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29 January 2013

Enquires: B Minnaar
Email: bminnaar@justice.gov.za

My Ref: 7930/2012/Z59
Your Ref: D Milo/ E Sadleir/ 2328295

By Fax: 011 530 6232

Messrs Webber Wentzel

Illovo Boulevard

Johannesburg

Dear Mr Milo

**MANDG CENTRE FOR INVESTIGATIVE JOURNALISM AND ANOTHER / THE
MINISTER OF PUBLIC WORKS AND ANOTHER**

Our telephonic conversation earlier this afternoon refers.

It is confirmed that I noticed that the main affidavit of the Director General of Public works is not properly commissioned as every page has not been signed by the commissioner of oaths.

We do not want to delay matters and therefor agreed with yourselves that we shall fax the affidavit as it stands to you and then rectify the signature and will then provide you with a properly commissioned document.

Pages 115 and 116 are the notice of intention to oppose and page 117 is our fax report of service.

Yours faithfully

B MINNAAR
FOR: STATE ATTORNEY (PRETORIA)

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 67574/12

In the matter between :-

MANDG CENTRE FOR INVESTIGATIVE
JOURNALISM NPC

First Applicant

VINAYAK BHARDWAJ

Second Applicant

and

MINISTER OF PUBLIC WORKS

First Respondent

THE INFORMATION OFFICER: DEPARTMENT
OF PUBLIC WORKS

Second Respondent

FILING SHEET

Document: Respondents' Answering Affidavit

Filed By:

RESPONDENTS' ATTORNEY
THE STATE ATTORNEY
SALU BUILDING
255 FRANCIS BAARD (SCHOEMAN) STREET
CNR THABO SEHUME (ANDRIES) AND FRANCIS
BAARD (SCHOEMAN) STREETS
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TO: THE REGISTRAR OF THE

ABOVE HONOURABLE COURT
PRETORIA

AND
TO:

APPLICANTS' ATTORNEY
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RECEIVED COPY:

TIME:

DATE:

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 67574/12

In the matter between:

M AND G CENTRE FOR INVESTIGATIVE JOURNALISM NPC First Applicant

VINAYAK BHARDWAJ Second Applicant

and

THE MINISTER OF PUBLIC WORKS First Respondent

THE INFORMATION OFFICER: DEPARTMENT OF
PUBLIC WORKS Second Respondent

RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

MZIWONKE DLABANTU

do hereby make oath and say that:

1. I am the Director General of the Department of Public Works ("the Department"), having assumed this position on 16 January 2013.



2. I am duly authorised to depose to this affidavit on behalf of the Minister of Public Works ("the Minister"), the first respondent in this application.
3. I am also the Accounting Officer of the Department and accordingly the second respondent in this application. At the time the applicants launched this application, the second respondent was the Acting Director General of the Department, Ms. Mandisa Fatyela-Lindie, who ceased being Acting Director General on 15 January 2013. Ms. Fatyela-Lindie's confirmatory affidavit will be filed together with this affidavit.
4. Save where the context clearly indicates otherwise, the facts contained in this affidavit are within my personal knowledge and belief, and are both true and correct. I have read the founding affidavit of Mr. Bhardwaj. However, before responding to each of the paragraphs therein, it is necessary for me to set out the context within which this matter arose and the steps taken by the Minister since the issue of the security project at the Nkandla residence of President Zuma ("the Nkandla residence") first arose in the public domain.

Context

5. The President's residence is situated in Nkandla, a relatively underdeveloped rural area in KwaZulu Natal.
6. The Nkandla residence, like the residences of former Presidents and former Deputy Presidents, has been declared a National Key Point in terms of the

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National Key Points Act, No. 102 of 1980 ("the NKP Act"). The declaration certificate in respect of the Nkandla residence is dated 8 April 2010. All information relating to security measures applicable at, or in respect of, the Nkandla residence is protected from disclosure. In this regard, the respondents rely on section 10 of the NKP Act, sections 3 and 4 of the Protection of Information Act, No. 84 of 1982 ("the PI Act"), and sections 38 and 41 of the Promotion of Access to Information Act, No. 2 of 2000 ("PAIA").

