[297] The founding affidavit refers to the 2010 FIFA World Cup and Confederations Cup: South Africa Bylaw. Those bylaws do not confer E on the organising committee the power to procure or to award tenders.

[298] The founding affidavit refers to FIFA statutes and regulations. But those statutes and regulations manifestly do not amount to 'legislation' within the meaning of PAIA. They are simply the rules of a voluntary F association.

[299] In sum, the position is identical, submit the respondents, to that in *Institute for Democracy in South Africa and Others v African National Congress and Others*2005 (5) SA 39 (C) (2005 (10) BCLR 995) where Griesel J held as follows:

> '[30] Returning to the facts of the present case, the records being sought G from the respondents relate *exclusively to their fundraising activities*. Such activities, insofar as they relate to the private funding of political parties, are not regulated by legislation. The respondents are, accordingly, entirely at liberty to generate an income from any lawful means, including donations, soliciting contributions from members, the sale of merchandise, the realisation of investments, and the like.
>
> H [31] Having regard to the guidelines set out above, it cannot be said, in my view, that, in receiving private donations, the respondents are: *(a)* exercising any powers or performing any functions in terms of the Constitution; *(b)* exercising a public power or performing a public function in terms of any legislation; or *(c)* exercising any power or I performing any function as a public body. They simply exercise common-law powers, which, subject to the relevant fundraising legislation, are open to any person in South Africa.
>
> [32] In the result, I am of the opinion that the matter must be approached on the basis that, for purposes of their donations records, the respondents are not public bodies, as defined by PAIA, but that J they are indeed private bodies.' [Emphasis added.]

2011 (5) SA p215

Morison AJ

[300] The applicants counter this argument by, inter alia, drawing A attention to the terms of a notice promulgated by the Minister of Trade and Industry, a piece of legislation referred to for the first time in the answering affidavit. This latter fact does not prevent the applicants from relying on this legislation in argument.

[301] The respondents had properly drawn attention to the protected B event notice (which had been overlooked by the applicants). The applicants made much of this notice in their replying affidavit.

[302] Section 15A of the Merchandise Marks Act 17 of 1941 provides that the minister of Trade and Industry may by notice in the *Gazette* C designate an event as a 'protected event'. For the period during which an event is protected, no person may use a trademark in relation to such event in a manner which is calculated to achieve publicity for that trade- mark and thereby to derive special promotional benefit from the event, without the prior authority of the organiser of such event. D

[303] The minister of Trade and Industry has designated the 2010 FIFA World Cup as a '*protected event*' in terms of s 15A of the Merchandise Marks Act 17 of 1941. He did so in General Notice 683 of 2006, which was published in the *Government Gazette* on 25 May 2006 (the protected event notice). It reads: E

> 'I, Mandisi Mpahlwa, minister of Trade and Industry, pursuant to the Notice published 17 November 2005, in *Government Gazette* No 28243, Notice No 1259 hereby designate 2010 FIFA World Cup (the World Cup) as a protected event in terms of section 15A of the Merchandise Marks Act, 1941 (Act) from the date of publication of this F Notice in the *Government Gazette* to six calendar months after the date of commencement of the World Cup. For ease of reference section 15A is attached and the public should pay particular attention to the provisions of subsection 2, 3, 4 and 5 of the section.
>
> The protected event status is conferred on the World Cup on the understanding that the World Cup is in the public interest and that G local organising committee (LOC) has created opportunities for South African businesses, in particular those from the previously disadvantaged communities.
>
> The protected event status is further conferred on the understanding that: H
>
> The Procurement Policy of LOC shall apply public section procurement principles such as procedural and substantive fairness, equity, transparency and competitiveness.
>
> The Procurement Policy of LOC shall apply constitutional procurement principles, the Preferential Procurement Policy I Framework Act, 2000, the Department of Trade and Industry (the DTI) codes of good practice for Broad Based Black Economic Empowerment (BBBEE) when evaluating suppliers and administrative law principles of fair procedure.
>
> The LOC must submit an impact assessment of the World Cup on communities in South Africa to the Minister six months after termination of the protected event. J

Morison AJ

> A 'The date of termination of the ''protected event'' status is six calendar months (as envisaged in the Special Measures Act, 2006) after the date of commencement of the World Cup.'

[304] It was argued that the protected event notice does not purport to impose on the organising committee an obligation to 'apply constitutional B procurement principles, the Preferential Procurement Policy Framework Act, 2000 [and] the Department of Trade and Industry codes of good practice for Broad Based Black Economic Empowerment' (the procurement legislation); it serves merely to record the minister's 'understanding' that this would happen. An understanding is not a term that is usually used to convey legal obligation. A more direct obedience-inducing C form of language is generally used in legislation — words like 'shall' and 'must' are commonly used to convey the coercive quality of legislation.

[305] Although the minister in this Government Notice records his D understanding that certain procurement statutes will be applied by the LOC, if they are not, so respondents' argument goes, well, then the minister was simply mistaken in his understanding. Even if he was right in his understanding we are still free, says the LOC, to ignore the fact that he

had that understanding, because an understanding is something that E we can elect to give effect to or not. It is neither an agreement, nor does it have the force of legislation. The LOC, in conducting its activities in the shadow cast by the minister's understanding, is not acting in terms of any legislation. Thus, even if everything the LOC did was carried out in meticulous observance of the legislation and principles that the minister 'understood' the LOC would use to conduct its procurement F processes (and there is no suggestion on the papers that the LOC *is not* actually going about its procurement in exactly the way the minister understood it would), it would still not be acting 'in terms of legislation', because the legislatively coercive force is simply not present in the wording used.

G [306] The respondents submit that the protected event notice does not purport to impose on the organising committee an obligation to 'apply constitutional procurement principles, the Preferential Procurement Policy Framework Act, 2000 [and] the Department of Trade and Industry codes of good practice for Broad Based Black Economic H Empowerment'. The protected event notice does no more than to record the Minister's 'understanding' that the organising committee has assumed a voluntary obligation to comply with the legislation referred to therein. The answering affidavit explains that the organising committee indicated to the minister that it would *endeavour* to comply with these obligations where possible, even though it is not required to do so in law.

I [307] This amounts to the voluntary assumption of an obligation that would not otherwise apply. The organising committee has undertaken towards the minister that it will seek to comply with the underlying legislation, even though that legislation does not bind it. This does not amount to the imposition of a legislative obligation. The position would J be the same, argues respondents, if a commercial bank were to state

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publicly that it will seek (or endeavour) to comply with the Preferential A Procurement Policy Framework Act 5 of 2000[42] when it procures goods and services. This would not mean that the bank is bound by the Preferential Procurement Policy Framework Act. It would simply mean that the bank has voluntarily assumed an obligation that does not bind it as a matter of law. It would be different if it said it would comply. B

[308] According to the respondents, the applicants get it wrong when they state that 'a voluntary obligation is a contradiction in terms'. On the applicants' logic, submit the respondents, there would be no law of contract. For more than 2000 years, our common law has distinguished between obligations imposed *ex lege* and obligations imposed *ex consensu*. C Any obligation on the part of the organising committee to comply with 'public sector procurement principles' derives from its undertaking towards the minister. It is not imposed *ex lege*. What the respondents' argument omits to take into account is that if a voluntary obligation is not a contradiction in terms, then it is at least binding *ex contractu*, and the contract in which that voluntary obligation is recorded is in the D protected event notice, which is legislation. In conducting its tender processes, then, the LOC is obliged to act in terms of legislation, even though, on its argument, it is only a contract dressed up in legislation. It is still legislation.

