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

BHARDWAJ, VINAYAK Second Applicant

and

THE MINISTER OF PUBLIC WORKS First Respondent

THE INFORMATION OFFICER:
DEPARTMENT OF PUBLIC WORKS Second Respondent

APPLICANTS' SUBMISSIONS

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INTRODUCTION

1 The Department of Public Works ("the Department") has spent more than R210m on improvements at and for purposes of the President's Nkandla Estate since May 2009.[1] The applicants applied on 6 July 2012, in terms of s 18 of the Promotion of Access to Information Act 2 of 2000 ("PAIA"), for access to all the documents in the Department's possession or under its control, relating to the improvements and their financial implications.[2] The Acting Director General of the Department, who was also its information officer, refused the applicants' request on 13 August 2012.[3] The applicants appealed to the Minister of Public Works ("the Minister") on 10 September 2012 in terms of s 74 of PAIA.[4] The Minister failed to determine the appeal and is accordingly deemed, in terms of s 77(7) of PAIA, to have dismissed it.

2 The applicants applied in terms of s 78 of PAIA for an order compelling the respondents to disclose the documents sought. The respondents initially opposed the application because, they said, the documents sought are replete with "*security-sensitive information*"[5] which protected them against disclosure in terms of s 10 of the National Key Points Act 102 of 1980 ("NKP Act"), ss 3

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[1] Record Vol 8 Respondents' further affidavit, p 633, para 9.

[2] Record Vol 1 Annexure VB1 to the Founding affidavit, p 30.

[3] Record Vol 1 Annexure VB3 to the Founding affidavit, p37.

[4] Record Vol 1 Annexure VB4 to the Founding affidavit, pp 38 - 46.

[5] Record Vol 2 Respondents' Answering Affidavit, p 129 para 32.2, p 131 para 36 and pp 132-133 para 38.

and 4 of the Protection of Information Act 84 of 1982 ("the PI Act") and ss 38 and 41 of PAIA.[6]

3 On 14 June 2013, after the applicants filed replying and supplementary replying affidavits, and after the applicants had filed their heads of argument and the respondents' heads of argument were overdue, the respondents changed tack. They filed a further affidavit, deposed to by a Special Adviser to the Minister of Public Works ("Mr Masilo") in which they abandoned the blanket defence that all of the records sought could not be disclosed because they contain security-sensitive information. The respondents tendered a list of documents falling within the applicants' request.[7] Though, according to Mr Masilo, some documents required redaction to remove security-sensitive information, this was required only "to a very limited extent".[8] The respondents did not tender documents that they allege are security sensitive.[9]

4 On 21 June 2013, the applicants received copies of the tendered documents, which ran to approximately 12 000 pages.[10]

5 However, the first applicant's analysis of the tendered documents revealed that there were missing documents:[11]

[6] Record Vol 2 Respondents' Answering Affidavit p 121 - 122 para 6.

[7] Record Vol 8 Respondents' further affidavit, p 632, para 8.

[8] Record Vol 8 Respondents' further affidavit, p 633, para 11.

[9] Record Vol 8 Respondents' further affidavit, pp 633 - 634, paras 12 - 15.

[10] Record Vol 9 Applicants' supplementary affidavit, pp 721 - 722, paras 10 and 12.

[11] Record Vol 9 Applicants' supplementary affidavit, pp 725 - 726, para 16.

5.1 several of the documents tendered by the respondents and specifically listed in their schedule of tendered documents were not included in the documents provided to the applicants;

5.2 several of the disclosed documents were incomplete, in that they were missing pages or attachments;

5.3 several of the disclosed documents referred to meetings of which no minutes could be located among the disclosed documents; and

5.4 the disclosed documents were confined to communications among the Department's middle and lower management, consultants and contractors, and although such records refer to a higher level of communication, deliberation and decision-making – i.e. so-called "top management" – the disclosed documents did not include any records generated at that level.

6 After these deficiencies were pointed out in correspondence, the respondents' attorneys provided a schedule that had been prepared by Mr Masilo in which the outstanding documents were classified into four categories, highlighted in colour to indicate their status:[12]

6.1 Green: documents that had been tendered but mistakenly not copied. These documents have since been provided;

6.2 Yellow: documents that appear to have once existed but which the respondents' best efforts cannot locate;

[12] Record Vol 10 Annexure SA11 to the Applicants' supplementary affidavit, pp 808-817.

6.3 Red: documents that the respondents allege are security-sensitive and cannot be redacted; and

6.4 Blue: documents whose existence the respondents were unable to confirm.

7 Despite these two disclosures, the applicants persist in this application because they deny that the respondents have disclosed all of the documents that they are required by law to disclose. I submit that despite the disclosure of the documents contained in the list, the respondents have failed to satisfy their duties under PAIA. In particular:

7.1 In respect of some of the missing documents, the respondents have failed to demonstrate, as required by section 23 of PAIA, that they have taken all reasonable steps to find the records, or that there are reasonable grounds for this Court to accept that the records are either in the respondents' possession but cannot be found, or that the records do not exist;

7.2 In respect of some of the allegedly security-sensitive documents, this Court cannot accept the respondents' assertion that they contain security-sensitive information, and ought to require the respondents to disclose a list of every document claimed to be security sensitive. Furthermore, this Court should exercise its discretion to examine the records in terms of section 80(1) of PAIA to determine whether they are in fact security-sensitive and, if so, whether they are capable of redaction.

ACCESS TO INFORMATION HELD BY THE STATE

The constitutional right and its importance

8 Section 32(1)(a) of the Constitution provides that everyone "*has the right of access to any information held by the state*".

9 This right gives effect to the founding constitutional values of openness and accountability in public affairs. These values permeate the Constitution, for instance in the following provisions:

9.1 The preamble provides that the Constitution lays the foundation for a "*democratic and open society*".

9.2 The founding values in s 1 include the pursuit of "*accountability, responsiveness and openness*" in s 1(d).

9.3 Section 39(1)(a) provides that the courts must promote the values that underlie "*an open and democratic society*" when they interpret the Bill of Rights.

9.4 Section 41(1)(c) requires all spheres of government and all organs of state to provide "*transparent*" and "*accountable*" government.

9.5 Sections 57(1)(b), 59(1)(b), 70(1)(b), 72(1)(b), 116(1)(b), 118(1)(b) and 160(7) require parliament, the provincial legislatures and all municipal councils to conduct their business in an open, transparent and accountable manner.

9.6 Section 195 lays down the basic values and principles that govern public administration in every sphere of government.[13] They provide that public administration "*must be accountable*"[14] and that "*Transparency must be fostered by providing the public with timely, accessible and accurate information*".[15]

9.7 Even the security services are subject to "*the principles of transparency and accountability*" in terms of s 199(8).

10 The SCA said in ***M&G***[16] and the Constitutional Court confirmed in ***Oriani-Ambrosin***i[17] that "*[o]pen and transparent government and a free flow of information concerning the affairs of the State is the lifeblood of democracy*".

11 The Constitutional Court also emphasised the importance of the right in ***M&G***:[18]

> *"The constitutional guarantee of the right of access to information held by the State gives effect to 'accountability, responsiveness and openness' as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy."*[19]

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

[13] Section 195(2)(a).

[14] Section 195(1)(f).

[15] Section 195(1)(g).

[16] *President of the Republic of South Africa v M&G Media Ltd* 2011 (2) SA 1 (SCA) para 1.

[17] *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) para 46 footnote 45.

[18] *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC).

[19] Id para 10.

> *'must be fostered by providing the public with timely, accessible and accurate information'".*[20]
>
> *"The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined."*[21]

12 Currie and Klaaren note that the entrenchment of this right in the Constitution must be seen against the backdrop of the apartheid state's obsession with official secrecy. It is a characteristic feature of authoritarian states that they seek to control the flow of information in their societies. Section 32 of the Constitution marks a decisive break with the past, by entitling everyone to information held by the state. Our courts have held that the effect of the right of access to information is that public authorities are no longer permitted to "*play possum*" with members of the public where the rights of the latter are at stake. The purpose of the right of access to information "*is to subordinate the organs of State ... to a new regimen of openness and fair dealing with the public*."[22]

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[20] Id para 8 quoting with approval the Constitutional Court's judgment in *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at para 62.

[21] Id para 10.

[22] Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) p 2; *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 850A – cited with approval in *MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) para 21; *President of the Republic of South Africa and Others v M&G Media Ltd* 2011 (2) SA 1 (SCA) paras 9 to 11.

Transparency in public procurement

13 This case concerns the Department's procurement of goods and services on behalf of the state. Both the Constitution and the Public Finance Management Act 1 of 1999 ("PFMA") require that public procurement in particular be done in an open and transparent manner.

14 The following provisions of the Constitution make this clear:

14.1 Section 215(1) provides that national, provincial and municipal budgets and budgetary processes must promote "*transparency*" and "*accountability*".

14.2 Section 217(1) provides that, when public bodies contract for goods or services, they must do so in accordance with a system which is "*transparent*".

15 The PFMA echoes these requirements. It says for instance in s 38(1)(a) that the accounting officer of a department of state,

- must ensure that it has and maintains "*transparent systems of financial and risk management and internal control*"[23] and

- an appropriate procurement and provisioning system which is "*transparent*".[24]

16 The SCA underscored this principle in ***Transnet*** as follows:

[23] Section 38(1)(a)(i).

