

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

CASE NO: 67574/12

In the matter between:

**M AND G CENTRE FOR INVESTIGATIVE  
JOURNALISM NPC**

First Applicant

**VINAYAK BHARDWAJ**

Second Applicant

and

**THE MINISTER OF PUBLIC WORKS**

First Respondent

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

Second Respondent

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**RESPONDENTS' HEADS OF ARGUMENT**

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## INTRODUCTION

1. On 6 July 2012 the applicants applied to the Information Officer of the Department of Public Works<sup>1</sup> (“the Department”), in terms of section 18 of the Promotion of Access to Information Act 2 of 2000 (“PAIA”), for access to all records in documentary form in the possession of the Department which:<sup>2</sup>

*“1. Pertain to the procurement by the State of goods or services to improve, upgrade, alter, add to or secure the Nkandla Estate of the President;*

*2. Relate in whole or in part to the financial implications of the above; and*

*3. Were created during the period May 2009 to present.”*

2. The applicants’ request was initially refused on 13 August 2012 by the then Acting Director-General of the Department<sup>3</sup> on the grounds that all information relating to the Nkandla residence of the President was protected from disclosure in terms of the National Key Points Act,<sup>4</sup> the Protection of Information Act<sup>5</sup> and the Minimum Information Security Standards.<sup>6</sup>

3. On 10 September 2012 the applicants submitted an internal appeal to the Minister of Public Works (the first respondent), in terms of section

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<sup>1</sup> In terms of the Act, the Information Officer of the Department is its Director-General.

<sup>2</sup> Founding affidavit, annexure “VB1”, p30

<sup>3</sup> Ms Mandisa Fatyela-Lindie

<sup>4</sup> Act 102 of 1980

<sup>5</sup> Act 84 of 1982

<sup>6</sup> Vol 1 Founding affidavit, annexure “VB3”, p37

75 of PAIA, against the refusal of the Acting DG.<sup>7</sup> In their appeal, the applicants stressed that they were “*solely interested in the amount of money being spent and how it is being spent.*”<sup>8</sup>

4. The Minister failed to make a decision on the appeal. Accordingly, in terms of section 77(7) of PAIA, the Minister was deemed to have dismissed the internal appeal on or about 10 October 2012.
5. On 22 November 2012 the applicants instituted this application in terms of section 78(2) of PAIA for an order declaring the decisions of the Acting DG and the Minister unlawful and unconstitutional, and an order reviewing and setting aside the decisions. In addition, the applicants seek an order directing the respondents “*to supply the applicants with a copy of the requested records within 15 days of the granting of this order.*”<sup>9</sup>
6. The respondents resisted the application. The DG of the Department, Mr Mziwonke Dlabantu, relied on sections 3 and 4 of the Protection of Information Act,<sup>10</sup> section 10 of the National Key Points Act<sup>11</sup> and sections 38 and 41 of PAIA in support of the respondents’ contention that the documents could not be disclosed because they contained security sensitive information.<sup>12</sup>

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<sup>7</sup> Vol 1 Founding affidavit, annexure “**VB4**”, pp38 - 45

<sup>8</sup> Vol 1 Founding affidavit, annexure “**VB4**”, p44

<sup>9</sup> Vol 1 Notice of Motion, pp1 - 2

<sup>10</sup> Act 84 of 1982

<sup>11</sup> Act 102 of 1980

<sup>12</sup> Vol 2 Answering affidavit, pp132 - 133, par. 38

7. We concede that it is apparent that the DG did not properly apply his mind to the applicants' request. Had he done so, he would not have taken the position he did. He would have disclosed many of the documents that the respondents delivered to the applicants on 21 June 2013. On that date, the respondents remedied their failure to comply with their obligations under PAIA and, in a gesture of goodwill, delivered to the applicants the documents to which they initially ought to have been granted access, as well as documents that fell beyond the initial PAIA request.
8. On 21 June 2013 the respondents delivered the following records to the applicants (consisting of more than 12 000 pages), relating to the work done at the Nkandla Estate ("the Nkandla security upgrade"):
  - 8.1. Bid adjudication minutes;
  - 8.2. Contracts between the Department and service providers;
  - 8.3. Invoices submitted to the Department by contractors;
  - 8.4. Progress payment advices;
  - 8.5. Variation order motivations;
  - 8.6. Final accounts; and
  - 8.7. Internal departmental memoranda dealing with requests for funds and reallocation of funds.

9. The applicants reported on the contents of the documents disclosed in the *Mail & Guardian* newspaper on 5 & 12 July 2013 under the title “*The Nkandla Files*”.<sup>13</sup> The extent of their reporting is evidence of the extent of the respondents’ disclosure.
10. In the result, the applicants have been able to discharge their role as members of the media. In doing so, they have been able to inform the public about the extent of government expenditure on the Nkandla security upgrade and whether proper procedures were followed. It is these objectives that underpinned their request in the first place.
11. The documents delivered constitute all the records in the possession of the Department pertaining to the Nkandla security upgrade. The only records that have not been furnished to the applicants are those documents that contain security sensitive information and those that cannot be found. In respect of many of the documents that cannot be found, the respondents contend that there are reasonable grounds to believe that some of them do not exist.
12. On the papers before this Court, the applicants do not take issue with the records not disclosed for security reasons. In their supplementary affidavit filed on 4 September 2013, the applicants state that they: “ ... *are not in a position, at this stage, to advance any reasons why the withheld documents, which are very few in number, are required to be*

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<sup>13</sup> Vol 9 Supplementary affidavit, pp722 - 725, par. 13 and 14; See also annexure “**SA2**” at pp745 - 762 and annexure “**SA3**” at pp763 - 769