[309] The respondents submit that the applicants also err when they E state that 'the minister has prescribed that one of the conditions attaching to the declaration of the World Cup as a protected event is that the first respondent act in terms of the Constitution and the Preferential Procurement Policy Framework Act in inviting and awarding tenders'. This is precisely what the protected event notice does *not* say, according F to the respondents. It does no more than to record the minister's 'understanding' that the organising committee will comply with the underlying legislation. I have difficulty reconciling this argument with the respondents' other argument regarding voluntary obligations and the law of contract.

[310] Against this background, it is submitted by the respondents that G the organising committee does not 'act in terms of' the procurement legislation when it procures goods and services. This is so for two reasons:

(1) The first reason is that the organising committee would only act 'in terms of legislation' if it were bound by that legislation *ex lege*. H However, the underlying legislation does not bind the organising committee *ex lege*. The protected event notice records the minister's understanding that the organising committee will apply the underlying legislation *as if* it were bound by that legislation. The fact that the organising committee has undertaken to comply with the I underlying legislation does not mean that it acts 'in terms of legislation'. In the hypothetical example referred to above, the bank which voluntarily undertakes to comply with the Preferential

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Morison AJ

A Procurement Policy Framework Act similarly does not act 'in terms of legislation' when it procures goods and services.

(2) The second reason is that the organising committee would only exercise a public power or perform a public function 'in terms of legislation' if the relevant power or function derives from that B legislation. However, the procurement legislation is not the source of the organising committee's power to contract. The procurement legislation provides for substantive restrictions on a power that derives from the common law. The addition of such substantive restrictions does not mean that the organising committee is exercising a function 'in terms of legislation'. By analogy, the Consumer C Protection Act 68 of 2008 imposes various substantive limitations on the contractual powers of private parties, but this does not mean that those parties act 'in terms of legislation' when they conclude contracts.

[311] I am not persuaded. Section 15A(1)*(b)* of the Merchandise Marks Act D provides:

> 'The Minister *may not* designate an event as a protected event unless the staging of the event is in the public interest and the Minister is satisfied that the organisers have created sufficient opportunities for small businesses and in particular those of the previously disadvantaged E communities.' [Emphasis provided.]

[312] It seems that the minister, who would doubtless have been cognisant of this subsection, was 'satisfied that the organisers have created sufficient opportunities for small businesses and in particular those of the previously disadvantaged communities' by means of the F 'understanding' which the organising committee assumed a voluntary obligation to comply with.

[313] However, what the respondents do not appreciate is that the organising committee, even if it were only to comply with the legislation mentioned in the protected event notice as a matter of discretion G (which seems hardly likely), the organising committee, by enjoying the protection of the protected event notice and the Act that it was promulgated in terms of, is acting in terms of that legislation by staging the very event that is the subject of the notice. It is performing a public function of staging the World Cup in a manner that, but for the H legislation enacted, it would not be able to do.

[314] The respondents have argued that all that the LOC has done (and which is recorded in the 'understanding' part of the protected event notice) has been to indicate to the minister that it will endeavour to comply with these obligations where possible, even though it is not required to do so in law. This amounts to the voluntary assumption of an I obligation that does not bind the organising committee in law. It does not amount to the imposition of a legislative obligation.

[315] I very much doubt that the minister would be happy to learn that he had failed (in

his dealings with the LOC prior to the promulgation of the protected event notice) to satisfy himself that the organisers had J 'created opportunities for South African businesses and in particular

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Morison AJ

those of the previously disadvantaged communities', for on the LOC's A version the minister had been 'satisfied' by unenforceable impressions — his 'understanding', that the LOC would apply the procurement legislation designed to distribute the wealth of the country to small businesses and the members of previously disadvantaged communities, was not enforceable or was at best only contractual. I consider this to be an B artificial interpretation of the notice. It is inconceivable that the legislature could have intended to refer to such legislation in so important a context, involving a budget of such proportions, with a view to leaving it open to the LOC to decide within its own discretion whether to comply with the legislation mentioned. In my view the intention of the legislature in promulgating the protected event notice was very clearly to bind the C LOC to observe the provisions of the procurement statute. Only in that way were the provisions of s 15A(1)*(b)* met.

[316] The LOC also acts, in my view, in terms of legislation when exercising its powers under the bylaws passed by Johannesburg and D Tshwane local authorities for purposes of the World Cup. They contain provisions that entitle the LOC to special privileges, including designating what a protected area is and giving the LOC the power to determine who is accredited to enter those protected areas, at least some of which would be ordinary public roads and areas where the populace normally E has freedom of movement, and, in restricting those rights via legislation enacted specifically to enable it to perform its functions, the LOC is acting in terms of legislation.

[317] The organising association agreement contains the following provisions regarding access control: F

'**PART G: ACCESS**

24. **GENERAL RULES**

24.1 **Access Rights and Restrictions**

24.1.1 FIFA shall be the sole holder of the domiciliary and access rights to the Controlled Access Sites and the G Organising Association hereby irrevocably transfers all its rights it may have in this respect to FIFA . . . .

24.2 **Access Control**

24.2.1 The Organising Association shall at all times be fully responsible for the planning, management and operation of access control to the Controlled Access H Sites in collaboration with the competent government authorities . . . .

24.2.2 Access control shall allow and control all people having the respective right to access a specific area during a specific period of time.'

[318] In terms of the bylaws of the local authorities referred to, a peace I officer may deny an unauthorised person access to an access-controlled area. The LOC enjoys the services of the police enforcing the LOC's decisions as to who can enter a particular area that would have been, but for the World Cup, a public roadway or public area. In so doing it is acting in terms of legislation. J

Morison AJ

A [319] The respondents contend that the first respondent does not act 'in terms of legislation' when it invites and awards tenders because there is no legislation that confers on the first respondent the power to procure goods and services or to award tenders. On

this basis they conclude that the first respondent is not a public body.

[320] The applicants, on the other hand, contend the opposite. They submit that the first respondent performs its functions 'in terms of legislation', and as such should be regarded as a public body.[43]

[321] The amicus submits that both the applicants and the respondents have interpreted the phrase 'public function in terms of legislation' to mean that, in order for the first respondent to be a public body, the relevant functions must be *authorised* by legislation, ie the source of its function or functions must be in legislation.

[322] The amicus submits that this interpretation and the requirement that the function that is performed must be *authorised* by legislation are unduly restrictive. The *source* of the power in terms of which a body exercises power is just one of the factors that must be considered. As I have mentioned, in *Chirwa* (supra) it was held in a minority judgment that there is no simple definition or clear test to be applied in determining whether a power or function is public. Rather, it is a question that has to be answered with regard to all the relevant factors, none of which will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.[44] I emphasise that the 'source of the power' is not necessarily determinative.