[24] Section 38(1)(a)(iii).

> *"To my mind the overriding consideration here is that the appellant, being an organ of State, is bound by a constitutional obligation to conduct its operations transparently and accountably. Once it enters into a commercial agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to State security or the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails."*[25]

17 The High Court more recently elaborated on this principle as follows:

> *"In her discussion of government procurement and transparency, Phoebe Bolton points out that in the government-procurement context, a transparent system can be said to refer to a system that is 'open' and 'public'.*
>
> *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 contractors should be able to access information on government-contract awards.*
>
> *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, are free to scrutinise the procedures followed …*
>
> *This is designed to ensure public confidence in government-procurement procedures and promote openness and accountability on 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.*
>
> *Having assumed an obligation of transparency in relation to its procurement, coupled with the fact that 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'."* [26]

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[25] *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 55.

[26] *M&G Media Ltd and Others v 2010 Fifa World Cup Organising Committee South Africa Ltd and Another* 2011 (5) SA 163 (GSJ) paras 378 - 382.

PAIA gives effect to the right

18 PAIA gives effect to the right of access to information. It says in its preamble 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 abuse of power and human rights violations",*

but that it seeks to,

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

19 To give effect to the clean break with the "*secretive and unresponsive culture*" of the past, s 5 makes it clear that PAIA overrides all legislation materially inconsistent with it:

> *"This Act applies to the exclusion of any provision of other legislation that –*
>
> *(a) prohibits or restricts the disclosure of a record of a public body or private body; and*
>
> *(b) is materially inconsistent with an object, or a specific provision, of this Act."*

20 Section 11(1) of PAIA lays down the general principle that,

> *"A requester must be given access to the record of a public body if –*
>
> *(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and*
>
> *(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."*

21 The Constitutional Court held in ***M&G*** that,

> *"the formulation of section 11 casts the exercise of this right in peremptory terms — the requester 'must' be given access to the report so long as the request complies with the procedures outlined in the Act and the record requested is not protected from disclosure by one of the exemptions set forth therein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception."*[27]

22 The SCA also held in ***Transnet***[28] that this principle is peremptory. If a public body fails to bring its information within one of the recognised exemptions in terms of PAIA, the requester is entitled to it as of right and the court does not have any discretion to refuse access to it.

23 Section 28(1) of PAIA deals with the records of public bodies which contain protected information that is severable from the remainder of the record. It imposes a duty on the public body to sever the protected information and disclose the remainder:

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

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

> *"Section 28 of PAIA requires that any information in a record that is not protected and that can reasonably be severed from the protected parts of the record be severed and disclosed. There is no discretion*

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[27] *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) para 9.

[28] *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 58.

> *to withhold information that is not protected. The unprotected material must be disclosed 'despite any other provision' of PAIA, unless it 'cannot reasonably be severed' from the protected portions."*[29]

25 Section 23 of PAIA applies to situations in which a record cannot be found or does not exist. In respect of such records, the information officer is required to give a full account of all the steps taken to find the record or to determine whether the record exists, sufficient to satisfy the Court that all reasonable steps have been taken to find the record and there are reasonable grounds for believing that the record is in the public body's possession but cannot be found, or does not exist.

26 Section 20(1)(a) of PAIA provides that if a record is not in the possession or under the control of the public body to whom the request has been made, the information officer is obliged to transfer the request to the information officer of the other public body. Section 20(2) of PAIA provides that if the information officer does not know which public body has possession or control of the record, and the record was created by or for another public body, he or she is obliged to transfer the request for information to the information officer of the public body.

The nature of these proceedings

27 Court proceedings under PAIA are governed by ss 78 to 82. They establish the following principles.

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[29] *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) para 65.

28 In terms of s 78, a requester aggrieved by a refusal of a request for access to information, may "*by way of an application*" apply to court for appropriate relief. The requester is obliged to proceed by application proceedings even when disputes of fact are foreseeable. The respondents' contention that this application ought to be dismissed because the applicants proceeded by application despite disputes of fact that "*were bound to arise*",[30] is thus unfounded.

29 In such an application, the court is not limited to a review of the decision to refuse access to information. It decides the public body's claim of exemption from disclosure afresh and engages in a *de novo* reconsideration of the merits.[31]

30 Section 81 provides that the proceedings are civil proceedings[32] subject to the rules of evidence applicable to proceedings of that kind.[33] It goes on to say that the burden of establishing that the refusal of a request for access complies with the provisions of PAIA, "*rests on the party claiming that it so complies*".[34]

31 The imposition of the burden on the state, to show that a record is exempted from disclosure, is understandable. The Constitutional Court held in ***M&G*** that it would be "*manifestly unfair and contrary to the spirit of PAIA read in the light of section 32 of the Constitution*" to impose the burden on the requester to

[30] Record Vol 2 Respondents' Answering Affidavit, p 131, para 36.

[31] *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) paras 24 - 26; *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) para 14.

[32] Section 81(1).

[33] Section 81(2).

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

show that a record is not exempt from disclosure.[35] It went on to say that "*neither the mere ipse dixit of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the State*".[36]

THE UNDISCLOSED DOCUMENTS

32 There are two significant categories of documents that the applicants submit ought to have been disclosed and which remain in dispute for the purposes of this application:

32.1 The first is the category of documents that the respondents assert cannot be found or do not exist ("*missing documents*").

32.2 The second is the category of documents that the respondents have in their possession but which they assert cannot be disclosed because they contain security-sensitive information ("*security-sensitive documents*").

The missing documents

33 The missing documents are those documents that the respondents say cannot be found or whose existence cannot be confirmed.[37]

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[35] *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) para 15.

[36] Id para 22.

[37] Documents that appear to have once existed are shaded in yellow on the schedule put up by the respondents; those whose existence could not be confirmed by Mr Masilo despite his best efforts are

34 It is particularly significant that the missing documents include all records of meetings, communications, deliberations and decisions at the level of "*top management*" - the term employed in the disclosed documents to refer to the Minister, the Deputy Minister of Public Works ("Deputy Minister"), the Director General of Public Works ("DG") and the Deputy Director General of Public Works ("DDG"), including in their communications with the Principal (President Zuma) ("top-level documents").[38]

35 A number of these documents will have been generated as a result of the Department's compliance with the law. The Department's implementation of the project was subject to a range of requirements under the Constitution, the PFMA, the Treasury Regulations, the Preferential Procurement Policy Framework Act 5 of 2000 ("the PPP Act") and the Preferential Procurement Regulations[39] ("the PP Regulations"), compliance with which will have generated a large volume of documents, including top-level documents:

35.1 The Department may only spend money for the purposes for which it has been appropriated by parliament. Section 213(2)(a) of the Constitution provides that money may only be withdrawn from the National Revenue Fund "*in terms of an appropriation by an Act of Parliament*". Section 38(2) of the PFMA provides that an accounting officer may not commit a department to any liability "*for which money has not been appropriated*". Section 39(1) adds that the accounting officer of a department must

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shaded in blue on the schedule. The schedule appears at Record Vol 10 Annexure SA11 to the Applicants' supplementary affidavit, pp 808-817.

[38] Record Vol 9 Applicants' supplementary affidavit, p 734, para 31.

[39] GN R502 in GG 34350 of 8 June 2011.

ensure that the expenditure of the department "*is in accordance with the vote of the department and the main divisions within the vote*" and that "*effective and appropriate steps are taken to prevent unauthorised expenditure*". The Department was accordingly not permitted to embark on the project without parliamentary appropriation of money for that purpose.

35.2 Section 217(1) of the Constitution provides that, when an organ of state contracts for goods or services, it must do so "*in accordance with a system which is fair, equitable, transparent, competitive and cost-effective*". This requirement is echoed in s 38(1)(a)(iii) and (iv) of the PFMA which provide that an accounting officer of a department must ensure that it has and maintains "*an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective*" and "*a system for properly evaluating all major capital projects prior to a final decision on the project*". Treasury Regulation 16A elaborates on these requirements. It specifies for instance in regulations 16A6.3(c) and (d) that all tenders must be advertised and awards published in the Government Tender Bulletin.

35.3 Section 2(1) of the PPP Act provides that an organ of state must have and implement a preferential procurement policy in terms of which preference points are awarded for the achievement of specified goals[40] and the contract awarded to the tenderer who scores the highest points

[40] Section 2(1)(a) and (b).

unless objective criteria justify the award to another tenderer.[41] The PP Regulations specify in detail how this must be done.[42] This process inevitably generates a great deal of documentation.

35.4 The PFMA also requires the accounting officer of a department to keep full and proper records of its expenditure:

35.4.1 Section 40(1)(a) provides that the accounting officer "*must keep full and proper records of the financial affairs of the department*".

35.4.2 In terms of s 40(4)(a), the accounting officer must, before the beginning of a financial year, provide the National Treasury with a breakdown per month of the Department's anticipated expenditure for the forthcoming financial year.

35.4.3 In terms of s 40(4)(b) and (c), the accounting officer must render monthly returns to the National Treasury with particulars of the Department's actual expenditure for the preceding month and its anticipated expenditure for the following month.

36 The respondents say that,

- "*There was no specific budget allocated for the security upgrades to the Nkandla residence*", that "*funds were sourced from other prestige projects that were under-utilising the funds that had been*

[41] Section 2(1)(f).