7. The following observations are also relevant:

- 7.1 The President's residence is owned by the President and is used by him regularly.
- 7.2 The residence accommodates and is used by the President's entire family.
- 7.3 The Nkandla residence was constructed on land which is more than 3 hectares in extent. Nkandla is situated in a remote rural area, far from towns such as Eshowe, Durban, Pietermaritzburg and Ulundi. Its underdevelopment hinders the provision of essential services, including medical services, to the President and his family. This requires that special measures be taken to ensure that those services can be readily available to the President and his family.

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- 7.4 The President receives VIP protection and is accompanied by a large security detail at all times.
8. In November 2012, the Minister established a task team to investigate the facts surrounding the security project at the Nkandla residence.
9. The task team reported to the Minister during January 2013. The contents of the report contain security-related information and therefore cannot be made public. However, on Sunday 27 January 2013, the Minister released the findings of the task team to the public. The findings are summarised below.
10. After the inauguration of President Zuma in May 2009, an expert team representing the Departments of Police Service, Defence and State Security reviewed the security circumstances surrounding the President and identified shortcomings. Plans were drawn up and implemented. As part of this process, new security capacity was requested for the Nkandla residence and its immediately surrounding area. In line with its obligation to effect the security requested, the Department became involved in the construction at the Nkandla residence.
11. The approach at the Nkandla residence was based on assessments of security threats and the requirements of the security forces. The security threat analysis pointed to a deep rural area lacking in services. It was found amongst others that:

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- 11.1 the water supply was erratic with it being available for a few hours at a time and only for a few days of the week;
- 11.2 the Eskom pylons and the mountainous area made access by air (helicopter) hazardous;
- 11.3 the steep terrain and the surrounding cliffs and mountains make any form of transport difficult in bad weather;
- 11.4 the roads to the area were muddy and required good 4X4 driving skills and suitable vehicles;
- 11.5 given that the area is on the leeward side of the surrounding escarpment and is generally drier than surrounding areas, the threat of fire was high;
- 11.6 the security forces would also need to be accommodated locally as a 24/7/365 service was required, with force levels varying, based on prevailing threats; and
- 11.7 the Nkandla residence was the location of many diverse types of functions, including meetings of Heads of State, Cabinet Ministers, other high risk dignitaries, local communities, provincial and national government members and many other foreign and local dignitaries.

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12. The security agencies required, in relation to the Nkandla residence, that the Department attend to:

- 12.1 a physical security system;
- 12.2 an evacuation mechanism;
- 12.3 fire-fighting capabilities; and
- 12.4 the operational needs of other national departments, including medical facilities and accommodation.

13. These security requirements have now been met.
14. The task team found that in 2008, before President Zuma became the President of the Republic, he and his family had already contracted an architect and a contractor to develop plans and to build or improve his private houses at the Nkandla residence. When President Zuma was inaugurated, the construction of his houses as per private contract was already underway, having progressed close to completion.
15. As a result of the security assessments, certain amendments to the Zuma family plans had to be effected in order to accommodate the requirements of the security agencies.
16. The task team also found that 15 service providers including consultants were contracted by the Department to render various services ranging from bullet proof windows and security fence construction to many other security-related



services. The Minister has accepted all the findings and recommendations of the task team.

17. The task team found that proper procedures were not following in relation to the procurement of goods and services.
18. The task team also found that the security upgrades at the Nkandla residence have cost the Department R71 212 621.79, including consultancy fees, and that the related operational needs of the other state departments have cost the Department R135 208 022.58, including consultancy fees. Of the above, R26 677 240.80 constitutes variation orders. Accordingly, the total cost paid by the Department to date is R206 420 644.37.