[323] The need to look beyond the source of the power being exercised was considered in *Mittalsteel* (supra).[45] Contracts are widely used by public authorities as instruments both of policy and administration.[46] If this approach is followed, it is arguable that a body may perform a public function even if the basis on which it does so is not sourced in legislation.

[324] If that is so, the words 'in terms of legislation' should not be given a meaning which requires that the performance of the function is specifically authorised by legislation. The amicus contends that the words 'in terms of legislation' in the definition of a 'public body' in PAIA are capable of bearing the meaning '*in accordance with legislation*'. It follows that it may well be sufficient that the first respondent performs its

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procurement functions in accordance with legislation. The amicus submitted that the first respondent was bound to act in accordance with the Preferential Procurement Policy Framework Act 5 of 2000, and the Department of Trade and Industry (the DTI) codes of good practice for Broad Based Black Economic Empowerment (BBBEE) when evaluating suppliers, and administrative-law principles of fair procedure. I have indicated that I consider this to be correct, if not by force of legislation, then at least by contract embodied in legislation.

[325] The amicus submits that the Merchandise Marks Act, read together with the Government Notice makes it clear that 'protected event' status was conferred on the first respondent *on condition* that it complied with government procurement policy and applicable legislation. Put differently, it is a condition of the 'protected event' status that the first respondent act *in accordance with* the legislation referred to in the Government Notice. The respondents confirm that the LOC undertook to 'endeavour to comply' with government procurement policy and legislation.

[326] I accordingly conclude that the LOC was acting in terms of legislation when the records in respect of its tenders were brought into existence and that it was then acting as a public body as defined in the definition thereof in s 1*(b)*(ii) in PAIA.

The private-body request

[327] Section 50 of PAIA provides that:

'(1) A requester must be given access to any record of a *private body* if —

(a) that record is required for the exercise or protection of any rights;

(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and

(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

(2) . . . .' [Emphasis added.]

[328] A requester who establishes that a record is required for the G exercise or protection of a right is not automatically entitled to be given access to it. The requirements of s 50(1) are cumulative. But the first step is to determine whether the record is in fact required for the exercise or protection of a right. I asked Mr *Budlender*, for the applicants, whether the right in question was one that applicants sought to 'exercise' or H merely 'protect' and the answer was that the applicants seek to exercise the right.

[329] In the event that this court holds that the LOC is not a public body, the amicus submitted that the applicants should in any event be given access to the records, because they require the records for the exercise I and protection of their right to freedom of the media.

[330] Section 50(1)*(a)* of PAIA provides that a requester must be given access to any record of a private body if 'that record is required for the exercise or protection of any rights'. This repeats what is stated in s 32(1)*(b)* of the Constitution. J

Morison AJ

A [331] In order to be granted access to the records of a private body a requester must therefore show two things:

(i) a right which he/she seeks to exercise or protect; and

(ii) that access to the records is required in order to exercise or protect that right.

B [332] In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*2001 (3) SA 1013 (SCA) (2001 (10) BCLR 1026) at para 28 Streicher JA held:

'Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. C It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right.'

D [333] Each of these requirements is addressed below.

[334] The drafters of both the Constitution and PAIA deemed it appropriate to include the word 'any' before the word 'right' when articulating the right of access to information held by private bodies. This language choice is significant. It points to the drafters' intention to E ensure that the broadest possible interpretation be given to what qualifies as a right for the purposes of these sections.

[335] The sections could just as easily have been drafted to omit the reference to 'any'. They could have read: 'that record is required for the exercise or protection of a right'.

F [336] Just as the Constitutional Court has held that the reference to 'everyone' in sections of the Constitution must be given a broad interpretation,[47] so too, the amicus submits, must the word 'any' in s 32(1)*(b)* of the Constitution, and with it, s 50(1)*(a)* of PAIA, be given an expansive interpretation.

G [337] There can be little doubt that the right to freedom of the media, and the corollary right of the public to receive information on matters of public interest, which are entrenched in s 16 of the Constitution, qualify as 'any right'.[48]

H [338] It is important to emphasise that the right which the applicants seek to exercise is the right to freedom of the media, and not the more general right to freedom of expression, which any member of the public may be able to invoke. This is significant. There could be reluctance on the part of a court to accept that *anyone* may simply invoke the right to freedom of expression in order to be given access to the records of a I private body. This case is different. It involves the media fulfilling their

duty as public watchdog, and the information they require in order to A discharge this obligation.

[339] The Constitutional Court has recognised the particular and vital role which access to information plays in the work of the media. In *Brümmer v Minister of Social Development and Others* Ngcobo J (as he then was) held: B

> '(A)ccess to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, *access to information is crucial to the right to freedom of expression which includes freedom of the press and other media* and freedom to receive or impart information or ideas. As the present case illustrates, *Mr Brümmer, a journalist, requires* C *information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid*. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. *The media therefore has a significant influence in a democratic State. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate* D *reporting and thus to imparting accurate information to the public*.'[49]

[340] The vital role of the media to facilitate and foster the public's right to receive and impart information and ideas has repeatedly been recognised by local and foreign courts.

[341] For example, in *Khumalo v Holomisa* the Constitutional Court E described the right as follows:

> '[22] *The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society*. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these F aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. . . . The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of G expression.
>
> [23] Furthermore, *the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require*. As Joffe J said in *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another*1995 (2) SA 221 (T) at 227I to 228A: H
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> > "It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest, mal- and inept administration. . . . It must advance communication between the governed and those who govern. I
>
> '[24] *In a democratic society, then, the mass media play a role of undeniable importance*. They bear an obligation to provide citizens both with

> A information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional B mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution C thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16.'[50] [Emphasis added.]

(i) The Supreme Court of Appeal has similarly highlighted the significance of freedom of the media:

> '(W)e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion . . . . *The press and the rest of the media provide the means by which useful, and sometimes vital, information about the daily affairs of the nation is conveyed to its citizens . . . .*'[51]

(ii) The role of media freedom in a democracy has also been recognised in foreign jurisdictions. For example, in *McCartan Turkington Breen (a firm) v Times Newspapers Ltd*,[52] the House held that:

> 'In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. . . . (T)he majority cannot participate in the public life of their society . . . if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media . . . that they will be so alerted and informed. *The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring*.'[53]

(iii) In a case dealing with the confidentiality of sources handed down just a few weeks ago by the Canadian Supreme Court, McLachlin CJ held that:

Morison AJ

> 'The role of investigative journalism has expanded over the years to help fill what has been described as a democratic deficit in the transparency and accountability of our public institutions. The need to shine the light of public scrutiny on the dark corners of some private institutions as well is illustrated by [the list of corporate delinquencies which ''secret sources'' have exposed].'[54]

(iv) The European Court of Human Rights has recognised that obstacles created to hinder access to information of public interest might discourage the media and other public-interest organisations from pursuing their vital role as public watchdogs:[55]

> 'The Court considers that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. *As a result, they may no longer be able to play their vital role as public watchdogs and their ability to provide accurate and reliable information may be adversely affected* (see, *mutatis mutandis*, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, Reports 1996-II, p. 500, § 39).
>
> The foregoing considerations lead the Court to conclude that the interference with the applicant's freedom of expression in the present case cannot be regarded as having been necessary in a democratic society. It follows that there has been a violation of Article 10 of the Convention.'[56]

[342] The applicants submit that the media stand in a unique relationship to the right of access to information. Because information is the tool of their trade, it will often be necessary for the media to gain access to information in order to perform their democratic function of reporting on matters of public interest. That they should do so accurately is essential. That they should therefore have access to reliable sources of information, like the records of the body itself, is vital.