[42] The PP Regulations of 2001 were in force until 7 December 2011 when the PP Regulations of 2011 came into force.

allocated to them" and that there were accordingly "*no records reflecting the budget available for this project*";[43] and

- a ministerial task team found "*that proper procedures were not [followed] in relation to the procurement of goods and services*".[44]

37 Even if these "*excuses*" are true, the irregularities on which they are based would in themselves have triggered a range of processes involving much documentation:

37.1 In terms of s 1 of the PFMA, expenditure for which there is no budget approval, is classified as "*unauthorised expenditure*" and expenditure incurred on procurement in contravention of the PFMA is classified as "*irregular expenditure*".

37.2 In terms of s 34, unauthorised expenditure may not be discharged from the National Revenue Fund.

37.3 The accounting officer of the Department is obliged, in terms of s 38(1)(c)(ii), to prevent unauthorised and irregular expenditure.

37.4 When any unauthorised or irregular expenditure is discovered, the accounting officer must, in terms of s 38(1)(g), immediately report the matter to the National Treasury. She is also obliged in terms of s 38(1)(h)(iii) to "*take effective and appropriate disciplinary steps*" against the responsible official.

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[43] Record Vol 2 Respondents' Answering Affidavit, pp 129 - 130, para 32.1.2.

[44] Record Vol 2 Respondents' Answering Affidavit, p 126, para 17; Record Vol 2 Annexure RA4 to the Respondents' Answering Affidavit, pp 189-190.

37.5 In terms of s 40(3)(b), the Department's annual report and audited financial statements must include particulars of any unauthorised or irregular expenditure.

37.6 If the accounting officer is unable to comply with any of these requirements, she must promptly report the matter to the Minister and to the National Treasury in terms of s 40(5).

37.7 An accounting officer who wilfully or negligently fails to comply with these requirements of ss 38 and 40, is guilty of financial misconduct in terms of s 81(1). If an accounting officer is alleged to have committed such financial misconduct, the National Treasury must immediately ensure that the Minister initiates an investigation into the matter.

37.8 An accounting officer who wilfully or grossly negligently fails to comply with the requirements of ss 38 and 40, is guilty of a criminal offence in terms of s 86(1).

38 I submit that it is impossible in the light of these legal requirements and the consequences of their breach that no top-level documents were created and retained in the Nkandla process. This is an extensive class of highly relevant documents falling within the ambit of the request for which the Department remains required to account. The respondents' bald assertion that these documents "may not exist" is insufficient and cannot, in any event, be sustained.

39 This is so for two further reasons, which are set out in detail below.

39.1 First, there are several documents referred to in the disclosed documents that were neither tendered nor disclosed, although they must be, or have been, in the possession of the Department.

39.2 Second, and significantly, the applicants are in possession of examples of such documents which have not been disclosed.

Documents referred to within the disclosed documents

40 There are numerous documents that are referred to within the disclosed documents but which have neither been tendered nor disclosed. I submit that these documents must be or have been in the possession of the Department.[45] These include: [46]

40.1 records of the site handover held on 17 June 2010, site inspection held on 9 July 2010, and site meetings held on 1, 15 and 29 July, 12 and 26 August, 9 and 23 September, 7 and 21 October, 4 and 18 November, and 2 December 2010;

40.2 terms of reference for Durban: Prestige Project A: security measures, dated 8 September 2010;

40.3 records of meetings held on:

40.3.1 17 September 2010 (attended by the Minister);

40.3.2 2 December 2010 in Pretoria (attended by the Deputy Minister);

[45] In the letter dated 8 August 2013 the applicants' attorneys listed several documents of such kind. See Record Vol 9 Annexure SA6 to the Applicants' supplementary affidavit, p 787 - 790.

[46] Record Vol 9 Applicants' supplementary affidavit, pp 730 - 731, para 27.

40.3.3 20 December 2010 (attended by the Deputy Minister, the DDG and the Project Manager of the Nkandla upgrade, Mr Jean Rindel ("the Project Manager"));

40.3.4 21 December 2010 (attended by the Deputy Minister and the DDG);

40.3.5 6 June 2011 in Pretoria (attended by the Acting DG, the Project Manager and the Durban Regional Manager of the Department, Mr Kenneth Khanyile ("the Regional Manager"));

40.3.6 mid-January 2012 in Midrand (attended by the Minister); and

40.3.7 21 May 2012 at the Durban Regional Office of the Department (attended by the Acting DG);

40.4 records of the regular (weekly, bi-weekly, monthly, and bi-monthly) meetings held prior to 3 March 2011 between the Project Manager and the Minister, the Deputy Minister or the DG;

40.5 records of the fortnightly meetings between the Deputy Director-General of Public Works and consultants held on 25 May, 8 and 22 June, 6, 13 and 27 July, and 10 and 24 August 2011;

40.6 the internal memorandum from the Regional Manager to the Minister, regarding apportionment of costs between the State and the Principal (President Zuma), dated 28 March 2011; and

40.7 instructions from the Minister to Mr Philip Crafford on 19 July 2011.

41 Each of the above documents is described sufficiently clearly in several of the disclosed documents that they must either exist or have existed and been in the possession of the Department. Although the documents listed above at paragraph 40 are those to which specific reference is made in documents that are in the applicants' possession, there is no reason to believe that these documents do not form part of a broader class of documents that have not been disclosed.

42 The applicants have set out in detail their evidence in support of the contention that the respondents must have been in possession of the listed documents at paragraphs 27 to 38 of the supplementary affidavit.[47] They have also set out a number of examples of such documents.[48] The respondents do not deal adequately with this evidence or these examples, but baldly assert that the relevant documents may not exist or cannot be found.[49]

[47] Record Vol 9 Applicants' supplementary affidavit, pp 730 - 736, paras 27 - 38.

[48] See Record Vol 9 Applicants' supplementary affidavit, p 732, para 29.

[49] Record Vol 10 Respondents' further answering affidavit, pp 849 - 852, paras 34 – 45.

Documents in the applicants' possession

43 The second reason that there must exist a class of undisclosed documents including top management documents is that the applicants have examples of such documents in their possession.

44 Clear indications of the existence of the missing documents appear, not only in the documents provided in the first disclosure (as set out above), but also in several of the documents provided in the second disclosure. The most notable of these is a draft (unsigned and undated) internal memorandum from the DG to the Minister with the subject "*Requesting assistance in the relocation of neighboring [sic] families from their old houses to newly build [sic] accommodation*".[50]

45 This draft memorandum, moreover, makes it clear that the Principal issued "*deadlines*" (and presumably other directions) to the "*top management*" of the Department and that they, in turn, kept him informed of the progress of the Nkandla upgrade. Records of such instructions from the Principal to the Department and of such updates from the Department to the Principal undeniably must exist or have existed, and must be or have been in the possession of the Department.

46 Moreover, a document anonymously leaked to the applicants (an internal memorandum from the Regional Manager to the Minister dated 28 March 2011), records that work falling under the "*private portion*" of the project (which

[50] Record Vol 10 Annexure SA15 to the Applicants' supplementary affidavit, pp 834 - 837.

the Principal would be responsible for funding) fell "*outside the scope of the security measures*" and could not be implemented "*without the written instructions from top management*".[51] There must accordingly be such written instructions in existence. The respondents have not disputed the existence or the authenticity of this document. In the respondents' further answering affidavit of 19 September 2013 there is no mention of this document at all.

47 In addition, this leaked document is itself not among the disclosed documents. Mr Masilo speculates that the reason for this is that some unknown person removed the document from the Department's files and made it available to the applicants. The fact that Mr Masilo can only speculate as to what happened to these documents, undermines the relevance and reliability of his evidence as to the remaining documents. If the documents related to the Nkandla upgrade were as security sensitive as the Department said they were, one would expect the files to have been specially secured, and access to them monitored. It is, moreover, extremely implausible that the Department would have only one copy of any record, particularly one which appears to have been electronically generated.

48 Yet the respondents' case before this Court is that this category of documents either does not exist or cannot be located. I will submit that this claim is so untenable that it falls to be rejected on the papers; alternatively, that if this Court finds that the respondents' version creates a dispute of fact that cannot be resolved on these papers, that it should refer this issue to oral evidence.

[51] Record Vol 3 Annexure RA6 to the Applicants' replying affidavit, p 197.

The security-sensitive documents

49 There are two categories of security-sensitive documents.

50 The first category is those documents that were initially tendered by the respondents, allegedly after Mr Masilo had considered them and decided that they contained no security-sensitive information that was not capable of redaction. When the applicants pointed out that these documents had not been disclosed, the respondents changed their minds and asserted that these documents cannot be disclosed as they contain security-sensitive information.[52] There are five documents in this category.

51 The second category is those documents that the respondents have in their possession but did not tender because they assert that they are security-sensitive. These documents include documents produced by the SAPS and SANDF.[53] The applicants do not know how many such documents exist, because the respondents refuse to disclose a list of such documents, despite request.[54]

52 I will submit that this Court should not accept the respondents' assertion that these documents are security sensitive. This Court should compel the respondents to disclose a full list of all such documents, and exercise its

[52] These are the documents shaded in red in the schedule provided by the respondents. The schedule appears at Record Vol 10 Annexure SA11 to the Applicants' supplementary affidavit, pp 808-817.

[53] Record Vol 8 Respondents' further affidavit, p 633 - 634, paras 12-15.