The merits of the applicants' request

19. I now turn to the founding affidavit of Mr. Bhardwaj.

20. **Ad paragraph 1**

The respondents have no knowledge of the contents of this paragraph.

21. **Ad paragraph 2**

I deny that all the facts and allegations in the founding affidavit are true and correct. The extent of my denial appears from the paragraphs below.



22. **Ad paragraphs 3 to 5**

The respondents have no knowledge of the contents of these paragraphs.

23. **Ad paragraphs 6 and 7**

The respondents have no knowledge of the contents of these paragraphs.

24. **Ad paragraph 8**

Save for stating that the Minister has delegated the responsibility for all the records of the Department to the Director General, the contents of this paragraph are admitted.

25. **Ad paragraph 9**

Save for stating that Ms. Fatyela-Lindie is no longer the information officer of the Department, the contents of this paragraph are admitted.

26. **Ad paragraphs 10 and 11**

The contents of these paragraphs are admitted.

27. **Ad paragraphs 12 and 13**

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The contents of these paragraphs are noted.

28. **Ad paragraphs 14 to 17**

The contents of these paragraphs are admitted.

29. **Ad paragraph 18 and 19**

The contents of these paragraphs constitute matters for argument which will be dealt with at the hearing of this application.

30. **Ad paragraphs 20 to 22**

The contents of these paragraphs are admitted.

31. **Ad paragraph 23**

Save for denying that the Department has spent at least R248 million on the Nkandla residence, the contents of this paragraph are admitted. It is clear from what I have stated above that the Department has spent a total of R206 420 622.37 in relation to the security upgrade of the Nkandla residence and the immediately surrounding area.

32. **Ad paragraphs 24 to 29**

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32.1 The contents of these paragraphs are admitted.

32.2 Although the applicants expressly stated that they did not seek access to any information relating to the technical detail of security-sensitive improvements, it is clear that the documents sought are so replete with security-related information that they cannot be disclosed without disclosing security-sensitive information at the same time. Using the headings in the applicants' request, I set out below why the applicants' disavowal of security-sensitive information renders their request internally contradictory.

32.1.1 Needs assessments / motivations

These records consist of security assessments by the South African Police Service, the Department of Defence and other security agencies on the security requirements of the President. I submit that it is self evident that these records contain security-sensitive information.

32.1.2 Budgetary availability

There was no specific budget allocated for the security upgrades to the Nkandla residence. In this regard, funds were sourced from other prestige projects that were under-

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utilising the funds that had been allocated to them. Accordingly, there are no records reflecting the budget available for this project.

32.1.3 Bid evaluations and outcomes

All the documents under this heading deal with technical detail of what the prospective bidders were proposing to do and the detail of what was eventually agreed upon would be done. Once again, I submit that it is evident that these documents contain security-sensitive information.

32.1.4 Contracts awarded and their values

Each of the contracts awarded contain details of what the successful service provider was required to do. This information similarly contains extensive security-related detail which cannot be disclosed without compromising the security arrangements at the Nkandla residence. In addition, the identities of the successful service providers were agreed between the Department and the service provider concerned to be kept confidential, in line with the security concerns of the security agencies.

33. Ad paragraphs 30 to 32

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The contents of these paragraphs are admitted.

34. **Ad paragraphs 33 and 34**

The contents of these paragraphs are admitted.

35. **Ad paragraphs 35 to 42**

The contents of these paragraphs are admitted. After receipt of Senior Counsel's input, the Minister decided to allow the provisions of section 77(7) of PAIA to take effect.

36. **Ad paragraph 43**

The respondents submit that the applicants are not entitled to the relief sought, more particularly to an order that they be supplied with a copy of the records sought. This is so because the records sought are so replete with security-related information that they cannot be disclosed, and ought not to be disclosed, for the reasons set out above. Furthermore, the applicants must have foreseen that the respondents would resist the production of these documents on this basis, but nevertheless proceeded with an application in which material disputes of fact were bound to arise, which cannot be resolved on paper. For this reason alone, this application ought to be dismissed with

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costs, including the costs of two counsel. Further legal argument in this regard will be made at the hearing of this application.