[343] For this reason the law ought to recognise the special position of journalists in this context. This would not be unusual in our law. In the context of defamation, and for the very same reasons which it has advanced, our law has been developed to recognise a special defence for journalists. Whereas non-media defendants are restricted to the defence of truth and public interest, the media are afforded the latitude of the defence of reasonableness. The media may therefore defeat a claim for defamation, notwithstanding the fact that the defamatory statement may have been false, provided they can show that publication in the circumstances was reasonable.

Morison AJ

A [344] In *National Media Ltd and Others v Bogoshi*,[57] the Supreme Court of Appeal developed the common law to hold that —

> 'the publication *in the press* of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the B particular way and at the particular time'.[58]

[345] In *Khumalo and Others v Holomisa*,[59] the Constitutional Court recognised that this defence is available to the media.

> 'This fourth defence for rebutting unlawfulness, therefore, allows *media defendants* to establish that the publication of a defamatory statement, C albeit false, was nevertheless reasonable in all the circumstances.'[60]

[346] The Constitutional Court has also considered the parameters of 'the media', albeit in the two minority judgments in *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)*.[61] D O'Regan J held that the media should include 'professional and commercial purveyors of information',[62] and Langa CJ commented that the media constituted 'professionals involved in the distribution of information for commercial gain'.[63]

E [347] The applicants submit that these persons, who disseminate information professionally and broadly, benefit from the rights and bear the obligations that are associated with 'the media'.[64]

[348] It is common cause that the applicants are well-established members of the media. As such, they have expressly invoked the right to F freedom of the media as the basis upon which they seek access to the records. There can be no doubt that this right qualifies as 'any right' for the purposes of s 50(1)*(a)* of PAIA.

[349] The Supreme Court of Appeal has held that 'required' in G s 50(1)*(a)* of PAIA means 'reasonably required', and that the question

Morison AJ

whether a person is entitled to a particular record must be determined on A the facts of each case.[65]

[350] In *Unitas v Van Wyk*, Brand JA held:

> 'The threshold requirement of assistance has thus been established. If the requester cannot show that the information will be of assistance for B the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of assistance will not be enough. The acceptance of any notion to the contrary will, after all, be in conflict with the postulate that mere usefulness to the requester will not suffice.'[66]

[351] In *Clutchco (Pty) Ltd v Davis*,[67] where the rights of shareholders in C a private company having no public significance were concerned, Comrie AJA interpreted the phrase 'required for the exercise or protection of any rights' to mean reasonably required, provided it is understood to connote a substantial advantage or an element of need.

[352] Thus a record will be 'required' where there has been a demonstration D of some connection between the requested information and the exercise or protection of the right.[68]

[353] As Currie & De Waal point out, it should be borne in mind that a requester is seeking access to information that is not currently possessed. E As a result, a requester will not usually know its contents, and accordingly cannot be expected to demonstrate a link between the record and rights with any degree of detail or precision.[69]

[354] PAIA therefore requires requesters to demonstrate a need to know the information — a connection between the information requested and F the protection and enforcement of rights. But the degree of connection should not be set too high, or the principal purpose of PAIA will be frustrated. The words 'required for the exercise or protection of any rights' must therefore be interpreted so as to enable access to such information as will *enhance and promote* the exercise and protection of rights.[70] G

[355] More may be required from some private bodies than others. In his minority judgment in *Unitas Hospital v Van Wyk*, Cameron JA held that one must consider the extent to which it is appropriate, in the case of any private body, to further the express statutory object of promoting H

A 'transparency, accountability and effective governance' in private bodies. According to Cameron JA —

> '(t)his statutory purpose suggests that it is appropriate to differentiate between different kinds of private bodies. Some will be very private, like the small family enterprise in *Clutchco*. Effective governance and B accountability, while important, will be of less public significance. Other entities, like the listed public companies that dominate the country's economic production and distribution, though not public bodies under PAIA, should be treated as more amenable to the statutory purpose of promoting transparency, accountability and effective C governance.'[71]

[356] What is therefore required by the media from a company which has the sole responsibility for organising, staging and hosting the most significant sporting event in the world may be different from what is required by the media from, for example, a small, corner fish-and-chips D shop.

[357] Although the identification of these 'public private bodies' took place in a minority judgment in *Unitas Hospital v Van Wyk*, I am of the view that there is ample support for this approach in another, linked area E of the law.

[358] The law already recognises that the more public the nature of the activity, the more the protection of privacy diminishes. The protection of privacy is most intense in its protection of 'the inner sanctum of a person, such as his/her family life, sexual preference and home environment'.[72] F From this core, the protection of privacy diminishes as it extends outwards in 'what can be seen as a series of concentric circles . . . to the outer rings that would yield more readily to the rights of other citizens and the public interest'.[73]

[359] I have above highlighted the public character of the LOC activities. G When these features are considered alongside the undisputable fact that the only manner in which the applicants are able to obtain the information required to investigate tenders in relation to the Confederations Cup and the World Cup, and to publish matters of public interest in connection with such tenders, is by obtaining access to the records held H by the first respondent, it is clear that access to the records is 'required' in the relevant sense for the purposes of s 50(1)*(a)* of PAIA.

[360] The applicants submit that they are not able to enquire into and determine whether corruption, graft and/or incompetence have marred I the LOC's tender processes, because they have not had access to the

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records required to investigate the issue. As members of the media, the A applicants have an obligation to 'ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators'.[74] Access to the records requested is therefore required in order for the applicants to exercise their right to media freedom.

[361] If this court determines either that the LOC is a public body, or B that it is a private body to whose records the applicants require access, then the onus shifts to the LOC to satisfy this court that access ought to be denied on the grounds of refusal invoked.[75] The onus is addressed in the next section of this judgment.

[362] The respondents and the amicus point out that access to a record C may, despite being required for the exercise or protection of a right, still be refused in terms of any ground for refusal contemplated in ss 63 to 69 of PAIA.