[54] See the applicants' letter of 29 July 2013, Record Vol 9 Annexure SA4 to the Applicants' supplementary affidavit, p 770; and the applicants' letter of 8 August 2013, Record Vol 9 Annexure SA6 to the Applicants' supplementary affidavit, p 787.

discretion to examine the records in terms of section 80(1) of PAIA to determine whether they are in fact security-sensitive and incapable of redaction.

THE MISSING DOCUMENTS - FAILURE TO COMPLY WITH PAIA

53 The respondents rely on section 23 of PAIA to justify their refusal to disclose the missing documents.

54 Sections 23(1)-(2) of PAIA provide:

> *"**23 Records that cannot be found or do not exist***
>
> *(1) If-*
>
> *(a) all reasonable steps have been taken to find a record requested; and*
>
> *(b) there are reasonable grounds for believing that the record-*
>
> *(i) is in the public body's possession but cannot be found; or*
>
> *(ii) does not exist,*
>
> *the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.*
>
> *(2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer."*

55 In order to satisfy this Court that section 23 of PAIA justifies their failure to disclose the missing documents, the respondents are required to demonstrate the following:

55.1 The respondents have taken all reasonable steps to find the missing documents;

55.2 There are reasonable grounds for believing that the record is in the respondents' possession and cannot be found; or does not exist; and

55.3 That the respondents have given a full account of all steps taken to find the record including all communications with every person who conducted the search.

56 This Court is therefore required to determine whether the evidence put up by the respondents on this score is adequate by this measure. I submit that it plainly is not.

Disputes of fact in motion proceedings

57 The applicants expressly deny that the respondents have properly accounted for the missing documents.[55] They set out at length the reasons why many of the missing documents must exist, and must be in the possession of the respondents.[56] They also set out their reasons for saying that the respondents have failed to account adequately for the missing documents.[57] The respondents deny these allegations.[58]

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[55] Record Vol 9 Applicants' supplementary affidavit, pp 729 - 730, para 26.

[56] Record Vol 9 Applicants' supplementary affidavit, pp 730 - 736, paras 27-38.

[57] Record Vol 9 Applicants' supplementary affidavit, pp 736 - 742, paras 39-51.

[58] Record Vol 10 Respondents' further answering affidavit, pp 849 - 852, paras 34 - 45.

58 The proper approach to disputes of fact in motion proceedings has been articulated by the SCA in the following terms:

> *"an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."*[59]

59 In ***Zuma***, the SCA restated the position as follows:

> *"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's … affidavits, which have been admitted by the respondent …, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*[60]

60 Thus the rule that the respondents' version of the facts must form the basis for the court's adjudication of an application for final relief is subject to two exceptions.

61 The first exception applies where a denial by the respondent of a fact which has been alleged by the applicant may be insufficient to raise a real, genuine or bona fide dispute regarding this alleged fact. If, in such a case, the respondent

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[59] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 12 emphasis added; referring with approval to *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C and *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A - 153C.

[60] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

has not availed itself of the right to apply for the deponent concerned to be called to be cross-examined in terms of Rule 6(5)(g) of the Uniform Rules of Court, and the Court is satisfied as to the inherent credibility of the factual averment of applicant, it may proceed on the basis of the correctness of this averment and include it within the factual matrix upon which it determines whether the applicant is entitled to the relief sought.[61]

62 A bare denial is not sufficient to create a dispute of fact:

> *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."*[62]

63 The second exception applies where a respondent's answer contains a denial of allegations which were so far-fetched and untenable that a court is justified in rejecting them on the papers. The second exception is designed to deal with a case in which a respondent makes bald allegations or far-fetched denials which are manifestly untenable, not supported by any evidence or reason and which have been designed simply to exploit the ordinary rule to the latter's advantage

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[61] *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 152C – F.

[62] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para 13. See also *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 868H-869A, emphasis added.

and to the detriment of applicant whose factual averments cannot be attacked on any plausible basis.[63]

64 I submit that the respondents' evidence on the question of the existence of the top-level documents falls into one or both of these two exceptions. As is shown hereunder, the respondents' affidavits are a combination of bare denial and untenable assertions unsupported by any adequate evidence. This is despite the fact that knowledge of the facts in issue is peculiarly in the respondents' possession and they must be able to provide an answer. Instead of doing so, the respondents rely on hearsay and ambiguous and unsubstantiated denials.

The respondents' version

65 The respondents' version regarding the missing documents is as follows:

65.1 After the applicants filed their replying affidavit Mr Masilo was instructed to examine all of the documents in the possession of the Department that fell within the scope of the request for information.[64]

65.2 The Department provided Mr Masilo with 42 files of documents to review.[65]

65.3 The 42 files included:

65.3.1 Documents kept in the central registry of the KwaZulu-Natal Regional Office of the Department ("KZN Regional Office"),

[63] *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 152J – 153B.

[64] Record Vol 8 Respondents' further affidavit, p 631, para 4.

[65] Record Vol 8 Respondents' further affidavit, p 632, para 7.

where the Department stored all of the relevant documents;[66] and

65.3.2 Records and documents kept by the principal agent, consultant engineers and quantity surveyors involved in the upgrade.[67]

65.4 Mr Masilo reviewed all of the documents contained in the 42 files.[68] He consulted with the SAPS and SANDF to determine which of the documents were security sensitive. The respondents tendered to disclose all of the documents Mr Masilo reviewed that were not security sensitive.[69]

65.5 On 29 July 2013, the applicants' attorneys alerted the state attorney that a number of the tendered documents had not been delivered. Mr Masilo then re-examined his files and asked the project manager in the KZN Regional Office (Mr Rindel) to check whether any of the missing documents had mistakenly been left behind in the process of collecting the documents and transporting them to Pretoria.[70]

65.6 Mr Rindel contacted a number of service providers to check whether they were in possession of any of the documents.[71]

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[66] Record Vol 10 Respondents' further answering affidavit, p 844, para 14.

[67] Record Vol 10 Respondents' further answering affidavit, p 844, para 15.

[68] Record Vol 8 Respondents' further affidavit, p 632, para 7.

[69] Record Vol 8 Respondents' further affidavit, p 633 - 634, paras 12-15.

[70] Record Vol 10 Respondents' further answering affidavit, p 847, paras 25 - 27.

[71] Record Vol 10 Respondents' further answering affidavit, p 847, para 28.

65.7 Despite these efforts, Mr Masilo and Mr Rindel were unable to locate the missing documents. They therefore concluded that all of the missing documents either do not exist or cannot be located.

65.8 With regard to the top-level documents, the KZN Project Team was not part of any meetings between the Minister, Deputy Minister and/or the DG or Deputy DG. Mr Masilo was unable to find any records of these proceedings.[72]

65.9 Mr Masilo has no reason to believe that any employee of the Department deliberately withheld documents from him.[73]

65.10 The respondents concede that some of the documents may have been misfiled, and point out that this is entirely possible given the Department's size. The respondents also speculate that it is possible that persons unknown have deliberately removed some of the documents from the Department's files.[74]

66 The respondents' version, in short, is that the missing documents, including all top-level documents, either do not exist or cannot be found despite the Department (and in particular Mr Masilo) having taken all reasonable steps to try to find them.

67 As a matter of logic, there are three possibilities regarding the top-level documents:

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[72] Record Vol 10 Respondents' further answering affidavit, p 850, para 35.5.

[73] Record Vol 10 Respondents' further answering affidavit, p 850, para 37.

[74] Record Vol 10 Respondents' further answering affidavit, pp 850 - 851, paras 38-40.

67.1 First, the top-level documents do not exist or have never existed (this is inconceivable, as well as inconsistent with the disclosed documents which confirm the existence of numerous top-level documents);

67.2 Second, some top-level documents exist or did exist, but none is in the possession of the Department because all of have either been innocently misfiled or taken by persons unknown; or

67.3 Third, some top-level documents exist or did exist, but they were all deliberately excluded from the documents given to Mr Masilo in order to avoid disclosing them.

68 The respondents seek to convince this Court to accept either the first or the second proposition. They submit that either no such documents exist, or they have all been innocently misfiled. The respondents do not confirm or deny the existence of any top level documents. The implication of their evidence is therefore that no-one in the Department has any knowledge of whether the top level documents exist or have existed.

69 I pause to emphasise how improbable this version is. It would be remarkable if there were not a single top-level document in the possession of the Department; and if the Department were genuinely unable to say whether any top level document exists or did exist. It is highly unlikely that high-level government officials involved in a project relying on significant funds from the public purse would not insist that there were detailed records kept of meetings, correspondence and the various decisions taken, and that copies of these documents would be carefully managed. If a decision was taken not to keep

records, there is no doubt that the Department would be able to confirm such a decision and inform this Court that this is the reason why no top-level documents can be disclosed.

70 Furthermore, apparently until Mr Masilo filed his first supplementary affidavit, the Department was of the view that all the documents associated with the project were so sensitive as to justify the refusal to disclosure under PAIA. In respect of at least some of the documents associated with the Nkandla project it is correct that they are security sensitive. Despite this, the Department now alleges that it is not possible to definitely verify what precise documents, including documents generated at a ministerial or other top level, have existed. In addition, Mr Masilo claims that it is not possible to verify whether various documents were misfiled in other files within the vast number of files the Department maintains.[75] This assumes that no special or effective document management procedures were put in place in respect of the Nkandla upgrades which directly contradicts the Department's position with regard the sensitivity of the project.