*disclosed under PAIA.*"<sup>14</sup>

13. In their submissions, however, the applicants contend that these security sensitive records must be disclosed, alternatively that this Court should be entitled to inspect the records to verify whether they contain security sensitive information.
14. At the hearing of this application the respondents will argue that the applicants' submission on the security sensitive documents should not be entertained primarily because this is not an issue on the papers.
15. Alternatively, the respondents submit that these records contain security sensitive information, which, if disclosed, would compromise the security measures implemented at the Nkandla residence of the President and would endanger his life and that of his family. Records of this nature are protected from disclosure under sections 38 and 41 of PAIA.
16. The applicants have referred at length to the Constitutional provisions that give effect to section 32(1)(a) of the Constitution and the authorities that confirm the importance of the right of access to information held by the state. The respondents acknowledge and support the importance of this Constitutional right, and take no issue with the authorities cited by the applicants.
17. The principles articulated in these authorities are important. However,

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<sup>14</sup> Vol 9 Supplementary affidavit p729, par. 25

in this case they are not in issue. Unlike in *President of the Republic of South Africa v M&G*<sup>15</sup> and *Treatment Action Campaign v Minister of Correctional Services*,<sup>16</sup> the respondents in this case have not refused to disclose the records requested. The respondents have attempted to comply as fully as possible with the applicants' PAIA request. They have done so because they recognise the special role of the media in our constitutional democracy.

18. In this case, the respondents themselves have put information into the public domain confirming allegations of procurement irregularities in the Nkandla security upgrade. The Minister of Public Works is on record as stating:<sup>17</sup>

*"It is very clear that there were a number of irregularities with regards to appointment of service providers and procurement of goods and services."*

19. In addition, the allegations of procurement irregularities have already been referred to the Public Protector and to the Special Investigation Unit for further investigation.<sup>18</sup> Significantly, the records delivered to the applicants are the same records that were delivered to the Public Protector.<sup>19</sup>

20. Consequently, we submit that the only issue for this Court is whether

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<sup>15</sup> *President of the Republic of South Africa v M&G Media Ltd* 2011 (2) SA 1 (SCA) par. 1 and 10

<sup>16</sup> *Treatment Action Campaign v Minister of Correctional Services* 2009 JDR 043 (T)

<sup>17</sup> Vol 1 annexure "RA4" pp185 - 191, at p189

<sup>18</sup> Vol 1 annexure "RA4" p190; Vol 10 Respondents' further answering affidavit p845, par. 20

<sup>19</sup> Vol 10 Respondents' further answering affidavit p845, par. 20



the respondents have taken all reasonable steps to find the records requested and whether there are reasonable grounds for believing that some of these records do not exist.

21. The respondents contend that:

21.1. They have fully complied with the applicants' PAIA request of 6 July 2012;

21.2. They have disclosed all records in documentary form sought by the applicants, except those that they are lawfully entitled to withhold and those that they cannot locate;

21.3. They have taken all reasonable steps, as required by section 23 of PAIA, to locate the records that have not been found; and

21.4. There are reasonable grounds for believing that some of the records that have not been found do not exist.

## **THE APPLICANTS' ORIGINAL PAIA REQUEST**

22. The applicants applied to the Department for access to all records in documentary form relating to the "*expenditure by the Department on the improvement of the Nkandla Estate of the President of the Republic of South Africa, Mr Jacob Gedleyihlekisa Zuma*".<sup>20</sup>

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<sup>20</sup> Vol 1 Founding affidavit p8, par. 10

23. The ambit of the applicants' request is set out in their "*Form A*" request to the Department's Information Officer, dated 6 July 2012. In their request they sought access to all records in documentary form, created during the period May 2009 to date and related in whole or in part to the financial implications of the work done on the Nkandla Estate of the President.<sup>21</sup>
24. Specific reference was made in the request to records that included any document evidencing needs assessments/motivations, budgetary availability, bid evaluations and outcomes, and contracts awarded and their values.<sup>22</sup>
25. The applicants emphasised that they were not interested "*in the technical detail of security-sensitive improvements, but in the financial implications of procurement by the State in respect of the Nkandla Estate.*"<sup>23</sup>
26. The applicants restated this position in their internal appeal against the Department's refusal to allow them access.<sup>24</sup> They also stated that it "*has been widely reported that the South African government was planning to spend tens of millions of Rand of taxpayers' money in upgrading the Nkandla precinct.*" They repeated that they were not requesting any security related records and stressed that they were "*solely interested in the amount of money being spent and how it is*

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<sup>21</sup> Vol1 annexure "**VB1**" p30

<sup>22</sup> Vol1 annexure "**VB1**" p30

<sup>23</sup> Vol1 annexure "**VB1**" p30

<sup>24</sup> Vol1 annexure "**VB4**" p41, par.1.4 and 1.5

*being spent.*<sup>25</sup>

27. In their founding affidavit in support of this application, the applicants state:<sup>26</sup>

*“The continued state secrecy surrounding expenditure on the Nkandla Estate of the President, amid regular detailed news reports that considerable sums of public funds have been paid to private contractors and consultants without the required tender procedures, has created one of the most serious public spending scandals in the post-apartheid political era. This scandal has the potential to undermine national and indeed international confidence in the President and the public administration as a whole.*

*Accordingly, there is manifest and profound public interest in ascertaining, as a matter of increasing urgency, the true extent of public expenditure on upgrades to the Nkandla Estate of the President, and whether such expenditure has been undertaken in accordance with the applicable provisions of the Constitution and public procurement laws. The disclosure of the records is essential to ensure respect for the founding constitutional values of government openness, responsiveness and accountability, as well as to vindicate the constitutional rights of freedom of expression and of access to information.”*

28. To emphasise their point the applicants attach various newspaper articles to their founding affidavit, all of which speculate on the amount of money spent on the Nkandla security upgrade and raise

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<sup>25</sup> Vol1 annexure “**VB4**” p44, par. 2.12

<sup>26</sup> Vol1 Founding affidavit p25, par. 53 and 54 (Underlining added)

The applicants repeat this position in their replying affidavit, Vol 2, p162, par. 45

concern about whether or not proper procurement processes were followed in appointing contractors.<sup>27</sup>

29. As we demonstrate below, the current dispute between the parties does not relate to documents concerning the expenditure on Nkandla or whether the applicable provisions of the Constitution and public procurement laws were followed in undertaking such expenditure. By virtue of the documents delivered to the applicants on 21 June 2013, they have been able to publish details of how much money has been paid and to whom, and whether proper procurement procedures were followed or not.