[363] The statutory grounds upon which a record of a private body must D or may be refused are many and varied. They provide for the reasonable protection of privacy, commercial confidentiality, trade secrets, research information, and the like. The amicus correctly pointed out that the record in issue is not 'thrown open' the moment the requester establishes that it is required for the exercise of protection of any rights. E

[364] For this reason, the words 'required for the exercise or protection of any rights' should not, the amicus submits, be interpreted or applied restrictively. There is no basis for a concern that privacy, commercial confidentiality, trade secrets and the like would be in jeopardy F if s 50(1)*(a)* is given a meaning, or is applied in a manner, that sets a relatively low threshold.[76]

[365] It is also important to bear in mind that whether a record is '*required* for the exercise or protection of any rights' is a matter to be G determined on the facts of each case. Every application must be decided on its own merits. This appears clearly from the decision of Brand JA in

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Morison AJ

A *Unitas Hospital v Van Wyk and Another*2006 (4) SA 436 (SCA) ([2006] 4 All SA 231) at para 6:[77]

> 'Generally speaking, the question whether a particular record is required for the exercise or protection of a particular right is inextricably bound up with the facts of that matter.'[78]

B And para 18:

> 'I respectfully share the reluctance of Comrie AJA to venture a formulation of a positive, generally applicable definition of what ''require'' means. The reason is obvious. Potential applications of s 50 are countless. Any redefinition of the term ''require'' with the C purpose of restricting its flexible meaning will do more harm than good. To repeat the sentiment that I expressed earlier: The question whether the information sought in a particular case can be said to be ''required'' for the purpose of protecting or exercising the right concerned, can be answered only with reference to the facts of that case, having regard to the broad parameters laid down in the judgments of our courts, albeit, D for the most part, in a negative form.'

[366] The question to be answered in this case is whether the records requested by the applicants are reasonably required for the *exercise* of the constitutional right to freedom of expression in s 16(1) of the Constitution.

E [367] Section 16(1)*(a)* of the Constitution expressly includes the guarantee of freedom of the press and other media, in recognition of the important role played by the electronic and print media in facilitating the free exchange of information, opinions and ideas necessary to sustain a democratic society.

F [368] In terms of s 16(1)*(b)* the freedom to receive or impart information or ideas is also protected. Underpinning both of these is a recognition of the public's right to know.

[369] The vital role of the media in a constitutional democracy has now G been emphasised in many cases, eg *National Media Ltd and Others v Bogoshi*1998 (4) SA 1196 (SCA) (1999 (1) BCLR 1; [1998] 4 All SA 347) at 1209H/I – J.

[370] The principles are largely accepted by the respondents. All parties referred in oral

argument to *Midi Television (Pty) Ltd t/a E-TV v Director* H *of Public Prosecutions (Western Cape)*2007 (5) SA 540 (SCA) (2007 (9) BCLR 958; [2007] 3 All SA 318) at para 6, which emphasises that the constitutional promise of a free press, protected by s 16(1)*(a)* of the Constitution, is not one that is made for the protection of the special interests of the press.

2011 (5) SA p231

Morison AJ

[371] The constitutional promise of access to information is made to A serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press.

[372] It must, however, be accepted that a general appeal to the fact that the print and electronic media play a role of undeniable importance in our society may be insufficient for the purposes of s 50(1)*(a)* of PAIA. B This court must find that the records are required for the exercise or protection of the s 16(1) right *in this case*.

[373] In this case — and I emphasise that other cases may raise very different considerations — I find that the critical enquiry is whether the public has a 'right to know' the information that the applicants may C glean from the records in issue.

[374] That the public is the source of at least a significant sum of the funds that the first respondent is spending is a principle that must have a bearing on the enquiry. I would think that by funding government as D the public does through the taxes and other forms of payment it makes to government, the public acquires a right to know what is being done with its moneys. I refer to the discussion of this principle above where I deal with the concession made by the respondents in respect of the VWV consortium.

[375] In para 88 of their submissions, the respondents raise the issue of E whether the s 16(1) right imposes a correlative duty on private entities. With great respect, this is to ask the wrong question. The key question is whether, in this case, the first respondent has an obligation or duty to provide information, which the public has a correlative right to know.

[376] I find that the first respondent does indeed have such a duty. The F duty flows, at the very least, from the first respondent's acceptance of public funding and its voluntary assumption of various obligations in relation to its Procurement Policy. These are set out in the protected event notice. They include that:

> 'The Procurement Policy of LOC shall apply *public sector* procurement G principles such as procedural and substantive fairness, equity, *transparency* and competitiveness.'

[377] The first respondent also assumed an obligation to comply with 'constitutional procurement principles', which as s 217(1) of the Constitution indicates, include the principles of 'transparency' and H 'cost-effective[ness]'. The constitutional principle of 'transparency', as it applies to the 'public sector', is given meaning in s 195(1)*(g)* of the Constitution, which provides that: 'Transparency must be fostered by providing the public with timely, accessible and accurate information.'

[378] In her discussion of government procurement and transparency, I Phoebe Bolton[79] points out that in the government-procurement context, a transparent system can be said to refer to a system that is 'open' and 'public'.

2011 (5) SA p232

Morison AJ

A [379] This means, inter alia, that when an organ of State 'contracts', whether with a private entity or another organ of State, this should not be done behind closed doors. Procurement information should be generally available; there should be publication of general procurement rules and practices; government contracts should be advertised;

and B contractors should be able to access information on government-contract awards.

[380] Bolton gives the underlying rationale for transparency in a procurement system as to ensure that interested or affected parties, like the media, the legislature, potential contractors and the public, as taxpayers, C are free to scrutinise the procedures followed. I would add to this list those who are intended to benefit from the legislation enacted to redress the economic injustices of the past.

[381] This is designed to ensure public confidence in government- procurement procedures and promote openness and accountability on D the part of State organs. Transparent procurement procedures encourage good decision-making and, to a large extent, serve to combat corrupt procurement practices. The learned author observes that it is a well-known phenomenon that corruption thrives in the dark.

[382] Having assumed an obligation of transparency in relation to its E procurement, coupled with the fact it is the recipient of substantial amounts of public money, the first respondent has a duty that is correlative to the public's 'right to know'.

[383] Also of significance is the fact that it was on the basis of the assumption of that duty (amongst others) that the protected event F notice was issued by the minister of Trade and Industry. I have referred above to s 15A(1)*(b)* of the Merchandise Marks Act. Moreover, the protected event notice was also issued on the understanding that 'the World Cup is in the public interest and that the local organising committee (LOC) has created opportunities for South African businesses, in particular those from the previously disadvantaged G communities'.

[384] It is not essential for the purposes of this enquiry, for this court to decide whether the duty of transparency in relation to the first respondent's procurement was imposed *ex lege*, as a condition of the designation H of the 2010 FIFA World Cup as a protected event under s 15A of the Merchandise Marks Act, or whether it was merely voluntarily assumed by the first respondent. An obligation that is voluntarily assumed is no less of an obligation upon the first respondent, in this instance in favour of the public. It is not decisive, as I have shown above that the public moneys received by the first respondent may have been ring-fenced for I specific purposes. At the very least, the public has a 'right to know' that this is in fact so.

[385] Even in relation to moneys received by the LOC from FIFA, because the protected event notice was issued on the basis that the event is in the public interest and the minister's 'understanding' that the J first respondent has created opportunities for small businesses and

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previously disadvantaged communities, the public has a 'right to know' A whether this was indeed true when the first respondent engaged in procurement with FIFA's money.

[396] It is precisely the role of the applicants to convey *this information* to the public so that it can be fully scrutinised. This is what constitutes the exercise of the right to freedom of expression in terms of s 16(1) of the B Constitution in this case.