71 The implausibility of the respondents' version is exacerbated by the fact that the top level documents are the documents whose contents are likely to be most embarrassing to the most senior members of government involved in the Nkandla upgrades. They are therefore the documents that the Department has the greatest incentive not to disclose. This makes their innocent disappearance and the respondents' disavowal of any knowledge of their existence even more improbable.

[75] Record Vol 10 Respondents' further answering affidavit, pp 850 - 851, paras 38-40.

72 I submit that the Department's evidence in support of this proposition amounts to a bare and unsubstantiated denial, or is so untenable that it can be rejected on the papers. I say so for the reasons that follow.

73 The Department's evidence on the question of whether any top-level documents exist is patently evasive and ambiguous. The high water mark of the respondents' answer is that the documents "*cannot reasonably be found, and may not even exist*".[76] This answer is unsatisfactory, given that:

73.1 The applicants expressly invited the respondents to explain:[77]

73.1.1 Whether the documents tendered include documents possessed by the Minister;

73.1.2 Whether any person conducted a comprehensive audit of all of the documents held by the Department to determine which fell within the request, and if not what process was followed; and

73.1.3 Whether the respondents could exclude the possibility that relevant documents could have been excluded from files examined by Mr Masilo.

Despite this invitation, the respondents never answered these questions.

73.2 The respondents rely on the evidence of Mr Masilo for their claim that the documents either cannot be found or do not exist.

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[76] Record Vol 10 DG's Confirmatory affidavit to Respondents' further answering affidavit, p 880, para 5.

[77] Record Vol 9 Applicants' supplementary affidavit, pp 726 - 727, paras 19.1, 19.3 and 19.4; see also Record Vol 9 Annexure SA6 to the Applicants' supplementary affidavit, pp 787 - 788.

73.3 PAIA explicitly places the burden of establishing that a refusal of a request for access to information on the party claiming that it complies.[78] The Constitutional Court held in ***M&G*** that,

> *"The Supreme Court of Appeal held that a deponent's assertion that information is within his or her personal knowledge 'is of little value without some indication, at least from the context, of how that knowledge was acquired'. I agree. An indication of how the alleged knowledge was acquired is necessary to determine the weight, if any, to be attached to the evidence set out in the affidavit. The key question is whether the deponent would, in the ordinary course of his or her duties or as a result of some other capacity described in the affidavit, have had the opportunity to acquire the information or knowledge alleged."* [79]

73.4 In addition, in Cameron J's minority decision in ***M&G***, he stated:

> *"As the Supreme Court of Appeal pointed out, one can gain personal knowledge of an event in three very different ways: by experiencing it directly; by receiving a report that it happened (which is hearsay); or by deducing from other signs that it took place. Mr Chikane does not tell us in which of these ways he acquired personal knowledge. This leaves a court unable to perform its most elementary function, which is to assess the quality, strength and reliability of his knowledge in determining whether the fact to which he deposes is true. The mere assertion that he has personal knowledge gives no help in that duty. It follows that his assertion is without value as evidence of the fact in issue."* [80]

73.5 Mr Masilo has no knowledge of whether the top-level documents exist or what might have happened to them. Nor can he be expected to have knowledge of these questions by virtue of his position. Mr Masilo only has knowledge of the contents of the 42 files that were provided to him. While there is no reason to doubt Mr Masilo's honesty or integrity, he cannot give evidence as to the existence or possible misfiling of the top-level documents, as he could not have (and does not claim) direct

[78] S 81(3) of PAIA.

[79] President of the RSA v M&G Media 2012 (2) SA 50 (CC) para 28.

[80] Id at para 107.

knowledge of these issues. His statements to the effect that they may not exist or may have been misfiled are pure speculation and hearsay, and are insufficient to discharge the burden placed on the respondents by PAIA.

73.6 Though Mr Masilo may not know whether any top-level documents exist, there must be officials in the Department with direct knowledge of whether any top-level documents exist. It is inconceivable that no official or former official in the Department has any knowledge of the existence of any top-level documents.

73.7 Yet no official has deposed to an affidavit confirming whether they exist.

73.8 The DG, who was appointed only after this application was launched, does not explain how despite this he has personal knowledge of the facts to which he deposes, has filed a confirmatory affidavit. However he only says that:

73.8.1 He confirms Mr Masilo's version;[81]

73.8.2 The Department has taken all reasonable steps to find and deliver all documents in its possession to the applicants;[82]

73.8.3 The remainder of the documents cannot be located or reasonably found, and therefore may not exist.[83]

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[81] Record Vol 10 DG's Confirmatory affidavit to Respondents' further answering affidavit, p 880, para 3.

[82] Record Vol 10 DG's Confirmatory affidavit to Respondents' further answering affidavit, p 880, para 5.

[83] Id.

73.9 The most remarkable aspect of the DG's confirmatory affidavit is what the DG does not say. The DG does not say that:

73.9.1 to his knowledge no top-level documents exist;

73.9.2 to his knowledge some top-level documents do exist, but they cannot be located;

73.9.3 to his knowledge some top-level documents do exist but are held by another department or organ of state;

73.9.4 if the DG does not know whether any top-level documents exist, which official would know, and what steps, if any, have been taken to determine whether any top level documents exist; or

73.9.5 the Department has taken steps to determine what has happened to the top-level documents, if they do exist.

73.10 The DG's evidence is patently evasive and ambiguous. It avoids entirely one of the key questions before this Court, namely the existence of the top level documents.

73.11 The respondents have accordingly not taken this Court into their confidence on the issue of the existence of the top-level documents, and have attempted to avoid the issue by vaguely asserting that they "*may not exist*."

74 In support of the respondents' case that section 23 of PAIA applies to the top-level documents, therefore, this Court is asked to rely solely on the *ipse dixit* of

Mr Masilo, who has no knowledge of the existence of the documents; and the evasive, vague and unsubstantiated evidence of the DG to the effect that the documents may not exist.

75 I submit that the respondents have not submitted sufficient evidence, by anyone with direct knowledge of the facts deposed to, so as to satisfy their onus under section 81(3) of PAIA. Alternatively, I submit that this version amounts to a bare denial; alternatively, it is so untenable that it falls to be rejected on the papers. The only possible inference is that the top-level documents were deliberately removed from the papers given to Mr Masilo in order to avoid disclosing them.

Failure to take all reasonable steps

76 Section 23 of PAIA requires the respondents to take all reasonable steps to find the missing documents.

77 Our courts have not had frequent occasion to deal with section 23. However, the following unreported judgments are relevant:

77.1 In ***Hlatswayo v Iscor***,[84] the High Court held that the respondent had failed to file a proper account of the steps taken to locate missing documents as required by section 23(2) of PAIA. The High Court ordered the respondent either to provide access to the documents or file an

[84] *Hlatswayo v Iscor Ltd* [2005] JOL 13726 (T).

affidavit putting forward a proper and full account of the steps it had taken to locate the documents and determine whether they existed.

77.2 In ***TAC v Minister for Correctional Services***,[85] Southwood J held that the respondent's account of the search for documents was so inadequate that his claim that the document was not in his possession was so far-fetched and untenable that it had to be rejected on the papers.[86]

78 The Australian Freedom of Information Act, 1982 contains a provision similar to section 23 of PAIA.[87] In the case of ***Chu v Telstra Corporation Limited***, the Federal Court of Australia addressed the extent of a public body's obligations under this provision and held that:[88]

> *"A person requesting access to a document that has been in that agency's or Minister's possession should only be able to be denied on the section 24A ground [that being the equivalent provision to section 23 of PAIA] when the agency (or the Minister) is properly satisfied that it has done all that it could reasonably be required of it to find the document in question. Taking the steps necessary to do this may in some circumstances require the agency or Minister to confront and overcome inadequacies in its investigative processes. Section 24A is not meant to be a refuge for the disordered and the disorganised.*
>
> *The Tribunal's failure to appreciate the significance of 'all' has, in my view, led it to adopt a tempered and erroneous view of what is required to be done for s 24A purposes."* (Emphasis added.)

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[85] *Treatment Action Campaign v Minister of Correctional Services & others* [2009] JOL 23021 (T).

[86] At pages 48-49.

[87] Which the Constitutional Court found to be a useful comparator with PAIA in *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) at paras 21-22.

[88] *Chu v Telstra Corporation Limited* [2005] FCA 1730, paras 35-36.