#### **DOCUMENTS DISCLOSED TO THE APPLICANTS**

30. The respondents have, on two occasions, tendered and delivered to the applicants records in excess of 12 000 pages. The first disclosure was made on 21 June 2013 and the second on 3 September 2013.

31. Very few of the records in the 21 June disclosure had been redacted. The applicants have not taken issue with the redactions. The records delivered to the applicants on this date, included:<sup>28</sup>

31.1. Bid adjudication minutes;

31.2. Contracts between the Department and various service providers for work done on Phase 1 (high risk) and Phase 2

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<sup>27</sup> See annexures “**VB8**” – “**VB24**” Vol 1 Founding affidavit pp56 – 100 and Vol 2 Founding affidavit p101

<sup>28</sup> Vol 8 Respondents’ further affidavit, annexure **PM2**” pp638 - 711

(low risk) of the Nkandla security upgrade;

31.3. Invoices submitted by contractors to the Department;

31.4. Progress payment advices;

31.5. Variation order motivations;

31.6. Final accounts; and

31.7. Internal memoranda of the Department dealing with requests for funds and reallocation of funds.

32. The applicants were also furnished with a schedule listing the names of the contractors who worked on the Nkandla security upgrade as well as details of the amounts paid to each of them.<sup>29</sup>

33. The documents delivered included records that were not included in the scope of the applicants' original PAIA request but which were nevertheless disclosed. Although they relate to the Nkandla security upgrade they do not contain financial information or information about procurement. Examples include minutes of project meetings, minutes of technical meetings between contractors and minutes of project co-ordination meetings.

34. The respondents made a further disclosure on 30 August 2013. The background to this disclosure, briefly summarised, is the following:

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<sup>29</sup> Vol 8 Respondents' further affidavit, annexure **PM1**" p637

34.1. By letter dated 29 July 2013, the applicants' attorneys informed the state attorney that the documents delivered on 21 June 2013 did not fully satisfy the applicants' request for access to information. Some of the documents were delivered in incomplete form, while others were not delivered at all.<sup>30</sup>

34.2. The applicants also sought access to records of meetings and/or events referred to in the delivered documents.

35. Accordingly, on 30 August 2013 the respondents tendered to the applicants an additional 25 documents.<sup>31</sup> In error, these documents had either not been included, or had been included in incomplete form, in the bundle of documents delivered on 21 June 2013.<sup>32</sup> The additional documents were delivered on 3 September 2013 and included many documents unrelated to expenditure or procurement, such as the following:

35.1. Progress report for Prestige Project A security measures, dated 10 October 2010;

35.2. Internal memorandum from Mr Rindel to Mr T Nkatha relating to the Park Homes;

35.3. Minutes of consultants' planning and coordination meeting held on 19 March 2012;

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<sup>30</sup> Vol 9 annexure "SA4" p770

<sup>31</sup> Vol 10 annexure "SA11" pp808 – 817

<sup>32</sup> Vol 10 annexure "SA9" p797, par. 2.2

- 35.4. Documents and correspondence to GL Mahlangu-Nkabinde regarding resistance from families to the relocation from old homes to newly built accommodation;
  - 35.5. Email correspondence from Mr Rindel regarding cancelled contract;
  - 35.6. Scope of work document by Minenhle Makhanya, dated 20 August 2012;
  - 35.7. Minutes of Emergency progress meeting No 8, together with minutes of seven prior meetings;
  - 35.8. Internal memorandum from Mr J Mokuoana to the Chairperson: Sketch Plan Committee;
  - 35.9. Fax from the South African Civil Aviation Authority, dated 28 May 2009, regarding early stop information; and
  - 35.10. Email from Mr Khanyile to Mr Rindel, dated 22 November 2010, regarding follow up at the site meeting on 18 October 2010.
36. In an effort to locate missing records, two additional documents were obtained from contractors. These were attached to the respondents' further answering affidavit of 19 September 2013, being the minutes of the consultants planning and coordination meetings held on 7 June

2011 and 12 January 2012 respectively.<sup>33</sup> We point out again that the documents contain no information on expenditure or procurement.

## THE SECURITY SENSITIVE DOCUMENTS

37. The respondents have withheld three documents from the applicants because they contain security sensitive information.<sup>34</sup> This category of documents must be distinguished from the documents that were disclosed in redacted form on 21 June 2013. The security sensitive documents are listed in the schedule attached to the state attorney's letter of 30 August 2013.<sup>35</sup> They are:

37.1. Needs assessment from the South African Police Service to the DG in the Department of Public Works, dated 15 October 2009;<sup>36</sup>

37.2. Procurement instruction from Eddie Malan to the Regional Manager dated 18 August 2009 regarding Nkandla installation of security measures and related services at the Presidential private residence with a SAPS security needs assessment as an attachment;<sup>37</sup> and

37.3. Drawings by the Department of Defence re: medical clinic

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<sup>33</sup> Vol10 Respondents' further answering affidavit, p850, par. 35.3; See also annexures "FAA1" pp855 -857 and "FAA2" pp860 - 862

<sup>34</sup> Vol 9 annexure "SA5" pp785 - 786

<sup>35</sup> Vol 10 annexure "SA11" pp808 – 817

<sup>36</sup> Vol 9 annexure "SA11" item 5.64 p808

<sup>37</sup> Vol 9 annexure "SA11" item 7.5 p809



dated 22 September 2009.<sup>38</sup>

38. The security needs assessments conducted by the South African Police Service (items 5.64 and 7.5) identify specific requirements that must be implemented to ensure the President's security and the security of his family. They include recommendations about the type of security systems to install, where to place intruder alarms and security control rooms, and how to ensure the perimeter of the residence against intruders. They also detail measures to ensure the safety of the President and his family in the event of a hostile attack or natural disaster.<sup>39</sup>
39. If the information is made public the general public will know what security measures are in place and how to undermine them. A threat to the President's life could reasonably be expected to cause prejudice to the defence and security of the Republic.<sup>40</sup>
40. The drawings by the Department of Defence detail the technical specifications of the medical facility. If compromised, it could affect the ability of emergency services to respond to a security emergency.
41. This information is protected from disclosure by sections 38(a) and (b) and section 41 of PAIA.