[387] Applicants submit that, in this case, there can be little doubt that access to the records sought by the applicants is 'required' for the exercise of the right. In *Brummer* (supra) it was emphasised that access to information 'carries with it the responsibility to report accurately. The C consequences of inaccurate reporting may be devastating. *Access to information is crucial to accurate reporting and thus to imparting accurate information to the public*.' (In para 63.)

[388] I accordingly find that, even if I am wrong about the LOC in regard D to its public body status, the applicants have satisfied the requirements of PAIA in regard to the LOC

being a private body which, on the facts of this case, is, subject to the discussion of the statutory obstacles below, entitled to access to the records in question.

Statutory grounds for refusal

[389] The court having found that the organising committee is a 'public E body' when it awards tenders, the organising committee relies on s 42(3)*(b)* of PAIA for refusing access to the relevant records. Section 42(3)*(b)* of PAIA provides that the information officer of a public body may refuse a request for access to a record if the record 'contains financial, commercial, scientific or technical information, other than F trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the State or a public body'. I shall consider the arguments with reference to the particular categories of records requested by the applicants.

The documents sought in para 16.2 of the founding affidavit G

[390] In the main, the para 16.2 and para 16.6 records include all the documentation relevant to the issue and award of tenders by the LOC.

[391] The LOC contends that amongst these records there are communications between the LOC and individual bidders, as well as the H contracts concluded between the LOC and successful bidders, which constitute commercial information relating to the business and operations of the LOC, the disclosure of which is likely to cause harm to the commercial interests of the LOC.

[392] The respondents have indicated that they rely on this provision in I order to refuse access to the records described in para 16.2 of the founding affidavit, to the extent that those records name a tenderer as being successful. They explain this as follows:

(i) Amongst these records are communications addressed by the organising committee to individual bidders, which indicate that a bidder has either been awarded a contract pursuant to a tender J

A process, or has been designated as preferred bidder pursuant to a tender process.

(ii) Clause 29 of the organising association agreement regulates so-called 'Marketing Rights' in respect of the 2010 FIFA World Cup. The business model of FIFA is to grant specified marketing rights to B selected commercial affiliates, based on their financial contributions to the 2010 FIFA World Cup, and to prohibit all other commercial entities from advertising or disclosing any affiliation at all with the 2010 FIFA World Cup. Thus the organising committee is obliged to ensure that in all of its service-provision contracts, there is a clause prohibiting the service provider from disclosing the fact of its C obligation to provide goods or services to the organising committee, since such disclosure would undermine the marketing rights granted by FIFA to paying sponsors.

(iii) The organising committee is under a general obligation not to engage in any conduct that would result in an infringement of D FIFA's marketing rights or those of the commercial affiliates. Public disclosure in the media of the names, and any other details regarding service providers, to the organising committee which are not commercial affiliates, would undermine the business model of FIFA, and jeopardise the position of the commercial affiliates, with consequential harm to FIFA. Because the commercial interests of E the organising committee are so closely aligned to those of FIFA, this would also cause harm to the organising committee.

[393] Sections 42(3)*(b)* and 68(1)*(b)* of PAIA provide, in virtually identical terms, a ground of refusal for public and private bodies designed to protect the commercial interests of the body to which a F request is made.

[394] Section 42(3)*(b)* reads as follows:

> '(3) Subject to subsection (5), the information officer of a public body may refuse a request for access to a record of the body if the record —
>
> G . . .
>
> *(b)* contains financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the State or a public body;
>
> H . . . .'

[395] These sections provide the LOC with a discretionary ground of refusal. As Currie & Klaaren point out, PAIA provides for discretionary (as opposed to mandatory) grounds of refusal when the interests of the body itself, rather than those of third parties, are implicated by the I request for access.[80] In this case, it is alleged that the commercial interests of the LOC are affected. If that is indeed so, the LOC is given a discretion whether to disclose this information to the applicants.

Morison AJ

[396] It is appropriate to interpret the discretionary grounds of refusal in A such a manner as to require that the discretion be exercised in favour of the underlying policy of the Act, which favours disclosure.

[397] I do not see how disclosure of the records relating to who the successful tenderers in the media, and any other details regarding service providers to the organising committee, which are not commercial B affiliates, would undermine the business model of FIFA, and jeopardise the position of the commercial affiliates, with consequential harm to FIFA. I am assured by the respondents that it will take at least three weeks for the records to be produced from the date of this order. The suspensive effect of appeal processes aside, likely to delay the implementation C of the order for much longer, in three weeks from the date of the handing-down of this order the 2010 FIFA World Cup will be almost over. The commercial affiliates' advertising and marketing will have been set in motion on a large scale. I very much doubt that the publication of any particular successful tenderer's name in the media will cause much damage to the commercial affiliates' interests, or indeed those of FIFA. D I cannot see the commercial affiliates approaching FIFA for refunds of that which they paid FIFA, or any damages, simply because it is reported in the media that certain entities were successful in obtaining business from the LOC, particularly as the LOC will only make that disclosure pursuant to an order of court.

[398] In any event, even if this were so, the harm that would be incurred E would be far less than the harm done to the rights of the people of the country to access to information if these records were to be kept secret. FIFA's business model is of its own making. It awarded the 2010 World Cup to South Africa no doubt with full knowledge of the fact that this is a constitutional democracy in which access to information is a constitutionally F guaranteed right.

[399] In *Rubin v Canada Mortgage and Housing Corporation* (1988) 52 DLR 4th 671 (CA), the Federal Court of Appeal overturned a decision to refuse access to the minutes of board meetings of the G corporation, on the basis that the corporation had failed to conduct a sufficiently thorough examination of its records to be able to decide whether the records requested were covered in their entirety by the exemption. The blanket assertion by the LOC that it cannot disclose even one of the records which have been requested (save for the VWV consortium ones) gives rise to a real question as to whether it has H considered

every one of those records.

[400] Regardless of this issue, the LOC faces a fundamental difficulty in relying on this ground of refusal. That difficulty is that the alleged commercial harm which will be caused by disclosure does not relate to the LOC but, instead, to FIFA — a separate entity entirely. I

[401] According to the respondents, providing access to the records will result in disclosure of the identity of the parties providing goods and services to the LOC. Public disclosure of these names would, so the respondents say, undermine the business model of FIFA, and jeopardise the position of commercial affiliates, with consequential harm to FIFA, J

Morison AJ

A and 'because the commercial interests of the LOC are so closely linked to those of FIFA, this would cause harm to the [LOC]'.

[402] This reasoning suffers two fatal defects. First, in order for ss 42(3)*(b)* and 68(1)*(b)* of PAIA to be applicable, the body to which the request is made must *itself* be likely to suffer the harm associated with B disclosure. Here, it is not the LOC which is alleged to suffer the harm, but instead FIFA. The respondents have therefore failed to bring themselves within the ambit of these sections. Secondly, even if it is to be assumed that the LOC and FIFA are sufficiently linked that harm to one converts into harm to the other, it is simply not the case that disclosure C of the identity of service providers to the applicants would likely result in any harm to either FIFA or the LOC.