79 In ***Maksimovic v Commonwealth Director of Public Prosecutions***, the Australian Administrative Appeals Tribunal emphasised the following considerations:

79.1 whether extensive enquiries with persons familiar with the subject matter have been made; and

79.2 whether there have been extensive searches for electronic documents in addition to paper documents.[89]

80 The same considerations apply here. The respondents are obliged to demonstrate that they have taken <u>all</u> reasonable steps. The story told by the respondents in this regard was set out above at paragraph 65. It falls far short of the requirement that the respondents must take <u>all</u> reasonable steps. While the applicants do not wish to engage in speculation as to what measures could have been taken, the following are examples of steps the applicants would have expected the respondents to take but which they appear to have failed to do:

80.1.1 The Head Office of the Department of Public Works should have been searched for the requested documents. No mention is ever made of a search being conducted at the head office. Rather, Mr Masilo simply states that "*no documents were kept at the Head Office of the Department or the Ministry*", but does not indicate how he knows this. This is unlikely to be a fact that would fall within Mr Masilo's personal knowledge. It is also

[89] *Maksimovic v Commonwealth Director of Public Prosecutions* [2008] AATA 700.

unlikely that for a project as large and significant as the Nkandla upgrade the Department kept no records whatsoever at its head office. In particular, several of the documents were generated by or sent to officials such as the DG, or Minister, who are not based in the KZN Regional Office, and so presumably a copy of these documents would have been kept at that office at which they were generated or at which they were received. No explanation is given as to what has happened to these documents, which must have existed at locations other than the KZN Regional Office;

80.1.2 The KwaZulu-Natal Central Registry should have been searched for the requested documents. No mention is ever made of a search being conducted at the central registry. While the applicants are told that the project manager retrieved documents relating to the Nkandla upgrade for the Minister's task team, it is plausible that there are various other documents that may still be in the central registry;

80.1.3 The electronic copies of the requested documents should have been retrieved either from the network or from the computers of the relevant persons. Several of the outstanding identified items on the schedule are emails.[90] Such emails (as well as countless emails that the applicants do not have the resources to identify specifically) could easily be obtained either from the “Inbox” of

[90] The schedule appears at Record Vol 10 Annexure SA11 to the Applicants' supplementary affidavit, pp 808-817.

the recipient or the “Sent items” of the sender, together with the attachments to the emails. No mention is made of any such efforts being undertaken by the respondents. Furthermore, it is likely that most of the outstanding information would be typed, and therefore saved either on the network or an individual computer. A prime example of this is the internal memoranda, of which there are thirteen contained in the schedule which the respondents claim they cannot locate.[91] The schedule contains details for most of the items as to the identity of the sender and the recipient, making it a simple task for the respondents to obtain the electronic copies of the documents. The respondents appear to have made no effort in this regard.

80.1.4 The persons responsible for keeping and storing top level records should have been met and interviewed. One of them should have been asked to explain the status of the top level documents.

80.2 It is therefore clear that the respondents have not complied with their obligation to take all reasonable steps to locate and determine the existence of the documents.

[91] The schedule appears at Record Vol 10 Annexure SA11 to the Applicants' supplementary affidavit, pp 808-817.

Failure to give a full account of steps taken

81 The respondents have also failed to provide a full account of all the steps taken. The respondents provide no information as to with whom Mr Masilo or the respondents have met; the detail with which they have engaged; or the likelihood that such people are indeed appropriate and would have the requisite knowledge.

Failure to refer the request to other public bodies

82 In addition, the respondents have failed to comply with section 20 of PAIA, which requires them to refer the request to another public body if there is reason to believe that the documents are in the possession of such other body.

82.1 Section 20(2)(a) of PAIA provides:

> *"If a request for access is made to the information officer of a public body in respect of which -*
>
> *(a) the record is not in the possession or under the control of the public body of that information officer and the information officer does not know which public body has possession or control of the record…*
>
> *the information officer to whom the request is made must as soon as reasonably possible, but in any event within 14 days after the request is received, transfer the request to the information officer of the public body by or for which the record was created or which received it first, as the case may be."*

82.2 The wording of section 20(2)(a) is peremptory. The information officer *must* transfer the request to the information officer of the public body by or for which the record was created or which received it first.

82.3 The respondents do not suggest that they have transferred the request to public bodies by or for which the missing records were created.

82.4 The respondents' schedule[92] provides several examples to which section 20(2)(a) would apply:

82.4.1 The document referred to in item 8.13 of the schedule[93] sets out that *"[a] meeting was held with Deputy Minister Bogopane-Zulu and DDG: ICR, PM & PS on 21 December 2010 in which she confirmed that the Principal indicated that he does not want other contractors on site in Phase II opposed to Phase I. The meeting agreed that the works should be negotiated and on the following bases…*"

82.4.2 The respondents say that "*[n]o minutes could be located of either the meeting between the Deputy Minister and the Principal or the meeting between the Deputy Minister and the DDG"*.

82.5 The information officer had a responsibility to transfer the request to the office of the President in terms of section 20(2)(a) in order to ascertain whether the office of the President may have copies of the records.

82.6 The document referred to in item 11.13 of the schedule of documents[94] states:

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[92] Record Vol 10 Annexure SA11 to the Applicants' supplementary affidavit, pp 808-817.

[93] Record Vol 10 Annexure SA11 to the Applicants' supplementary affidavit, p 809.

[94] Record Vol 10 Annexure SA11 to the Applicants' supplementary affidavit, p 811.

82.6.1 "*By instruction of the State President, President Zuma the existing house at Nkandla, currently accommodate SAPS members must be converted as part of the President's household*".

82.6.2 The respondents say that "*[n]either a copy of this instruction, nor the minutes of the meeting at which it was conveyed, could be located*".

82.6.3 Again, the respondents had an obligation to transfer the request to the Office of the President in order to ascertain whether that office might have the record.

83 The respondents have therefore failed to comply with the peremptory provisions of section 20(2)(a) of PAIA.

Referral to oral evidence

84 If this Court is not inclined to reject the respondents' evidence on the basis of one of the exceptions to the ***Plascon-Evans*** rule, I submit that it should refer this issue to oral evidence, so that the version of the DG and other officials with knowledge of the existence of the top level documents can be tested under cross-examination.

85 Rule 6(5)(g) of the Uniform Rules of Court entitles the Court to *"direct that oral evidence be heard on specified issues with a view to resolving any*

dispute of fact". The following principles are relevant to whether a court will exercise this discretion:

85.1 In the context of PAIA applications, courts should not hesitate to refer a dispute of fact to oral evidence. This is because the material facts are generally within the peculiar knowledge of the public body:

> *"[T]rue disputes of fact will seldom arise, because the material facts will generally be within the peculiar knowledge of the public body. However, if a genuine dispute of fact does occur the court must scrutinise the affidavits put up by the public body with particular care and, in the exercise of its wide discretion, the court should not hesitate to allow viva voce evidence that may entail also allowing cross-examination of the witnesses who deposed to the affidavits to ascertain the veracity of their stories."*[95]

85.2 The discretionary power of the Court to refer a matter to oral evidence is not limited to those instances in which a dispute of fact is shown to exist.[96]

85.3 Oral evidence should be allowed where there are reasonable grounds for doubting the correctness of allegations. Facts peculiarly within the knowledge of a party must be carefully scrutinised in making this decision.[97]

86 I submit that if this Court finds that it cannot reject the respondents' evidence regarding the existence and location of the missing documents on the papers, the issue should be referred to oral evidence. This is for three reasons:

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[95] *De Lange and Another v Eskom Holdings Ltd and Others* 2012 (5) BCLR 502 (GSJ) at para 119.

[96] *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) At 93F; confirmed in *Khumalo v Director-General of Co-Operation and Development and Others* 1991 (1) SA 158 (A) at 167G-J.

[97] *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) At 93H; confirmed in *Khumalo v Director-General of Co-Operation and Development and Others 1991* (1) SA 158 (A) at 167G-J.

86.1 The issue of the existence and location is peculiarly within the knowledge of the officials (including former officials) of the Department;

86.2 There are reasons for doubting the correctness of the evidence on which the respondents rely; and

86.3 A referral to oral evidence would resolve the issue, by requiring officials of the Department who have knowledge of the existence of the top-level documents to testify and be cross-examined.

Conclusions

87 I submit that:

87.1 The respondents' evidence is not sufficient to meet the their onus under section 81(3) of PAIA; alternatively

87.2 The respondents' version is so untenable, unsubstantiated and ambiguous that it can be rejected on the papers in terms of the recognised exceptions to the ***Plascon-Evans*** rule; and

87.3 Alternatively, if this Court finds that there is a real dispute of fact incapable of resolution on these papers, the applicant requests that the matter be referred to oral evidence on this issue, so that the applicants may have the opportunity of testing the respondents' version under cross-examination.

THE SECURITY-SENSITIVE DOCUMENTS - A JUDICIAL PEEK

88 The respondents assert that there are a number of documents that cannot be disclosed because they contain security-sensitive information. I submit that on the basis of the evidence before this Court, this assertion cannot be accepted at face value. This Court should require the respondents to disclose to the Court the allegedly security-sensitive documents that they have in their possession as contemplated in section 80(1) of PAIA.

89 Section 80(1) of PAIA permits the court to examine any of the records to which the applicants seek access and "*no such record may be withheld from the court on any grounds*".

90 The Constitutional Court dealt at length with the circumstances in which this power may be invoked in ***M&G***.[98] It held that the court may invoke it when it would be in the interests of justice to do so.[99] It held that the purpose of judicial peek is to allow a court to make a responsible decision on whether a record falls within the claimed exemption when the evidence before it is inadequate to allow it to do so:

> *"Judicial peek facilitates the responsible exercise of the judicial function where courts may be lacking the material necessary to responsibly determine whether the record falls within the exemption claimed."* [100]

[98] *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) paras 38 to 54.

[99] Id para 45.

[100] Id para 41.