41.1. Section 38(a) provides that an information officer must refuse

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<sup>38</sup> Vol 9 annexure "SA11" item 38.40 p816

<sup>39</sup> Vol 8 Respondents' further affidavit p634, par. 13

<sup>40</sup> Vol 8 Respondents' further affidavit p634, par. 14

a request for access to a record if its disclosure could reasonably be expected to endanger the life or physical safety of an individual.

41.2. Section 38(b) provides that an information officer may refuse a request for access to a record if its disclosure would be likely to prejudice or impair the security of a building, structure or system.

41.3. Sections 41(1)(a)(i) and (ii) provide that a record may be refused if its disclosure could reasonably be expected to cause prejudice to the defence and security of the Republic.

42. In their submissions, the applicants incorrectly state that there are five documents in this category of documents withheld because they contain security sensitive information.<sup>41</sup>

43. The other two documents relate to work done by the Department on the King's Durban house. The documents were misfiled and ought not to have been in the Nkandla security upgrade files. This is clearly indicated in the annexure attached to the state attorney's letter of 30 August 2013.<sup>42</sup>

44. It is not clear to the respondents why the applicants persist with an argument in relation to the documents that have been withheld for

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<sup>41</sup> Applicants' submissions p58, par. 96

<sup>42</sup> See comments at items 38.43 and 38.44 in Vol 10 annexure "**SA11**" pp816 and 817

security related reasons when there is no dispute between the parties on the papers. In the applicants' supplementary affidavit, filed on 5 September 2013, Mr Bhardwaj states:<sup>43</sup>

*"The applicants are not in a position, at this stage, to advance any reasons why the withheld documents, which are very few in number, are required to be disclosed under PAIA. The applicants record, however, that the respondents have taken the position in their letter dated 6 August 2013 ("SA6"), that they have not withheld (for security reasons or otherwise) any documents apart from the withheld documents identified in this schedule."*

45. It has also been the applicants' repeatedly stated position that they are not seeking any documentation relating to security measures at the Nkandla residence.
46. We therefore submit that it is not open to the applicants to contend that this Court ought to examine these records in terms section 80(1) of PAIA.
47. In any event, the respondents contend that they are lawfully entitled to refuse to disclose these records. In doing so, the respondents have listed each of the documents being withheld and have described their contents. Furthermore, the respondents have identified the provisions of PAIA relied upon and have explained the consequences of their disclosure.

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<sup>43</sup> Vol 9 Applicants' supplementary affidavit p729, par. 25

48. We submit that the respondents have put forward sufficient evidence for this Court to conclude, on the probabilities, that the information withheld falls within the exemption claimed.<sup>44</sup>

49. This information falls outside the PAIA request of the applicants. The procurement and related documents that arise from the security needs assessments have been disclosed, albeit in redacted form.

### **DOCUMENTS THAT EXIST BUT CANNOT BE LOCATED**

50. The respondents have been unable to locate the following records:<sup>45</sup>

50.1. WCS consultant payment advice to Igoda projects, dated 5 December 2009 (item 4.19);

50.2. Agenda for consultants coordination meeting held on 2 April 2012 (item 5.25);

50.3. Preliminary cost estimate number 3 prepared by R&G consultants (item 9.11);

50.4. Attachment to an email from Mr Rindel to Sam Mahadeo, dated 13 October 2009 (item 9.22);

50.5. Complete minutes of the bid adjudication committee meeting held on 17 January 2011 (item 10.24);

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<sup>44</sup> President of the Republic of South Africa v M&G Media Ltd 2012 (2) SA 50 (CC) at par. [22] – [25]

<sup>45</sup> Vol 10 annexure “SA11” pp808 – 817

- 50.6. An internal memorandum from Mr Rindel to the Regional Bid Committee, dated 20 January 2011, regarding the application to issue a variation order (item 11.1);
- 50.7. Attachment email to an internal email memorandum from Mr Rindel to the Regional Bid Adjudication committee dated 26 May 2010 (item 17.26);
- 50.8. Minutes of a project team meeting held on Friday 16 July 2010 in the KZN Regional Office of the Department (item 22.4);
- 50.9. A schedule of site meeting dates (item 25.15) prepared by Minenhle Makhanya architects refers to a site handover, a site inspection and 12 site meetings scheduled to take place between 12 June 2010 and 2 December 2010. The applicants seek copies of the minutes of these meetings. Other than the copies of site meeting minutes, which the respondents have obtained and delivered to the applicants, there are no further minutes of site meetings in the respondents' possession;
- 50.10. Queries and comments sent by Glenda Pasley (KZN Regional office) to the quantity surveyors on 25 and 26 January 2011 and on 3 February 2011 (item 22.39);
- 50.11. Letter from Minenhle Makhanya Architects to R&G consultants, dated 25 January 2011, which was attached to

the internal memorandum from DJ Rindel to the Chairman: Regional Bid Adjudication Committee, dated 4 July 2011 (item 27.32);

50.12. Pages distributed under route form from Ministry, dated 24 March 2011, regarding discussion on apportionment of costs between the state and the principal (item 28.39);

50.13. Internal memorandum from DJ Rindel to the regional bid committee regarding request to appoint the landscape architect via the appointed architect, Messrs Minenhle Makhanya Architects (item 37);

50.14. Annexures to internal memorandum from Mr Rindel to the chairman of the Regional Bid Adjudication committee, dated 21 July 2011 (item 38.26); and

50.15. Internal memorandum from Mr Rindel to Mr Molosi regarding extension of contract period for Bonelena Construction, dated 29 April 2012 (item 40.38).

