

IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG LOCAL DIVISION, JOHANNESBURG]

CASE NO: 19/36248

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC

Applicant

and:

**SERVICES SECTOR EDUCATION AND
TRAINING AUTHORITY**

First Respondent

GRAYSON REED CONSULTING (PTY) LTD

Second Respondent

SERVICE AND FILING SHEET

HEREWITH : FIRST RESPONDENT'S ANSWERING AFFIDAVIT

THUS DONE AND SIGNED AT MIDRAND THIS 17th DAY OF JANUARY 2020.


NDUMISO VOYI INCORPORATED
FIRST RESPONDENT'S ATTORNEYS
GROUND FLOOR, BUILDING 5
MIDRAND BUSINESS PARK
563 OLD PRETORIA MAIN ROAD
HALFWAY HOUSE, MIDRAND
TEL: 011 312 7536
FAX: 086 246 2216
REF: MR NP VOYI/zk/SER1/0172
CARE OF: NDLOVU AJ ATTORNEYS
6th FLOOR, MINERALS COUNCIL BUILDING
5 HOLLARD STREET, MARSHALLTOWN
JOHANNESBURG, 2001
REF: MR NDLOVU

TO:
**THE REGISTRAR OF THE ABOVE
HONOURABLE HIGH COURT
[JOHANNESBURG]**

FILED BY HAND

AND TO:
ALET UYS ATTORNEYS
APPLICANT'S ATTORNEY
397 CENTRAL PARK AVENUE
STRUBENKOP COMPLEX
LYNWOOD, PRETORIA
TEL : 060 729 9933
EMAIL: brendan@aletuysattorneys.co.za
REF : OL0009
C/O PANDOR ATTORNEYS
15 PETER PLACE
BRYANSTON
SANDTON, 2191

SERVED BY HAND

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 19/36248

In the matter between:

ORGANISATION UNDOING TAX ABUSE IPC

Applicant

and

**SERVICES SECTOR EDUCATION
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First Respondent

GRAYSON REED CONSULTING (PTY) LTD

Second Respondent

FIRST RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,

AMANDA BUZO-GQOBOKA

do hereby make oath and say that:

- 1 I am an adult female Chief Executive Officer and a Chief Information Officer, employed by the Services Sector Educator and Training Authority, the first respondent. I am authorised to depose to this affidavit.

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NTB

- 2 The facts deposed to herein are true and correct, and, save as where otherwise provided or the contrary appears from the context, are within my personal knowledge.
- 3 As most of the facts in this matter are common cause, particularly where corroborated by documents, and what is in issue between the parties, are matters primarily of inference, conclusion and argument, I do not intend dealing *ad seriatim* with each of the paragraphs in the founding affidavit. My failure to address each and every paragraph is not to be construed as any admission of the contents therein.
- 4 I set out, in summary form, the facts relevant to this application and thereafter set out certain observations and additional facts which arise from the requests made to the first respondent. These facts lead to the conclusion not only that there is not clarity as to how the first respondent should address the conflicting interests, but that the first respondent seeks clarity on the appropriate response. It therefore becomes necessary for the first respondent to assert and defend its position, lest assumptions and an adverse inference is likely to be drawn.
- 5 The relevant facts which underlie this application are as follows.

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- 6 The first respondent, the Services Sector Education and Training Authority (Service SETA) is a statutory body established in terms of the Skills Development Act 97 of 1998 ("**Skills Development Act**").
- 7 The first respondent is an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"). To be specific and as captured in the aforementioned definition, the first respondent is an institution performing a public function in terms of an Act of Parliament.
- 8 The first respondent is one of the twenty one (21) Sector Education and Training Authorities ("**the SETAs**") that were established in 2000 in terms of the Skills Development Act.
- 9 The purposes of the Skills Development Act include, amongst others, developing skills for the South African workforce; increasing the levels of investment in education and training in the labour market; encouraging employers to *inter alia* use the work-place as an active learning environment, provide employees with the opportunities to acquire new skills, and to employ persons who find it difficult to be employed; encouraging workers to participate in learning programmes; and ensuring the quality of learning in and for the workplace.

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- 10 In terms of section 2(2)(a) of the Skills Development Act, the above purposes are to be achieved through *inter alia* the SETAs such as the first respondent.
- 11 The first respondent, in essence, initiates skills development programmes aimed at improving and developing South Africa's human resource capacity and skills base.
- 12 The first respondent also strives to improve and develop a services sector workforce whose skills are recognised and valued in term of the National Qualifications Framework ("**the NQF**").
- 13 The first respondent is accredited as an Education and Training Quality Assurance ("**ETQA**") by the Quality Council of Trades and Occupation ("**QCTO**"), previously represented in this regard by the South African Qualifications Authority ("**SAQA**").
- 14 The ETQA status of the Applicant entitles it to accredit training providers and to monitor the quality of training provided by such training providers.
- 15 The first respondent does not offer training itself but does so, on an agency basis, through the accredited training providers.

