

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

CASE NO: 36248/19

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

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**FIRST RESPONDENT'S PRACTICE NOTE**

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**ON THE ROLL** : 07<sup>th</sup> June 2021

**COUNSEL APPEARING**

For the Applicant : Adv. Ori Ben-zeev  
076 652 7735

For the First Respondent : Adv. Dineo Gomba  
067 034 5066

## **1. NATURE OF THE APPLICATION AND ISSUES**

- 1.1 This is a Review Application in terms of sections 78 of Promotion of Access to Information Act ("PAIA").
- 1.2 The Applicant approached this court in terms of PAIA" seeking certain relief against the First Respondent.
- 1.3 Principally, the Applicant is seeking an order directing the First Respondent to furnish them with records in items 5 to 18 of the Applicant's request for access to information dated 22<sup>nd</sup> January 2019.
- 1.4 Moreover, the Applicant is also seeking an Order directing the First Respondent furnish the Applicant with a copy of all the records in items 5 to 18 as set out in its request for access to information dated 22<sup>nd</sup> January 2019 within 15 days of the date of the Order.

## **2. ISSUES TO BE DETERMINED**

- 2.1 The relevant issue is whether the First Respondent was entitled to rely on sections 36(1), 37(1), 44(1) and (2) of PAIA in refusing access to records in items 5 to 18 of the Applicant's request for access to information dated 22<sup>nd</sup> January 2019.

## **3. THE STATUTORY FRAMEWORK THAT REGULATES PROCEEDINGS UNDER PAIA**

- 3.1 It is demonstrably clear from the provisions of PAIA that the legislature has gone to great lengths in codifying a user friendly legislative road map for applications under PAIA.
- 3.2 This road map starts when an initial application for access to information is made to an information officer long before a court application in terms of section 78 of PAIA is made or even conceptualised.
- 3.3 It is evident from PAIA that the legislature had in mind an uncomplicated

and inexpensive procedure in which a request for information is made and access thereto is given administratively, a court application being the exception rather than the rule.

3.4 It is only the dismissal of the internal appeal by the relevant authority that paves the way for a court application in terms of section 78. Thus, section 78 reads in part as follows:

“(2) A requester –

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;”

3.5 Only a requester who falls into one of the categories mentioned in section 78(2) may approach court for an appropriate relief. Thus, the Applicant in this matter falls within the category listed in the aforesaid section. PAIA applications have been authoritatively described in our courts. In ***President of the Republic of South Africa and Another v M & G Media Ltd 2012 (2) SA 50 (CC)*** at paragraph [13] the Constitutional Court said:

“[13] Court proceedings under PAIA are governed by sections 78 to 82. Section 81 provides that proceedings under PAIA are civil proceedings and the rules of evidence applicable in civil proceedings apply. The burden of establishing that the refusal of access to information is justified under the provisions of PAIA rests on the state or any other party refusing access. In proceedings under PAIA, a court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It decides the claim of exemption from disclosure afresh, engaging in a *de novo* reconsideration of the merits. The evidentiary burden borne by the state pursuant to section 81(3) is discharged, as in any civil proceedings, on a balance of probabilities.”

3.6 In ***Transnet Ltd and Another v SA Metal Machinery Co. (Pty) Ltd 2006 (6) SA 285 (SCA)*** at paragraph [24], Howie P expressed the following sentiments pertaining to the legal exposition on proceedings in terms of section 78:

“[24] As to the contested issues, it is convenient to begin with a point raised by the appellant which is really jurisdictional in nature. It contended that in an application under s 78 the relevant material on which a court had to make its decision was limited to such material as was before the information officer when access was refused. That cannot be right. A court application under the Act is not the kind of limited review provided for, for example under the Promotion of Administrative Justice Act 3 of 2000.