#### **DOCUMENTS THE RESPONDENTS BELIEVE DO NOT EXIST**

51. In the schedule attached to their letter of 29 July 2013 the applicants identified a number of additional documents to which they sought access.

52. The applicants claim that the documents must exist because they are

referred within the documents already disclosed. This is not correct. What these documents do establish is that discussions or meetings took place because they record the contents of these discussions or meetings. They do not establish that any minutes were taken or that a separate documentary record of these discussions or meetings exists.<sup>46</sup>

52.1. One of the documents already disclosed is an approval by the Regional Bid Adjudication committee, dated 10 January 2011, dealing with an application to issue a variation order of 8.6%. An attachment, a fax from R&G consultants to Mr Rindel, dated 10 January 2011, makes reference to a discussion using the words “*as discussed*” (item 6.5). The applicants seek the minutes or other records of this discussion. No such minutes or other records have been located.

52.2. Paragraph 2.3 of the internal memorandum from Mr Rindel to the Regional Bid Committee (undated), regarding the report on the negotiated tender with MoneyMine Investment 310 CC, refers to a meeting with the Deputy Minister on 21 December 2010 in which the scope of works was identified (item 7.1). The applicants seek a copy of the minutes of the meeting with the Deputy Minister. The respondents do not have a minute of the meeting with the Deputy Minister.

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<sup>46</sup> See schedule attached to annexure “**SA11**” Vol 10 pp808 - 817

- 52.3. The same document refers to an instruction by the Deputy Minister that she be part of the process to approve the scope of works for landscaping. The internal memorandum records: *“Further, the original Bill of Quantities included the scope of works for Landscaping, but this was removed, as the Honourable Deputy Minister instructed that she must be part of the process of approve this works as it will be subject to splitting of the cost between the State and the Principal”.*
- 52.4. The applicants seek the record of the meeting at which the Deputy Minister instructed that she be consulted on the splitting of costs. There is however no record of any minute of the meeting of 21 December 2010. The only reference to the meeting and to the Deputy Minister’s instruction is what is contained in the internal memorandum from Mr Rindel to the Regional Bid Committee. The respondents have disclosed that document.
- 52.5. Paragraph 10 of item 8.13, the approval by the Regional Bid Adjudication Committee, dated 10 January 2011, records: *“A meeting was held with Deputy Minister Bogopane-Zulu and DDG: ICR, PM and 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 works should be negotiated, and on the following bases: ...”*



- 52.6. The applicants seek the minutes of the meeting between the Deputy Minister and the Principal or the minutes of the meeting between the Deputy Minister and the DDG.
- 52.7. There is no record in the Department of these minutes. The instruction from the Deputy Minister and the instruction from the Principal to the Deputy Minister are recorded in the records of the Regional Bid Adjudication Committee. The respondents have disclosed this document.
- 52.8. An email from Minenhle Makhanya dated 9 October 2009 (item 9.22) records: *“Reference to our meeting on the 7<sup>th</sup> October 2009, we had agreed to issue to you - i) the cost estimate of the various components of the project, ii) the master copy of the Bills of Quantities to you and iii) the list of contractors. This we did.”*
- 52.9. The applicants seek a copy of the minutes of the meeting of 7 October 2009. There is no record of any such minutes in the Department’s records. The respondents have disclosed the only record of the discussion, namely a copy of the email, which records the undertaking given by Mr Makhanya.
- 52.10. A fax from Mr Rindel to Moneymine on 12 January 2011 re: Durban Prestige Project A: Phase II (item 10.22) records: *“You are herewith invited to negotiation meeting for the above mentioned project as follows: ... 12 January 2011 ... 15:00...”*

The applicants seek a copy of the minutes of the meeting on 12 January 2011. The respondents do not have a copy of the minutes of a meeting on this day.

52.11. In an internal memorandum from Mr Rindel to the Regional Bid Committee, dated 20 January 2011 regarding an application to issue a variation order (item 11.1), it is recorded that Minister Doidge gave instructions on 17 September 2010. The applicants seek a copy of the minutes of the meeting with Minister Doidge on 17 September 2010. The respondents do not have a record of this meeting.

52.12. Minutes of Minister's meeting held on 1 April 2011 (item 28, appearing after item 28.43). The applicants were given a copy of handwritten notes of the Minister's meeting on 1 April 2011. They subsequently sought the formal minutes. There is no record of any formal minutes of a meeting on 1 April 2011 involving the Minister.

52.13. An internal memorandum from Gerard Damstra to the Acting Director General, dated 13 May 2012, regarding Prestige Project A (item 11.4) records that "*Commitment was made to the Minister of Public Works in mid-January 2012 in a meeting held in Midrand to complete the project in end February 2012 as it was the matter of concern.*" The applicants seek a copy of the minutes of the meeting in which the commitment was

made to the Minister. The respondents do not have a record of this meeting.

52.14. The internal memorandum from Ms N Mbukushe to the Chairperson: PMBC, dated 2 June 2010 (item 11.13) records: *“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.”* The applicants seek a record of the instruction by the President as well as a copy of the minutes of the meeting at which the instruction was conveyed. However, the Department has no record of the instruction other than in the internal memorandum, which has already been disclosed. There is no record of any meeting at which the instruction was conveyed.

52.15. An internal memorandum from Mr Rindel, dated 3 March 2011, attached to the progress payment to Pro-Hydraulics of 21 June 2011, refers to 2 monthly/weekly meetings between Minister Doidge or Deputy Minister Bogapane-Zulu and the DDG (item 11.15). The applicants seek the minutes of these meetings. The Department has no record of the minutes of these meetings.