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- 16 Of significance, the first respondent is also a National Public Entity as listed under Part A to Schedule 3 of the Public Finance Management Act 1 of 1999 as amended ("*the PFMA*").
- 17 Under the provisions of the PFMA, particularly section 49, it is stipulated that every public entity such as the first respondent "*...must have an authority which must be accountable for the purposes of [the PFMA].*"
- 18 Section 50 of the PFMA sets out the fiduciary duties of the Accounting Authority of a Public Entity. More importantly, section 51 of the PFMA sets out the general responsibilities of the Accounting Authority of a Public Entity.
- 19 The Accounting Authority of a Public Entity has various rigorous responsibilities under Chapter 6 of the PFMA. These responsibilities cascade to the Public Entity itself.
- 20 Amongst such responsibilities, I may mention the following:
- 20.1 A Public Entity must have and maintain "*...effective, efficient and transparent systems of financial and risk management and internal control;...*" [section 51(1)(a)(i)]

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- 20.2 A Public Entity's Accounting Authority must take effective and appropriate steps to – "*...manage available working capital efficiently and economically;...*" [section 51(1)(b)(iii)]
- 20.3 A Public Entity's Accounting Authority "*...is responsible for the management, including the safe-guarding, of the assets and for the management of the revenue, expenditure and liabilities of [its] public entity;...*" [section 51(1)(c)]
- 21 There are also key responsibilities of 'officials' of a Public Entity under section 57 of the PFMA.
- 22 The Skills Development Act, itself, recognises the relevance of the PFMA in the governance and management of institutions such as the first respondent.
- 23 Under section 14(4) of the Skills Development Act, it is stipulated that "*[a] SETA must be managed in accordance with the Public Finance Management Act.*"
- 24 It is, therefore, axiomatic that the rigorous responsibilities set out under the provisions of the PFMA, some of which are briefly

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captured in paragraph 20 above, are strictly applicable to the first respondent as a Public Entity.

- 25 At section 10 of the Skills Development Act, one of the functions of the first respondents is to implement its sector skills plan by *"...allocating grants in the prescribed manner and in accordance with any prescribed standards and criteria to employers, education and skills development providers and workers;"*.
- 26 The first respondent allocates grants in line with this function on an annual basis. A major portion of the grant funding is allocated for learners as stipends. The first respondent would allocate funding to funded entities and the latter would, in turn, be responsible for paying the stipend portion of the grant funding to the learners.
- 27 The first respondent identified numerous gaps and irregularities in its previous payment mechanism, in which grants were paid directly to funded entities who would then be responsible for paying learners their stipends. It was observed that there were instances of collusion between funded entities and learners wherein attendance registers would be fraudulently signed or where learners would sign attendance registers without having attended training.

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- 28 A decision was then taken to appoint an independent entity that would be responsible for the administration and payment of stipends directly to the learners so as to avoid the irregularities identified, as mentioned above.
- 29 On or about 31 July 2017 in the Sowetan Newspaper, the first respondent issued an invitation of bids seeking to appoint service providers to process learner stipends directly to learners. A copy of this invitation is annexed hereto, marked Annexure "**AB1**".
- 30 A similar invitation was also published in the Government Tender Bulletin No 2979 on 25 August 2017.
- 31 A copy of the relevant page of the Government Tender Bulletin is annexed hereto, marked "**AB2**".
- 32 The tender was subsequently awarded to the second respondent, Grayson Reed Consulting (Pty) Ltd.
- 33 On 23 January 2019, the first respondent received a request from the applicant, purportedly acting in accordance with the provisions of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**" or "**the Act**") a set of records pertaining to the aforesaid tender that was awarded to the second respondent.

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34 On 1 February 2019 in a letter, a copy of which is annexed to the founding affidavit, "FA3", the first respondent acting in terms of section 26 of the Act, extended the period of 30 (thirty) days once for a further period of 30 days for the following reasons:

34.1 The request by the applicant is for a large number of documents and would definitely require a search through a number of records, with the result that compliance with the request within 30 days would unreasonably interfere with the operational activities of the first respondent.

34.2 I was also of the view that some of the information requested by the applicant relates to a third party, in particular the second respondent, that must be notified of the request in terms of section 47 of the Act and still be afforded an opportunity to make representations as contemplated by section 48 of the Act.

34.3 The first respondent was undergoing an audit by the Auditor General of South Africa and its human resources had been diverted to dealing with the audit.

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34.4 The request by the applicant referred to some documents and information that is stored off-site and the retrieval thereof could not be reasonably be completed within 30 days unless first respondent's human resources were diverted from its operational activities, which was unwarranted at the time when there was an ongoing audit.

35 I indicated in that extension letter than I would be in a position to decide on the request and notified the applicant of the first respondent's decision by no later than Friday 22 March 2019.

36 Although the first respondent advised the applicant of the right to lodge an internal objection against the extension, the applicant did not do so as it considered the reasons proffered by the first respondent to be justified in terms of section 26 of the Act.

37 On 8 February 2019 the first respondent issued a statutory notice to the third party, the second respondent, in terms of section 47 of the Act advising the latter of the request the first respondent received from the applicant. A copy of this notice is annexed hereto, marked Annexure "AB3".