It is much more extensive. It is a civil proceeding like any motion matter, in the course of which both sides (and the third party, if appropriate) are at liberty to present evidence to support their respective cases for access and refusal. Moreover, it is unlikely that a Court, acting under section 82, would be sufficiently informed so as to be in a position to make a just and equitable order were the limitation to apply.”

#### **4. SECTION 46 OF PAIA**

4.1 Section 46 of PAIA provides what has been termed a ‘mandatory public interest override’.<sup>92</sup> It reads, in relevant part, as follows:

‘Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section ... 39(1) ... (b) if—

- (a) the disclosure of the record would reveal evidence of—
  - (i) a substantial contravention of, or failure to comply with, the law; or
  - (ii) an imminent and serious public safety or environmental risk; and
- (b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.’

4.2 The requirements of section 46 are mandatory: where access to a record is denied under, for example, section 39(1)(b)(iii)(ee), an information officer must nonetheless grant access to the record where a) disclosure of the record would reveal evidence of a substantial breach of the law and b) the public interest in disclosure clearly outweighs the harm contemplated in the section.

4.3 It follows from the above that in every case where there is a refusal of access on the grounds of one of the sections of the Act listed under section 46, it is incumbent upon the information officer concerned (and, in any event, upon the court later confronted with an application under section 78 of PAIA) to consider whether section 46 applies to the case. This is so particularly where an applicant specifically raises public interest grounds for seeking access, as is clearly the case in this application.

4.4 The First Respondents as a result, did not consider the impact of section 46 on the question whether access to the records ought to be granted to the Applicant because the refusal in granting access to records in items 5 to 18 of the

Applicant's request for access to information dated 22nd January 2019. was accordingly based on sections 36(1), 37(1) 44(1) and (2) of PAIA.

**5. IMPACT OF SECTION 46 OF PAIA IN THIS APPLICATION**

5.1 In this case, the above Honourable Court has to consider the impact of section 46 on the question whether access to the records ought to be granted to the Applicant.

5.2 It is the First Respondent's submission that the above Honourable Court is required to consider the application of section 46 in order to determine the prospects of success on the merits of the Applicant's case.

5.3 The Court is thus, required to engage in a proper analysis of section 46 in order to determine whether access to the records ought to be granted to the Applicant.

5.4 Consequently, there are three jurisdictional facts which are required to have been established in order for section 46 of PAIA to be applicable to the Applicant's request for access.

1. Firstly, there must have been a refusal of access under one of the listed sections of the Act. In this case, that requirement is not satisfied because the First Respondent refused the Applicant's request for access on the basis of section 36(1), 37(1), 44(1) and (2) of PAIA;

2. Secondly, it must have been established that disclosure of the records would provide evidence of a substantial contravention of, or failure to comply with, the law. In this case, there is no evidence presented that the disclosure of the record would likely establish contraventions of section 217 of the Constitution and the Corruption Act, 1992 or the Prevention and Combating of Corrupt Activities Act of 2004;

3. Thirdly, the public interest in disclosure must have outweighed the harm contemplated in section 36(1), that is, the potential harm to the administration of justice. In this case, the public interest in disclosure is not

explicitly directly linked to the Applicant's and the public's rights under section 217 of the Constitution except for the fact that the Applicant requested the information in order to verify the veracity of the allegations of irregularities which had allegedly been brought to its attention by 'several whistle blowers'.

## **6. COSTS**

6.1 The First Respondent respectfully submit that the present application should be dismissed with costs.

6.2 Thus, in law and fairness, the Applicant should be held liable for the costs of this application.

## **7. CONCLUSION**

7.1 Thus, in light of the foregoing, it is the First Respondent's respectful submission that the correct procedure, processes and provisions of PAIA were followed and accordingly complied with in arriving at the decision to refuse granting access to records listed in items 5 to 18 of the Applicant's request for access to information dated 22nd January 2019.

**Signed electronically**  
**Adv. Dineo Gomba**  
**First Respondent's Counsel**  
**06<sup>th</sup> June 2021**