52.16. The minutes of a meeting held on 10 August 2011 at the national office of the Department (item 14.19) records that the

PC is “*under Ministerial instruction to get involved in the project.*” The applicants seek the minutes of the meeting in which the Ministerial instruction was given. The respondents do not have any record of such a meeting, except for that contained in the minutes of 10 August 2011.

52.17. An email sent by Glenda Pasely to Mr Rindel, dated 21 February 2011 (item 22.42), refers to their meeting on 19 February 2011. The applicants seek the minutes of that meeting. No such minutes could be located.

52.18. An email from Phillip Crafford on 20 July 2011 (item 22.49) makes reference to an instruction from the Minister regarding the involvement of professional services in the project. The applicants seek the minutes of a meeting in which the Minister’s instruction was given. Other than the email, which records the Minister’s instruction, the respondents have no record of such a meeting.

52.19. A fax from Ramcom consultants on 23 May 2013 (item 27.8) refers to DDG fortnightly meetings. The applicants seek minutes of these meetings. The respondents do not have any record that these meetings are minuted.

52.20. An internal memorandum from Mr Rindel to the Chairman of the Regional Bid Adjudication Committee, dated 4 July 2011, regarding the application to issue a variation order (item

27.32) records that it was agreed during a meeting with the Deputy Minister that “...works should be omitted from Messrs Moneymine Investment 310 CC and issued to Messrs Bonelena Construction and Projects”. The document also refers to a meeting with the Acting DG on 6 June 2011, which finalised the Appointment of Cost document.

52.21. The applicants seek the minutes of the meetings held with the Deputy Minister and the Acting DG. The respondents have no record that these meetings were minuted. The agreement and the finalisation are recorded in the internal memorandum, which has already been disclosed.

52.22. The minutes of the progress meeting dealing with security installations on 22 June 2011 (item 27.41) refers to a meeting to be held between Mr Makhanya from Minenhle Makhanya architects and the principal. The applicants seek a copy of the minutes of this meeting. The respondents do not have a record of this meeting other than in the minute of the progress meeting on 22 June 2011.

52.23. The internal memorandum from Mr Khanyile to the Acting DG on 21 December 2010 (item 28.13) refers to a meeting with the Deputy Minister and the DDG/ICR, PM and PS on 20 December 2010 in which the project structure and execution plan was discussed. The applicants seek a copy of the

minutes of the meeting with the Deputy Minister. However, the respondents have no record of this meeting other than in the internal memorandum of 21 December 2010.

53. The applicants contend that it is improbable that the documents do not exist. They contend:

53.1. The missing documents include records of communications, meetings, deliberations and decisions at the level of “*top management*” – i.e. the Minister and Deputy Minister of Public Works, the DG and the DDG and the Principal whom the applicants state must be the President.<sup>47</sup>

53.2. The documents, the existence of which the respondents have been unable to confirm, must exist because they are referred to in the documents disclosed by the respondents.

53.3. These “*top level documents*”, if disclosed, “*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.*”<sup>48</sup>

54. We submit that there is reason to believe that the documents do not exist.

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<sup>47</sup> Vol 9 Applicants’ supplementary affidavit p734, par. 31

<sup>48</sup> Applicants’ submissions par. 71

- 54.1. Contrary to the applicants' suggestion, the fact that some of the documents refer to meetings with the Minister or Deputy Minister does not mean that these meetings were minuted. These documents establish no more than that the meetings or discussions took place. It is quite possible that such meetings and discussions were not minuted. There is nevertheless a record of them and that record has been made available to the applicants.
- 54.2. For example, item 6.5 on the schedule refers to a "*discussion*" that took place. Clearly this discussion informed the approval by the Regional Bid Adjudication Committee on 10 January 2011 to issue a variation order. The written approval has been disclosed to the applicants. It does not follow that the discussion was minuted.
- 54.3. We further submit that it is not apparent that the meeting with the Deputy Minister on 21 December 2010 (item 7.1), in which the scope of work was discussed, was minuted. There is no reason why the Deputy Minister could not have given an oral instruction.
- 54.4. The applicants' request in item 8.13 also relates to the meeting on 21 December 2010, and various discussions and instructions both before and during the meeting. There is no reason why the discussions and instructions could not have

been between persons speaking to one another, without their interactions being recorded in writing.

54.5. We submit that similar considerations apply to all the other “documents” which the applicants claim must exist by virtue of a reference in another disclosed document to a meeting, an instruction or a discussion.

54.6. The applicants do not advance any facts in their papers to support their belated contention that the respondents have concealed these records because their disclosure is likely to cause embarrassment to senior members of government involved in the Nkandla upgrade.

55. The applicants ignore the fact that the respondents have already disclosed thousands of pages, many of which contain information embarrassing to the respondents and other senior members of the government. The articles published in the *Mail & Guardian*, based on the more than 12 000 pages disclosed to the applicants, confirm this graphically. If there were any desire on the part of the respondents to conceal records, these “embarrassing documents” would not have been disclosed.

56. In any event, all the documents delivered to the applicants have also been handed to the Public Protector. Any person, including senior members of government, found to have abused his or her position or



to have transgressed the Constitution and the law will have to face the consequences.

57. To satisfy the requirement under section 23(b)(ii) of PAIA, it is not necessary for the respondents to establish that the documents do not exist. We submit that the respondents are required only to show that there is reason to believe that they do not exist.<sup>49</sup> This requirement has been satisfied.

### **RESPONDENTS' ATTEMPTS TO LOCATE THE MISSING DOCUMENTS**

58. Section 23(1) of PAIA provides that an Information Officer of a public body must notify a requester that it is not possible to give him or her access to a record if:

58.1. all reasonable steps have been taken to find the record requested; and

58.2. there are reasonable grounds for believing that the record is in the public body's possession but cannot be found; or

58.3. there are reasonable grounds for believing that the record does not exist.

59. To satisfy the requirements in section 23(1) of PAIA the respondents must show, by way of affidavit or affirmation, that they have done everything reasonably required to locate the records requested.