91 The Constitutional Court held that it will often be in the interests of justice to invoke section 80 where there is doubt "*as to whether an exemption is rightly claimed*".[101]

92 The Constitutional Court emphasised the importance of section 80 in giving effect to the right of access to information, and held that courts should not be reluctant to make use of it:

> *"The role of s 80 in our constitutional democracy must be stressed. Its very purpose is to test the argument for non-disclosure by using the record in question to decide the merits of the exemption claimed and the legality of the refusal to disclose the record. In this sense, it facilitates, rather than obstructs, access to information. The very existence of the court's power to examine the record should, in itself, deter frivolous claims of exemptions. If courts are hesitant to use this powerful tool to examine the record independently in order to assess the validity of claims to exemptions, this may very well undermine the constitutional right of access to information. Quite apart from this, judicial access to the record in cases of this kind is a common feature of other open democracies with well-developed and robust access to information jurisprudence.*
>
> *In my view, the power of courts to examine the contested record under s 80 in access to information disputes is vital to the vindication of the right of access to information. Properly exercised, the power to examine the record will not undermine public trust in our courts. It is a fundamentally important instrument given to courts to assess claims of exemption independently and thus protect the constitutional right of access to information."* [102]

93 The respondents submit that this court should decline to invoke this power.[103] In respect of the allegedly security-sensitive documents, the applicants disagree. The evidence put up by the respondents is inadequate to permit this Court to make a responsible determination of whether the security-sensitive documents can lawfully be withheld. This is for three reasons:

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[101] Id para 46.

[102] Id paras 52 -53.

[103] Record Vol 2 Respondents' Answering Affidavit, p 137, para 49.

94 First, the respondents have not indicated the basis of their refusal to disclose the documents by reference to any specific provision of PAIA. Their refusal to disclose these documents ignores the following provisions of PAIA:

94.1 In terms of section 11(1)(b), the applicants are entitled to the access they seek unless the respondents' refusal is justified on a ground contemplated in ss 34 to 45 of PAIA. Although the respondents claim they rely on sections 38 and 41 of PAIA, those are detailed sections, containing multiple options. The respondents do not indicate which parts of the sections are applicable, let alone how and why they are applicable.

94.2 It is not clear whether the respondents persist in any reliance on legislation other than PAIA. If they do, section 5 of PAIA overrides any legislation that is materially inconsistent with it.

94.3 In terms of s 81(3)(a), the respondents bear the burden of proving that their refusal is justified on one or more of the enumerated grounds.

94.4 The Constitutional Court considered in ***M&G***,[104] what the state must do to discharge this burden of proof. It held that:

> *"Exemptions are construed narrowly, and neither the mere ipse dixit of the information officer nor his or her recitation of the words of the statute is sufficient to discharge the burden borne by the State."* [105]
>
> *"The proper approach to the question whether the State has discharged its burden under section 81(3) of PAIA is therefore to ask whether the State has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed."*[106]

[104] *President of the Republic of South Africa and Others v M&G Media Ltd* 2012 (2) SA 50 (CC) paras 22 to 25.

[105] Id para 22.

[106] Id para 23.

> *"The recitation of the statutory language of the exemptions claimed is not sufficient for the State to show that the record in question falls within the exemptions claimed. Nor are the mere ipse dixit affidavits proffered by the State. The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government."*[107]
>
> *"The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed."* [108]

94.5 The respondents do not make any serious attempt to discharge this burden of proof. They do not even identify the specific provisions of PAIA on which they rely or set out the facts necessary to bring their refusal within the terms of those provisions. The respondents merely assert that the documents contain security-sensitive information. They have accordingly failed to bring the information within one of the recognised exemptions in PAIA.

95 Second, this Court cannot accept the respondents' version regarding this category of documents. In its own terms, it is contradictory and unreliable.

95.1 Prior to the disclosure of the documents by Mr Masilo, the respondents repeatedly refused to disclose the requested information to the applicants on the basis that the information was replete with security-sensitive information. The respondents stated, *inter alia*, as follows:

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[107] Id para 24.

[108] Id para 25.

95.1.1 On 13 August 2012 the Department issued a blanket refusal in respect of the whole of the PAIA request. It did so on the ground that the residence is protected in terms of the NKP Act, the PI Act, the Minimum Information Security Standards (MISS) and other relevant security prescripts of the State Security Agency;[109]

95.1.2 In the respondents' answering affidavit, the DG repeatedly alleges that the documents sought by the applicants cannot be disclosed at all because of the security-sensitive information that they contain. For instance, the following appears in the answering affidavit deposed to by the DG:

(a) The DG states that "*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*";[110]

(b) Similarly, he states that "*the records sought are so replete with security-related information that they cannot be disclosed, and ought not to be"*.[111] The DG goes so far as to say in this paragraph that owing to the alleged security-sensitive information contained in the documents sought, the applicants "*must have foreseen that the respondents would resist the production of these documents on this basis*", and

[109] Record Vol 1 Annexure VB3 to the Founding affidavit, p37.

[110] Record Vol 2 Respondents' Answering Affidavit, p 129, para 32.2.

[111] Record Vol 2 Respondents' Answering Affidavit, p 131, para 36.

for nevertheless proceeding with the application the applicants should be mulcted in costs, including the costs of two counsel;[112]

(c) Furthermore, he later states that *"[t]he 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"*.[113]

95.2 It has since become clear that at the time that the DG deposed to this affidavit, no-one in the Department had applied their minds to the documents sought in the PAIA request. It was only after the replying affidavit and the applicants' heads were filed that the Department asked Mr Masilo to consider whether any of the documents falling within the scope of the PAIA request could be disclosed.[114] When he did so, it was immediately obvious to him that the vast majority of the information sought contained no security-sensitive information at all, and was required to be disclosed by PAIA.

95.3 As stated by Mr Masilo, it was only "*[t]o a very limited extent"* that *"some of the documents tendered have been redacted to remove references to security sensitive information*".[115] This directly contradicts the version

[112] Record Vol 2 Respondents' Answering Affidavit, p 131, para 36.

[113] Record Vol 2 Respondents' Answering Affidavit, p 133, para 38.4.

[114] Record Vol 8 Respondents' further affidavit, p 631, paras 4-5.

[115] Record Vol 8 Respondents' further affidavit, p 633, para 11.

that the respondents had presented up to that point, and the contents of the DG's answering affidavit. No explanation was ever tendered by the respondents as to why this information was not provided by the DG at the time of the request, and was only provided more than six months later. Nor is there any explanation of the false allegations contained in the DG's answering affidavit.

95.4 It is thus now apparent that most of the information sought either did not contain any security-sensitive information, or was easily capable of severance. In refusing the applicants' request under the guise of security concerns, the respondents either deliberately sought to mislead the applicants, or did not engage with the request at all and were thus derelict in their duties under PAIA.

95.5 The respondents have also repeatedly denied that the disclosure of the documents is in the public interest. In the answering affidavit, the DG indicates that *"[t]he respondents deny … in particular that the public interest in the information sought clearly outweighs the respondents' reasons for refusing access to the records"*.[116]

95.6 This too has turned out to be false. It is apparent from the widespread media coverage, some of which has been traversed in the applicants' affidavits, that there is significant public interest in this matter.[117] Additionally, in the Minister's press statement of 27 January 2013, he indicates that the task team investigation into Nkandla revealed that

[116] Record Vol 2 Respondents' Answering Affidavit pp 133 - 134, para 40.

[117] Record Vol 1 Annexures VB8-VB24 to the Founding affidavit, pp 56-101; and Record Vol 3 Annexure RA9 to the Replying Affidavit, pp 210-224.

there were significant instances of non-compliance supply chain management processes, bid adjudication procedures, financial regulations and other controls[118] - thus indicating a "*substantial contravention of, or failure to comply with, the law*" as contemplated in the public interest override under 46(a)(i) of PAIA.

96 Third, in respect of the five documents contained in the schedule that are alleged to be security sensitive, the respondents have failed to make out an adequate case against disclosure.

96.1 There are five documents contained in the schedule which are highlighted in red; these contain the following descriptions:

96.1.1 "*Drawings by Department of Defence re medical clinic 22 September 2009*";

96.1.2 "*Needs Assessment from South African Police Service to Director-General Department of Public Works dated 15 October 2009*";

96.1.3 "*Procurement instruction from Eddie Malan to Regional Manager dated 18 August 2009 re Nkandla installation of security measures and related services at Presidential private residence (SAPS security needs assessment attached)*";

96.1.4 "*Letter from RPO Consultants to Department of Public Works re repair of leaking roof at Durban King's house*"; and

[118] Record Vol 2 Annexure RA4 to the Replying Affidavit, pp 185-191.

96.1.5 "*RPO Consultants CC re: repair of roof at Durban King's house dated 15 November 2011*".

96.2 It is not apparent why some of these documents would be security-sensitive and incapable of redaction. In particular, there does not appear to be any reason why drawings relating to a medical clinic or information relating to roof repairs could be security-sensitive.

96.3 If some of the information contained in the schedule is not security-sensitive as claimed, this calls into question the veracity of all the respondents' claims in this regard.

96.4 The respondents have not explained why these allegedly security-sensitive documents were included in the schedule of documents that Mr Masilo had attested were not security sensitive (other than “very limited” portions that required redactions), and then subsequently were identified as security sensitive.

97 Finally, I submit that this Court should not rely on the *ipse dixit* of the respondents regarding the security-sensitive documents because of the disdain for the law and this Court that the respondents have demonstrated in this matter.

THE RESPONDENTS' DISDAIN FOR THE LAW

98 In their response to the applicants' request for access to information and in the proceedings in this Court, the respondents have acted with disdain for the Constitution, the law and this Court.