[403] According to Currie & Klaaren, 'likely to' is the more stringent of the tests applicable to the causative element of the grounds of refusal.[81] This means that a greater degree of probability is required where the D ground of refusal uses the language of 'likely to' rather than 'reasonably be expected to'. 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'.[82]

[404] In terms of the *2010 FIFA World Cup South Africa: FIFA Public Information Sheet* E *(a guide to FIFA's Official Marks)*, FIFA Rights Holders are entitled to the exclusive use of the official marks. The FIFA Rights Holders are further allowed to create an association with FIFA and with the World Cup, inter alia, through their use of the official marks.

[405] In this case, the LOC contends that the harm it (actually, FIFA) is F likely to suffer flows from the fact that disclosure of the identity of the service providers — who are not FIFA Rights Holders — would permit those service providers to benefit from their association with FIFA, without paying FIFA for the rights to be so affiliated.

G [406] The applicants accept that the protection of the exclusive rights to use the official marks is important for the funding of the World Cup and FIFA. However, making the identity of the preferred suppliers known *to the applicants* will not enable the preferred suppliers to use the official marks or market themselves on the basis of their relationship with FIFA.

H [407] The LOC's service-provision contracts explicitly prohibit the service provider *itself* disclosing the fact of its obligation to provide goods and services to the first respondent. Giving the names of the service providers to the applicants would not constitute a breach of this provision. It would not enable the service providers to market themselves on the basis of their relationship with FIFA: that prohibition would remain in force and effective.

Morison AJ

[408] The allegation of commercial harm is therefore without substance. A

[409] The respondents also base their refusal under these sections of PAIA on the assertion that, if they are required to disclose the contracts concluded between the LOC and its service providers, the commercial information contained in these contracts will be disclosed and will likely cause harm to the LOC. B

[410] However, the respondents provide no specifics whatsoever about this commercial information. They do not say which of the records contain such commercial information. They do not address the question of the extent to which redaction of the contracts could protect this information from disclosure. It is in keeping with the purpose of PAIA to require, as the Canadian courts do, that a body consider whether any information can reasonably be severed from that for which a ground of refusal is asserted under the Act. Just as the Canadian Federal Court of Appeal has rejected a blanket refusal of access to all of the documents sought without this type of exercise being conducted,[83] so too, this court requires more from the respondents than a bald assertion that there is sensitive commercial information in their contracts with service providers.

[411] For the reasons set out above, there is no merit in the grounds of refusal raised by the LOC. The disclosure will not permit service providers to make unauthorised use of the official marks of the World Cup; it will not cause harm to *the LOC* and the commercial interests of the LOC.

The documents sought in para 16.6 of the founding affidavit

[412] The respondents have indicated that they rely on s 42(3)*(b)* of PAIA in order to refuse access to the documents requested in para 16.6 of the founding affidavit.

[413] The reasons are analogous to those given above. For the same reasons they are rejected.

Conclusion

[414] Access to information is a constitutionally entrenched right. Any refusal of access is a limitation of that right, and therefore must be approached as the exception rather than the rule.

[415] The LOC, charged with organising the most significant sporting event in the world, and purporting to do so in the public interest, takes a legally insupportable stance in seeking to keep its conduct inaccessible to public scrutiny.

[416] Refusing access to these records would enable the organiser of this event to keep from the public eye documents which may disclose evidence of corruption, graft and incompetence in the organisation of the World Cup, or which may disclose that there has been no such

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A malfeasance. It will make it impossible for any enquiry into those matters to be undertaken. This apparently is what the LOC wants.

[417] This would be inconsistent with the principles of transparency and accountability which underpin our Constitution, and which are given effect in the right of access to information, contained in the Constitution B and in PAIA. The powers granted to the court under such an application are contained in s 82 of PAIA as follows:

'**82 Decision on application**

The court hearing an application may grant any order that is just and equitable, including orders —

C *(a)* confirming, amending or setting aside the decision which is the subject of the application concerned;

(b) requiring 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;

(c) granting an interdict, interim or specific relief, a declaratory order D or compensation; or

(d) as to costs.'

[418] accordingly order that:

1. The decisions of the first respondent dated 23 and 30 July 2009 refusing the applicants' request in terms of ss 11 and 50 of E PAIA to the records are set aside;
2. The respondents are to supply the applicants, within 30 days of payment by applicants to first respondent of the prescribed charges, with copies of:

   (a) all records of the first respondent in respect of all tenders F awarded by the first respondent, including advertisements and letters of award;

   and

   (b) all records of the first respondent relating to the award of the tenders, including but not limited to, the providers it was awarded to, the price to be paid, and the contracts between G the first respondent and the providers.
3. The first respondent is to pay the costs of this application, including the costs of two counsel.

Applicants' Attorneys: *Webber Wentzel*.

Respondents' Attorneys: *Edward Nathan Sonnenbergs*.

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1 Section 19 of the Companies Act 61 of 1973.
2 Section 103.
3 Section 113.
4 Section 19(3).
5 I adopt the term from the wording used by the parties, and do not need, for purposes of this judgment, to enquire into precisely what is meant by the term 'guarantee' in this context.
6 A term later to be defined in the agreement between SAFA and FIFA as meaning: 'marketing, promotional, advertising and public relations activities in words, sound or any other form relating to the Championship, which are intended to capitalize on any form of association with the Championship, but which are undertaken by a person or an entity which has not been granted the right to promote an affiliation with the Championship by FIFA'.
7 Section 15A of the Merchandise Marks Act 17 of 1941, s 15A inserted by s 2 of the Merchandise Marks Amendment Act 61 of 2002, which came into operation on 17 January 2003, provides that the minister of Trade and Industry may by notice in the *Gazette* designate an event as a 'protected event', and contraventions may, in terms of ss (4), constitute a criminal offence.
8 Section 7 of the Constitution.
9 *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*2006 (2) SA 311 (CC) (2006 (1) BCLR 1) at paras 100, 446 and 451.
10 Section 11(1) of PAIA.
11 Section 50(1) of PAIA.
12 *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo*2007 (1) SA 66 (SCA) para 10.
13 See 2010 FIFA World Cup South Africa Special Measures Act 11 of 2006.
14 See Special Measures Act supra n13.
15 *Mittalsteel* paras 13 – 16.
16 *Mittalsteel* para 22.
17 *Mittalsteel* para 19.
18 *Mittalsteel* para 21.
19 (1995) 5 ed at 167.
20 It is common cause between the parties that this is the case.
21 The definition bears obvious similarities to the definition of 'organ of state' in s 239 of the Constitution.
22 Like Bernard Shaw, I did not have time to write a short one.