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<sup>49</sup> Trust Bank van Afrika Bpk v Lief 1963 (4) SA 752 (T) at 755 C - E

60. PAIA contains no definition of the word “*reasonable*”. The test of what is reasonably required is a relative one. What is reasonable will differ from situation to situation.
61. To appreciate the steps taken by the respondents to locate the missing documents it is useful to set out how the documents related to the Nkandla security upgrade were generated and how they were stored:
- 61.1. The Nkandla security upgrade was a project of the KZN Regional Office of the Department. The project manager was Mr Jean Rindel.<sup>50</sup>
- 61.2. Mr Rindel kept working files for each contract/component of the project in his office. Once a specific contract/component of the project was completed, the related documents were archived in the central registry of the KZN Office. No documents were kept at the Head Office of the Defendant or at the Ministry.<sup>51</sup>
- 61.3. The KZN Regional Office did not keep records of site meetings or contractors’ progress meetings.<sup>52</sup> They were kept by the principal agent (Minenhle Makhanya Architects) appointed by the Department to project manage the Nkandla

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<sup>50</sup> Vol 10 Respondents’ further answering affidavit p844, par. 13

<sup>51</sup> Vol 10 Respondents’ further answering affidavit p844, par. 14

<sup>52</sup> Vol 10 Respondents’ further answering affidavit p845, par. 19

security upgrade.<sup>53</sup>

62. Following the allegations of procurement irregularity in the Nkandla security upgrade, the Minister appointed Mr Phillip Masilo and others to the task team established on 5 November 2012 to investigate these allegations.<sup>54</sup>
63. On 12 November 2012 the task team travelled to KZN to meet with Mr Rindel. One of their tasks was to collect all the documentation that pertained to the Nkandla security upgrade.<sup>55</sup>
64. Mr Masilo took control of these documents, which included minutes of site meetings obtained by Mr Rindel from the principal agent, and returned with them to Pretoria. On his return, he stored them in his office in the Ministry in Pretoria.<sup>56</sup>
65. Mr Masilo did not collect the documents with a view to considering the applicants' PAIA request. They were collected to enable the task team to conduct their investigation. At a later stage these documents were copied and given to the Public Protector.<sup>57</sup>
66. When Mr Masilo was asked by the Minister and the DG to advise whether any records could be disclosed to the applicants, Mr Masilo examined the documents he had stored in his office. The documents

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<sup>53</sup> Vol 10 Respondents' further answering affidavit p844, par. 15

<sup>54</sup> Vol 10 Respondents' further answering affidavit p845, par. 16

<sup>55</sup> Vol 10 Respondents' further answering affidavit p845, par. 18

<sup>56</sup> Vol 10 Respondents' further answering affidavit p845, par. 19 and 20

<sup>57</sup> Vol 10 Respondents' further answering affidavit p845, par. 20

that were delivered to the applicants on 21 June 2013 were copied from these documents.<sup>58</sup>

67. On receipt of the applicants' letter of 29 July 2013 in which they raised concerns about the extent of the Departments' disclosure, Mr Masilo re-examined all the files in his possession and asked Mr Rindel to check whether he could find any of the records listed in the applicants' schedule (attached to annexure "**SA4**").<sup>59</sup>
68. Mr Rindel also contacted a number of the service providers to check whether they could locate any of the documents in their files.<sup>60</sup>
69. The records that could be located were delivered to the applicants on 3 September 2013.<sup>61</sup>
70. We submit that it was eminently reasonable for Mr Masilo and Mr Rindel to work together on locating the missing documents. All the documents in the possession of the Department had originally been stored in the KZN Office. After they had been handed to Mr Masilo, any missing documents could only have been in one of two locations - either they had been left behind in the KZN Office or they had not been copied when Mr Masilo prepared the copies for the applicants.

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<sup>58</sup> Vol 10 Respondents' further answering affidavit p846, par. 21 and 22

<sup>59</sup> Vol 10 Respondents' further answering affidavit p847, par. 25 - 27

<sup>60</sup> Vol 10 Respondents' further answering affidavit p847, par. 28

<sup>61</sup> Vol 10 Respondents' further answering affidavit p847, par. 29 - p848, par. 32

71. Mr Rindel has been unable to confirm the existence of the missing documents. He has deposed to a confirmatory affidavit in which he confirms the process he undertook to locate the missing documents. He also confirms that there is reason to believe that they do not exist.<sup>62</sup>

72. Despite the exhaustive and time-consuming process undertaken by Mr Masilo and Mr Rindel, the applicants submit that the respondents have failed to take reasonable steps to locate the missing records. In this regard, they contend that:<sup>63</sup>

72.1. The Department's head office and the KZN central registry ought to have been searched;

72.2. Electronic copies of the requested documents should have been retrieved from the network or from the computers of the relevant persons;

72.3. The persons responsible for keeping and storing top level records should have been met and interviewed;

72.4. The respondents ought to have conducted an audit of all departmental records in an attempt to locate the missing documents; and

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<sup>62</sup> Vol 10 Mr Rindel's confirmatory affidavit p882 - 883; See also Vol 10 Respondents' further answering affidavit p849, par. 35 - p850, par. 37


<sup>63</sup> Vol 9 Applicants' supplementary affidavit p727, par. 19.3, p740, par. 47 and p741, par. 51

- 72.5. Extracts from the diaries of officials who attended meetings relating to the Nkandla upgrade, as well as emails exchanged between officials, consultants and contractors should have been examined.
73. We submit that the respondents could not reasonably have been required to go beyond the steps that they took. There was no reason for the respondents to search the Head Office for files. All the project files were stored in the central registry of the KZN Regional Office. Mr Rindel went back to the central registry to look for missing documents.
74. The further inquiry undertaken by Mr Rindel to locate the documents listed as missing in the applicants' schedule of 29 July 2013 did yield results. As a direct result of his efforts, additional documents were located and delivered to the applicants.
75. Significantly, the Department manages approximately 2 300 leases, 2 000 infrastructure developments and numerous Prestige projects, such as the Nkandla security upgrade, on behalf of the government.<sup>64</sup>
76. We submit that it is unreasonable to suggest (as the applicants do) that the respondents ought to have conducted "*a comprehensive audit of all the documents held by the Department*" in order to determine whether any of the missing documents may have been misfiled.<sup>65</sup>