99 The applicants lodged their request for access to information on 6 July 2012.[119] The request explained "*that our interest is not in the technical detail of security-sensitive improvements*" and noted that s 28 of PAIA imposed a duty on the State to sever protected from unprotected information and disclose the latter.

100 The Acting DG of the Department issued a blanket, unsubstantiated, refusal on 13 August 2012.[120] She said that the requested information "*is protected in terms of the National Key Point 102 of 1980*" and is also "*protected in line with the provisions of the Protection of Information Act no 84 of 1982, the Minimum Information Security Standards (MISS) and other relevant security prescripts of the State Security Agency*". She did not rely on any of the provisions of PAIA nor refer to the possibility of severance.

101 It is apparent from the refusal that the Acting DG did not refuse the request in accordance with PAIA and indeed seems to have been wilfully unaware of its requirements:

101.1 She was required in terms of s 25(1)(a), to take her decision "*in accordance with this Act*". It means that she could only refuse access to

[119] Record Vol 1 Annexure VB1 to the Founding affidavit, p 29.

[120] Record Vol 1 Annexure VB3 to the Founding affidavit, p37.

the information sought, if it was protected under one or more of the exemptions in ss 34 to 45. It seems apparent from her refusal, however, that she did not consider any of these provisions.

101.2 Section 25(3)(a) required her to give adequate reasons for her refusal "*including the provisions of this Act relied upon*". Her failure to identify any such provisions reinforces the inference that she had no regard to PAIA at all.

101.3 She relied instead on the NKP Act, the PI Act, "*the Minimum Information Security Standards*" and "*other (unidentified) relevant security prescripts of the State Security Agency*". She failed to identify any particular provisions in justification of her refusal. I shall later demonstrate that she could not even have read the legislation on which she relied. She also did not seem to know that the Minimum Information Security Standards are merely a national information security policy adopted by cabinet which does not have any force of law.[121]

102 The applicants lodged an appeal to the Minister in terms of s 74 of PAIA[122] on 10 September 2012. The Acting DG acknowledged receipt of the appeal on 19 September 2012 and assured the applicants that the matter "*is receiving Departmental attention and you will be notified about the outcomes thereof in due course*".[123]

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[121] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* 2008 (5) SA 31 (CC) paras 49 and 177.

[122] Record Vol 1 Annexure VB4 to the Founding affidavit, p 38.

[123] Record Vol 1 Annexure VB5 to the Founding affidavit, p 47.

103 The Minister was obliged by s 77(3)(a) to determine the appeal "*as soon as reasonably possible, but in any event within 30 days*", that is, by 10 October 2012. He however deliberately decided not to do so:

103.1 The second applicant, Mr Bhardwaj, made various telephone calls and sent several text messages to Mr Makgoba of the Department on 18 October 2012. He was eventually told that the appeal had been forwarded to the legal office of the Department and was given the contact details of a Mr Hlabiwa in the legal office of the Department. Mr Hlabiwa told him that the appeal had been received and that a response was being drafted and would be sent to the applicants' attorneys.[124]

103.2 Mr Bhardwaj telephoned Mr Hlabiwa on 22 and again on 25 October 2012 but was told that they were "*still awaiting [s]enior [c]ounsel's approval that the response could be sent*".[125]

103.3 On 29 October 2012, the applicants' attorneys addressed a letter to the Acting DG.[126] They recorded the history and added that, if they did not receive the response to the appeal by 1 November 2012, "*our client will have no option but to assume that the internal appeal has been refused and bring an application to the High Court*".

103.4 The respondents have never responded to the letter. The Minister also failed to determine the appeal.

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[124] Record Vol 1 Founding Affidavit. p 16, para 36.

[125] Record Vol 1, Founding Affidavit, p 16, paras 37 and 38.

[126] Record Vol 1 Annexure VB6 to the Founding affidavit, p 48.

104 The respondents admit this sorry history. Their explanation is that "*after receipt of senior counsel's input, the Minister decided to allow the provisions of section 77(7) of PAIA to take effect*". Section 77(7) says that an appeal authority who fails to give notice of the decision on appeal within 30 days, is "*regarded as having dismissed the internal appeal*".

105 The implications of this explanation are far-reaching:

105.1 It means that the Minister deliberately decided, after receiving senior counsel's advice, not to discharge his duties under PAIA,

- to decide the appeal in terms of s 77(3)(a);

- to notify the applicants of his decision in terms of s 77(4)(a); and

- to give adequate reasons for his decision, including the provisions of PAIA upon which it was based, in terms of s 77(5)(a).

105.2 The Minister thus decided to flout the law and his oath of office in terms of s 95 read with item 3 of Schedule 2 of the Constitution to "*obey, respect and uphold the Constitution and all other law of the Republic*".

105.3 The respondents say that the Minister did so "*after receipt of senior counsel's input*". It can only mean that senior counsel advised the Minister that there was no lawful basis upon which he could dismiss the appeal. He accordingly decided instead not to determine the appeal and so be deemed to have dismissed it instead.

106 The respondents' subsequent decision to disclose the bulk of the documents sought merely underlines the extent to which they have paid no regard to their constitutional and PAIA obligations. As has been set out above, the DG's original answering affidavit attempting to justify a blanket refusal turned out to contain manifestly false allegations which have never been explained.

107 Section 28(1) of PAIA requires that if a record of a public body contains protected information that is severable from the remainder of the record, the public body must sever the protected information and disclose the remainder. The Constitutional Court has held in relation to this provision that there is no discretion to withhold information that is not protected.[127] It is apparent from the documents that have now been provided to the applicants by Mr Masilo that even those documents which allegedly contain security-sensitive information are capable of redaction. However, as is apparent from the blanket refusal contained in the first response received from the Department and the affidavit of the DG, no attempt was ever made to comply with the provisions of section 28 of PAIA. In the answering affidavit, the DG did not even claim to have examined, or attempted to examine, the records requested. The DG simply states in his confirmatory affidavit to the respondents' further affidavit that he "*accept[s] Mr Masilo's conclusion in relation to the severability of the information sought by the applicants*" without giving any indication as to how he had previously come to such a vastly different conclusion.[128]

[127] *President of the RSA v M&G Media* 2012 (2) SA 50 (CC) para 50.

[128] Record Vol 8 DG's Confirmatory affidavit to Respondents' further affidavit, p 715, para 4.

108 Even after the disclosure of many of the documents, and to date, it is not clear on which specific grounds of PAIA the respondents rely in respect of those documents that they refuse to disclose.

THE APPROPRIATE ORDER

109 Section 82 of PAIA permits this court to make any order "*that is just and equitable*".

110 In light of the manifest disdain with which the respondents have regarded the Constitution, the law and this court, throughout these proceedings, I submit that it would be just and equitable to require the respondents to bear the applicants' costs on an attorney and client scale.

111 The applicants ask for an order in the following terms:

111.1 The second respondent's refusal dated 13 August 2012 of the applicants' application for access to information is set aside.

111.2 The second respondent is ordered to file a list of all of the documents it alleges cannot be disclosed for security reasons within one month of this order, and to make such documents available to this Court for examination in terms of section 80(1) of PAIA.

111.3 The respondents are ordered to give the applicants access within one month of this order, to all the records in the possession or under the control of the Department of Public Works relating to the work it has done or caused to be done at or for purposes of the Nkandla Estate and the

financial implications of doing so, including all of the top-level documents that it has in its possession; and to account in terms of section 23 of PAIA for those records that it contends cannot be located or do not exist; and/or to refer the PAIA application to the relevant entity under section 20 of PAIA.

111.4 In the alternative to paragraph 111.3 above:[129]

111.4.1 The matter is referred for the hearing of oral evidence, at a time to be arranged with the registrar, on the question of the existence of the missing documents and the steps taken by the respondents to locate them.

111.4.2 The deponent to the applicants' founding affidavit, namely Vinayak Bhardwaj is directed to present himself for examination and cross-examination on the issue of the existence of the missing documents and the steps taken by the respondents to locate them.

111.4.3 The deponents to the respondents' affidavits, namely Mandisa Fatyela-Lindie, Mziwonke Dlabantu, Phillip Sobi Masilo, Thembelani Nxesi, and Jean Rindel are directed to present themselves for examination and cross-examination on the issue of the existence of the missing documents and the steps taken by the respondents to locate them.

[129] This order is based on those granted in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 396 and *AECI Ltd and Another v Strand Municipality and Others* 1991 (4) SA 688 (C) at 701-2.

111.4.4 None of the parties shall be entitled to call any further witness unless:

(a) it has served on the other party at least 14 days before the date appointed for the hearing (in the case of a witness to be called by the respondents) and at least 10 days before such date (in the case of a witness to be called by the applicants), a statement wherein the evidence to be given in chief by such person is set out; or

(b) the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his evidence.

111.4.5 The parties may subpoena any other person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

111.4.6 The fact that a party has served a statement in terms of paragraph 111.4.4, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

111.4.7 Within 21 days of this order, each of the parties shall make discovery, on oath, of all documents relating to the issue referred to in paragraph 111.4.1, which are or have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Rule of Court 35

and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

111.4.8 The costs of the hearing of the oral evidence and the determination of the issue referred to oral evidence shall be determined after the hearing of oral evidence.

111.5 The respondents are ordered jointly and severally to pay the applicants' costs on an attorney and client scale including the costs of two counsel where applicable.

NICK FERREIRA

Chambers, Sandton

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