37. **Ad paragraph 44**

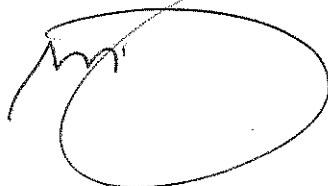
The contents of this paragraph are admitted.

38. **Ad paragraph 45**

38.1 I admit that the second respondent did not specify in her letter dated 13 August 2012 the provisions of PAIA that were relied upon in deciding not to grant the applicants access to the records sought.

38.2 However, the respondents submit that the reliance by the second respondent on the NKP Act and related security legislation was valid and consistent with the provisions of PAIA, more particularly sections 38 and 41 thereof.

38.3 The applicants contend that the reliance by the respondents on the NKP Act, the PI Act and related documents is invalid. I have been advised that PAIA does not repeal section 10 of the NKP Act, nor sections 3 and 4 of the PI Act, nor any other security-related provision upon which reliance was placed by the second respondent in this matter. Instead, PAIA recognises (in sections 38 and 41) that access to security-related records can be refused, and ought in certain

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circumstances to be refused, subject to the provisions of section 46. The documents to which access was sought in this matter fall, in the submission of the respondents, within the class of security-related information to which access can and ought to be refused. Further legal argument in this regard will be made at the hearing of this application.

38.4 In any event, the applicants stressed that they were not interested in gaining access to any security-related information. The problem with the applicants' request is that the documents to which they sought access are so replete with security-sensitive information that they could not be provided without undermining the very security arrangements that had to be put in place. Further legal argument in this regard will be made at the hearing of this application.

38.5 The remaining allegations in this paragraph are denied insofar as they are inconsistent with the contents of this affidavit.

39. **Ad paragraph 46**

The contents of this paragraph are denied.

40. **Ad paragraph 47**



I admit the contents of section 46 of PAIA. The respondents deny the remaining allegations in this paragraph, in particular that the public interest in the information sought clearly outweighs the respondents' reasons for refusing access to the records.

41. **Ad paragraphs 48 and 49**

41.1 The respondents admit that a lot of discussion and debate has been generated in the media and in Parliament concerning the construction at the Nkandla residence.

41.2 The respondents further admit that all the newspaper articles referred to in these paragraphs were published and entered the public domain on the dates alleged.

41.3 The respondents submit that the actions of the Minister in appointing the task team and in accepting all its findings and recommendations have served to counter-balance the perceptions created in the public domain and in Parliament.

41.4 The respondents further submit that it is not in the public interest for the documents sought to be made public because of the security-related information that is contained therein.

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41.5 Accordingly, the respondents deny the remaining allegations in these paragraphs. Further legal argument in this regard will be made at the hearing of this application.

42. **Ad paragraph 50**

Whilst the news reports referred to herein were in fact published, the details of the extent of public expenditure on the Nkandla residence has now been revealed by the Minister. Accordingly, the remaining allegations in this paragraph are denied.

43. **Ad paragraph 51**

The respondents submit that there was no basis for the motion of no confidence in President Zuma. The remaining allegations in this paragraph are admitted.

44. **Ad paragraph 52**

It is apparent from the extract referred to in this paragraph that President Zuma spoke in general terms and did not contravene the provisions of any legislation. The conclusions drawn in this paragraph are therefore denied.

45. **Ad paragraph 53**



The contents of this paragraph are denied.

46. **Ad paragraph 54**

At the press conference held on Sunday 27 January 2013, the Minister detailed the true extent of public expenditure on the security upgrades to the Nkandla residence. The Minister also stated that it appears that proper procedures were not followed. The Minister stressed *inter alia* that:

46.1 In view of the irregularities found by the task team, its report will be referred to the law enforcement agencies, including the Special Investigation Unit, the Auditor General and the South African Police Service with a view to investigating any possible acts of criminality;

46.2 If there are any professionals who are found to have acted unethically, they will be reported to their respective professional bodies; and

46.3 Disciplinary measures will immediately be instituted against those government officials who are implicated in the flouting of policies and procurement procedures.