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<sup>64</sup> Vol 10 annexure "**SA11**" p 807, par. 6; See also Vol 10 Respondents' further answering affidavit p851, par. 39

<sup>65</sup> Applicants' submissions, p37, par. 73.12

77. It is also possible that some of the documents that cannot be found were stolen. Three documents (annexures “**RA5**” to “**RA7**”) were stolen from the Department’s files and anonymously given to the applicants.<sup>66</sup> They are attached to the applicants’ replying affidavit.<sup>67</sup> It is reasonable to believe that some of the documents that the respondents cannot locate have also been stolen.
78. We further submit that the missing documents go well beyond the ambit of the applicants’ initial request. Accordingly, the applicants are in any event not entitled to these documents, if they exist at all. 
79. The applicants claim that Mr Masilo has no personal knowledge and that he is not in a position to state what documents were generated during the Nkandla upgrade, or when, how, by whom and in what form they were generated.<sup>68</sup>
80. We submit that the basis on which Mr Masilo gained his personal knowledge is plain. He acquired personal knowledge when he travelled to KZN with other members of the task team to meet Mr Rindel and when he took control of all the documents pertaining to the Nkandla security upgrade.<sup>69</sup>
81. In the circumstances we submit that the respondents have taken all reasonable steps to locate the missing documents and make these

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<sup>66</sup> Vol 10 Respondents’ further answering affidavit p851, par. 40

<sup>67</sup> Vol 3 annexure “**RA5**” pp192 - 196, “**RA6**” pp197 - 200, “**RA7**” pp201 - 208

<sup>68</sup> Applicants’ submissions par. 73.5

<sup>69</sup> President of the Republic of South Africa v M&G Media 2012 (2) SA 50 (CC) at [28]

available to the applicants. The requirements of section 23 of PAIA have therefore been satisfied.

## REFERRAL TO ORAL EVIDENCE

82. The applicants ask that this Court refer the issue of the existence of the so-called high-level documents to oral evidence in order to test the evidence put up by the respondents.<sup>70</sup>

83. As a general rule:

83.1. An application for the hearing of oral evidence must be made *in limine*, prior to arguments on the merits. Although there are exceptions to this rule, they remain exceptions.<sup>71</sup>

83.2. In exercising its discretion the Court should be guided to a large extent by the prospects of oral evidence tipping the balance in favour of the applicants. If, on the affidavits, the probabilities are evenly balanced, the Court will be more inclined to allow the hearing of oral evidence than if the balance is against the applicant.<sup>72</sup>

84. We submit that this Court is in a position to determine the factual dispute, relating to the existence of the missing documents, on the papers. The respondents set out in detail their attempts to locate the

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<sup>70</sup> Applicants' submissions par. 85

<sup>71</sup> *Law Society, Northern Province v Mogami* 2010 (1) SA 186 (SCA) at 195C; *De Reszke v Maras* 2006 (1) SA 401 (C) at 413 D - J

<sup>72</sup> *Kalil v Decotex (Pty) Ltd* 1988 (1) SA 943 (A) at 981 D - G



missing documents and to establish if they exist at all. The analysis set out above demonstrates that the records already disclosed are evidence only of the fact that meetings or discussions took place. They are not evidence that the meetings and discussions referred to were recorded in written form.

85. The respondents do not deny that these meetings and discussions took place. Nor do they deny the accuracy of the documents already disclosed.
86. We submit that the respondents' version is neither far fetched nor is it untenable. There is also no reason to doubt the respondents' version.
87. By contrast, the applicants are not able to put up any evidence to contradict the respondents' version. Their contentions, that the respondents have withheld "embarrassing documents", and that the meetings and discussions recorded in the documents disclosed must have been further recorded in written form, are based entirely on speculation.
88. Accordingly, we submit that this Court is able to determine the dispute relating to the existence of the missing documents on the basis of the rule set out in *Plascon-Evans*.<sup>73</sup> There is no basis for the issue of the missing documents to be referred to oral evidence.

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<sup>73</sup> *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

## CONCLUSION

89. We submit that:

89.1. The respondents have fully and lawfully complied with the applicants' PAIA request.

89.2. The only records not disclosed to the applicants are those that the respondents are lawfully entitled under sections 38 and 41 of PAIA to withhold.

89.3. On the facts set out in the papers, reasonable grounds exist for believing that some of the missing documents are in the possession of the Department but cannot be located, while the remainder do not exist. In respect of all these documents, the respondents have taken reasonable steps to locate them.

89.4. In spite of this, the applicants persist in their request for documents that fall way beyond the ambit of their original request. This is an abuse of the special position afforded to the media by the Constitution and their Constitutional right of access to information.

90. The respondents ask this Court to dismiss the application with costs, including the costs of two counsel, alternatively to apportion the costs between the parties on a basis that is just and equitable.

**D I Berger SC**  
**L G P Ledwaba**  
**K M Millard**  
Respondents' counsel

Chambers  
Sandton  
23 October 2013

## **TABLE OF AUTHORITIES**

De Reszke v Maras 2006 (1) SA 401 (C)

Kalil v Decotex (Pty) Ltd 1988 (1) SA 943 (A)

Law Society, Northern Province v Mogami 2010 (1) SA 186 (SCA)

Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

President of the Republic of South Africa v M&G Media Ltd 2011 (2) SA 1 (SCA)

Treatment Action Campaign v Minister of Correctional Services 2009 JDR 043 (T)

Trust Bank van Afrika Bpk v Lief 1963 (4) SA 752 (T)