23 See Special Measures Act supra n13.
24 See Special Measures Act supra n13.
25 **'39 Interpretation of Bill of Rights**
(1) When interpreting the Bill of Rights, a court, tribunal or forum —
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common-law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common-law, customary law or legislation, to the extent that they are consistent with the Bill.'
26 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another*2009 (1) SA 337 (CC) (2008 (11) BCLR 1123) at paras 46, 84 and 107.
27 See, for example, the founding affidavit: 'The first respondent exercises a public power or performs a public function.'
28 The definition is extensive, much more extensive than the definition of public body in PAIA. Much of the definition has been omitted from the quotation above.
29 *Greater Johannesburg Transitional Metropolitan Council v Eskom*2000 (1) SA 866 (SCA) para 12.
30 *Mittalsteel South Africa Ltd (formerly Iscor Ltd) v Hlatshwayo*2007 (1) SA 66 (SCA) para 22.
31 *Korf v Health Professions Council of South Africa*2000 (1) SA 1171 (T) at 1177I.
32 *Bekker v Western Province Sports Club (Inc)*1972 (3) SA 803 (C) at 811B; *Marlin v Durban Turf Club and Others* 1942 AD 112; *Turner v Jockey Club of South Africa*1974 (3) SA 633 (A); *Barnard v Jockey Club of South Africa*1984 (2) SA 35 (W); *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere*1976 (2) SA 1 (A).
33 *Institute for Democracy in South Africa and Others v African National Congress and Others*2005 (5) SA 39 (C) (2005 (10) BCLR 995) para 26.
34 Hogg *Constitutional Law of Canada* 4 ed vol 1, as quoted in *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)*2001 (3) SA 1151 (CC) (2001 (7) BCLR 652) para 40.
35 In para 194.
36 2002 (3) SA 30 (T) ([2001] 2 All SA 388).
37 *Mittalsteel* (supra) at 74H/I.
38 In para 20, at 75I.
39 *Greater Johannesburg Transitional Metropolitan Council v Eskom*2000 (1) SA 866 (SCA) para 12.
40 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*1984 (3) SA 623 (A) at 634H – 635C:
(W)here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact . . . . If . . . the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.'
41 In *Datafin*, the body concerned, a UK institution, the Panel on Take-Overs and Mergers, did not exercise statutory, prerogative or common-law powers. It nonetheless exercised considerable power, and performed an important public function in the manner in which large-scale take-overs and mergers of companies took place. The Court of Appeal held that its decisions were subject to judicial review. See, further, P Craig 'Public Law and the Control over Private Power' in M Taggart (ed) *The Province of Administrative Law* (1997) at 201 fn 17.
42 This Act only applies to organs of State.
43 The applicants point to the fact that the minister of Trade and Industry has designated the 2010 FIFA World Cup as a protected event in terms of s 15A of the Merchandise Marks Act 17 of 1941; the 2010 FIFA World Cup South Africa Special Measures Act 11 of 2006; and bylaws promulgated by various local governments in support of the contention that the organising committee performs its functions in terms of legislation.
44 *Chirwa v Transnet Ltd and Others*2008 (4) SA 367 (CC) ((2008) 29 *ILJ* 73; 2008 (3) BCLR 251; [2008] 2 BLLR 97) at para 186.
45 In paras 20 – 22.
46 In the UK, government by contract has been termed a 'new prerogative', Wade & Forsyth *Administrative Law* 10 ed (2009) at 679.
47 *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*2004 (4) SA 125 (CC) (2004 (7) BCLR 775) para 41.
48 *Claase v Information Officer, South African Airways (Pty) Ltd*2007 (5) SA 469 (SCA) paras 7 and 8.
49 *Brummer v Minister for Social Development and Others*2009 (6) SA 323 (CC) (2009 (11) BCLR 1075) para 63 (footnotes omitted; emphasis added).
50 *Khumalo and Others v Holomisa*2002 (5) SA 401 (CC) (2002 (8) BCLR 771) paras 22 to 24. Also see *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others*2007 (1) SA 523 (CC)

(2007 (1) SACR 408; 2007 (2) BCLR 167) paras 24, 28 and 122 (emphasis added).
51 *National Media Ltd and Others v Bogoshi*1998 (4) SA 1196 (SCA) (1999 (1) BCLR 1; [1998] 4 All SA 347) at 1209H/I – J (emphasis added).
52 [2000] 4 All ER 913 (HL) at 922*b – c/d*.
53 Emphasis added.
54 *R v National Post* [2010] 1 SCR 477 (2010 SCC 16) para 55.
55 *Tarsasag a Szabadsagjogokért v Hungary* [2009] ECHR 618 (Application No 37374/05, 14 April 2009) paras 38 – 39.
56 Emphasis added.
57 1998 (4) SA 1196 (SCA) (1999 (1) BCLR 1; [1998] 4 All SA 347) at 1212G – H.
58 Emphasis added.
59 *Khumalo and Others v Holomisa*2002 (5) SA 401 (CC) (2002 (8) BCLR 771).
60 In para 19.
61 2007 (5) SA 250 (CC) (2007 (7) BCLR 751).
62 In para 181.
63 In para 98. See also para 94.
64 There is authority from the Canadian Supreme Court that the reasonableness defence should not be limited to traditional media houses: see *Grant v Torstar Corp* 2009 SCC 61 ([2009] 3 SCR 640). It is not necessary, in this case, to reach the question of whether in our law this special approach applies also to electronic and other non-traditional media.
65 *Unitas Hospital v Van Wyk and Another*2006 (4) SA 436 (SCA) ([2006] 4 All SA 231) at para 6 (*per* Brand JA), at para 45 (*per* Cameron JA), in para 56 (*per* Conradie JA).
66 *Unitas Hospital v Van Wyk* in para 17.
67 *Clutchco (Pty) Ltd v Davis*2005 (3) SA 486 (SCA) ([2005] 2 All SA 225) in para 13.
68 Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 5.11 at p 68.
69 Currie & De Waal *The Bill of Rights Handbook* 3 ed (2005) 697.
70 *Unitas Hospital v Van Wyk (per* Cameron JA) para 31.
71 *Unitas Hospital v Van Wyk* para 40.
72 *Bernstein and Others v Bester and Others NNO*1996 (2) SA 751 (CC) (1996 (4) BCLR 449) para 67.
73 *Magajane v Chairperson, North West Gambling Board and Others*2006 (5) SA 250 (CC) (2006 (2) SACR 447; 2006 (10) BCLR 1133) para 42.
74 *Government of the Republic of South Africa v Sunday Times Newspaper and Another*1995 (2) SA 221 (T) (1995 (2) BCLR 182) at 227I.
75 Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 7.3 at p 100.
76 Moreover, s 2(1) of PAIA contains a clear directive that:
'When interpreting a provision of this Act, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects.'
The objects of PAIA, contained in s 9 of the statute, include 'to promote transparency, accountability and effective governance of all public and private bodies' (s 9*(e)*). Notably, transparency and accountability are not values which only public bodies are expected to observe.
77 All of the other judgments support this approach; see Cameron JA at para 30: 'Like the statute, the standard is accommodating, flexible and, in its application, necessarily fact-bound.' And the judgment of Conradie JA at para 56.
78 See also *Claase v Information Officer, South African Airways (Pty) Ltd*2007 (5) SA 469 (SCA) at para 6.
79 *The Law of Government Procurement in South Africa*.
80 Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 7.6 at 105 – 6.
81 Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 7.3 at p 102.
82 Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 7.3 at p 103.
83 *Rubin v Canada Mortgage and Housing Corporation* (1988) 52 DLR 4th 671 (CA) para 22.