46.4 Accordingly, the remaining allegations in this paragraph are denied.

47. **Ad paragraph 55**

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47.1 It appears from the findings of the task team that the provisions of the PFMA were not followed.

47.2 This matter has also been referred to the Public Protector who has commenced an investigation and who is receiving the co-operation of the Department. The respondents deny the remaining allegations in this paragraph. The respondents specifically deny that the public interest in the disclosure of the record clearly outweighs the harm contemplated by the respondents.

48. **Ad paragraph 56**

The contents of this paragraph are admitted.

49. **Ad paragraph 57**

The respondents submit that this Court should decline to exercise its discretion to examine the documents to which access is sought. By their very nature, the documents contain detailed security-related information. This Court will, with respect, be placed in an untenable position if it exercises its discretion in the manner proposed by the applicants, as it will have to rule on the disclosure of security-related and security-sensitive information without hearing any of the parties to this application. Further legal argument in this regard will be advanced at the hearing of this application.

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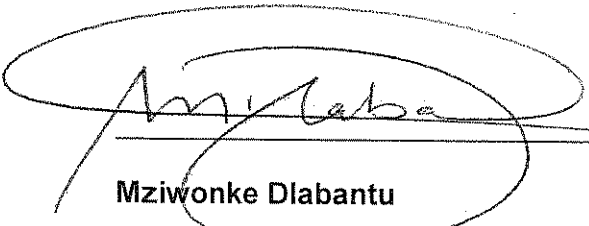
50. **Ad paragraph 58**

The contents of this paragraph are denied. For the reasons stated above, the respondents have good reason to refuse to make the records sought available to the applicants.

51. **Ad paragraph 59**

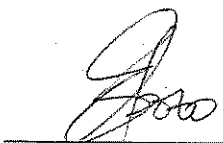
The contents of this paragraph are denied.

52. The respondents therefore request this Court to dismiss the application with costs, including the costs of two counsel.



Mziwonke Dlabantu

Signed and sworn to before me at PRETORIA on this the 29th day of JANUARY 2013, the deponent having acknowledged that he knows and understands the contents of this affidavit, and that it is true and correct.



Commissioner of Oaths

Full Names:

Business address

Designation:

Capacity:

NGWANAPHALAMA EUNICE POTO
Commissioner of Oaths
Admitted Attorney - RSA
2 Kotze Street, Woman's Jail, East Wing,
Constitution Hill, Braamfontein 2017
Tel: (011) 403-7182 Fax: (011) 403-5609
Date: _____

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CASE NO: 67574/12

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THE MINISTER OF PUBLIC WORKS First Respondent

**THE INFORMATION OFFICER: DEPARTMENT OF
PUBLIC WORKS** Second Respondent

CONFIRMATORY AFFIDAVIT

I, the undersigned,

MANDISA FATYELA-LINDIE

do hereby make oath and say that:

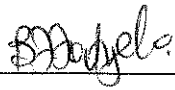
1. I am the former Acting Director General of the Department of Public Works.



BO.


2. Save where the context clearly indicates otherwise, the contents of this affidavit are within my personal knowledge and are, to the best of my belief, both true and correct.

3. I have read the affidavit of Mziwonke Dlabantu and confirm that the contents thereof are true and correct insofar as they relate to me.



Mandisa Fatyela-Lindie

Signed and sworn to before me at PRETORIA on this the 29th day of JANUARY 2013, the deponent having acknowledged that she knows and understands the contents of this affidavit, and that it is true and correct.



Commissioner of Oaths

Full Names:

Business address

Designation:

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Commissioner of Oaths
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2 Kotze Street, Woman's Jail, East Wing,
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