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38 In terms of the notice I, on behalf of the first respondent, informed the second respondent that I was considering a request that might, in my view, be a record contemplated in terms of section 36 and/or section 37 of the Act.

39 I further advised the second respondent of its options which included that it could:

39.1 make written or oral representations to the information officer why the request for access to the records should be refused; or

39.2 give written consent for the disclosure of the record to the requester.

40 On 12 March 2019, the second respondent replied to the first respondent's letter.

41 A copy of the response is attached hereto, marked Annexure "AB4".

42 In terms of the response, the second respondent objected to the provision of the record sought for the following reasons:

42.1 The requested information contains its trade secrets.

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- 42.2 The information contains, amongst other things, their confidential, financial, commercial and technical information.
- 42.3 The disclosure thereof will cause serious harm to its commercial interest and the company as a whole.
- 42.4 The disclosure would disadvantage the second respondent contractually and prejudice in its commercial competition.
- 42.5 The disclosure thereof would compromise its ongoing execution by its obligations in terms of the contract and the project; and
- 42.6 Disclosure may harm its relationship with its consortium, finance and technical partners.
- 43 The second respondent further added that it shared commercial sensitive information with the first respondent in confidence and as part of the contractual relationship it had with the first respondent. It added that in the event that such access was granted, the disclosure could reasonably be expected to prejudice the future supply of similar information or information from the same source.

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- 44 The second respondent also stated that the provisions of section 46 did not apply to the request on the basis that there was no substantial contravention of, or failure to comply with the law.
- 45 The second respondent concluded by stating that the applicant was not entitled to the information insofar as it relates to it. It then sought an undertaking from the first respondent that such information would not be disclosed without its consent.
- 46 On 22 March 2019 in a letter, marked annexure "FA5" to the founding affidavit the first respondent communicated its decision on the request for information. The response was based on the objection from the second respondent.
- 47 The first respondent refused the request for information pertaining to the second respondent. It, however, granted access to certain information requested under paragraphs 1 to 4 of Annexure "A" to the request.
- 48 The applicant was further advised by the first respondent that there was no Bid Specification Committee that recommended the appointment of the second respondent.

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- 49 On 9 April 2019, not satisfied with the outcome of the request, the applicant lodged an internal appeal, a copy of which is attached to the founding affidavit as Annexure "FA6".
- 50 On 28 May 2019, the first respondent, acting in terms of section 76 informed the second respondent to which the record relates, of the internal appeal.
- 51 A copy of the letter to the second respondent is annexed hereto, marked Annexure "AB5".
- 52 In terms of the notice, the first respondent advised the second respondent that it was considering an internal appeal against the refusal of the request for access to a record as contemplated in section 36(1) of the Act.
- 53 It invited the second respondent to make representations on why the internal appeal should not be upheld.
- 54 I pause to mention that on 29 May 2019, the first respondent advised the applicant that the decision of the relevant authority would be issued on or before 28 June 2019 after a special sitting to consider the internal appeal. A copy of the letter is annexed hereto, marked Annexure "AB6".

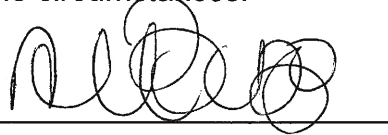
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- 55 On 21 June 2019, the first respondent received a reply from the second respondent, which response, save for releasing a few documents, some of which could be tendered in fully or in a redacted form, its position remained the same as its letter of 12 March 2019, responding to the initial request. A copy of the said letter is annexed hereto, marked Annexure "**AB7**". A copy of this letter must be read as if incorporated herein.
- 56 In effect, the second respondent strongly hold that the applicant is not entitled to its confidential information which it seeks from the first respondent insofar as it relates to it (the second respondent).
- 57 It is on the basis of these strong views by the second respondent that the first respondent communicated the decision on the internal appeal on 17 October 2019 in terms of which it dismissed the internal appeal.
- 58 A copy of the letter dismissing the appeal is annexed hereto, marked Annexure "**AB8**".
- 59 It also advised the applicant that should the application be launched, it will abide by the decision of the court, a position it still maintains.

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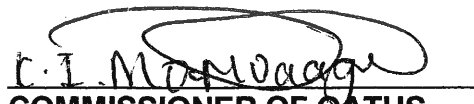
60 The first respondent does not intend to be obstructive. It is simply caught between a rock and a hard place. It lies between the applicant and the second respondent to jousts over the objections mentioned in paragraph 42 above. The first respondent is simply defending its position and the decisions it took.

61 In the premises, the first respondent contends that the decisions it took were right and justified by the circumstances.



DEPONENT

THUS SIGNED and **SWORN** to before me at Johannesburg on this 15th day of January 2020.
~~DECEMBER 2019~~, the Deponent having acknowledged that he knows and understands the contents of this Affidavit; that he has no objection to taking the prescribed oath and that he considers the oath as binding on his conscience.



COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

CAPACITY:

AREA:

KEAOBAKA IVAN MORWAAGAE
COMMISSIONER OF OATHS
PRACTICING ATTORNEY R.S.A
5th FLOOR, THE MALL OFFICES
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