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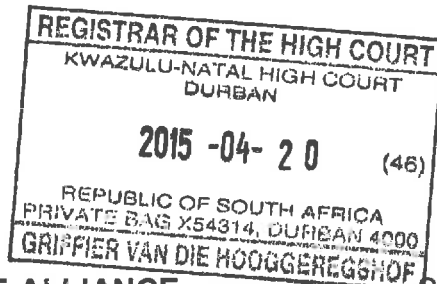
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IN THE HIGH COURT OF SOUTH AFRICA
(KWAZULU-NATAL DIVISION, DURBAN)

CASE NO: 4072/2015

In the matter between:

**SOUTH DURBAN COMMUNITY
ENVIRONMENTAL ALLIANCE**



First Applicant

VAAL ENVIRONMENTAL JUSTICE ALLIANCE

Second Applicant

and

THE DEPUTY INFORMATION OFFICER:

ETHEKWINI METROPOLITAN MUNICIPALITY

First Respondent

**THE SPEAKER: ETHEKWINI METROPOLITAN
MUNICIPALITY**

Second Respondent

ENGEN PETROLEUM LIMITED

Third Respondent

SHELL AND BP SOUTH AFRICAN

PETROLEUM REFINERIES (PTY) LIMITED

Fourth Respondent

NOTICE OF MOTION

TAKE NOTICE that the Applicants intend to make an application to the above Honourable Court for an order in the following terms:

1. The decisions of the First and Second Respondents to refuse the Applicants' requests for access to information dated 10 April 2013 and 29 October 2014 in terms of the Promotion of Access to Information Act 2 of 2000 are declared to be unlawful and unconstitutional.

2. The refusals by the First and Second Respondents of the Applicants' requests are reviewed and set aside.
3. The First and Second Respondents are directed to supply the Applicants with a copy of the requested records within 15 (fifteen) days of the granting of this order.
4. The First and Second Respondents, and any other Respondent that opposes this application, shall pay the costs of this application, including the costs of two counsel.
5. Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying Founding Affidavit of **DESMOND D'SA**, and the annexures thereto, will be used in support of this application.

BE PLEASED TO TAKE FURTHER NOTICE that the Applicants have appointed the address of their correspondent attorney, detailed below, as the address at which it will receive notice and service of all process in these proceedings, alternatively the electronic and facsimile addresses of the applicants' attorneys detailed below.

BE PLEASED TO TAKE FUTHER NOTICE that:

- (a) Notice of intention to oppose this application must be given within 15 (fifteen) days after receipt hereof and must contain an address within 8 (eight) kilometres of the Court to which this application is brought, where notice and service of documents will be accepted.

- (b) Answering affidavits, if any, must be filed within 15 (fifteen) days after service of the notice of intention to oppose this application.
- (c) In default of your complying with rule 3(5) of the Rules of Procedure for Application to Court in terms of PAIA, the Applicant may request the clerk of the court or the registrar as the case may be, to place this application before the Court for an order in terms of section 82(b) of PAIA.
- (d) In default of your delivering a notice of intention to oppose, the matter will without further notice, be placed on the roll for hearing after the expiry of the period mentioned in paragraph (a) above, on a date fixed by the clerk of the court or the registrar as the case may be, in terms of rule 3(6) of the Rules of Procedure for Application to Court in terms of PAIA.

23 JUNE 2015

DATED at DURBAN on this the 20TH day of April 2015.


CENTRE FOR ENVIRONMENTAL RIGHTS

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TO: **The Deputy Information Officer**
eThekweni Metropolitan Municipality
City Hall
263 Pixley KaSeme Street
Durban
Tel: 031 311 2100

AND TO: **The Speaker**
eThekweni Metropolitan Municipality
City Hall
263 Pixley KaSeme Street
Durban
Tel: 031 311 2025

AND TO: **Engen Petroleum Limited**
465 Tara Road
Bluff
Durban
Tel: 031 460 3911

AND TO: **Shell and BP South African Petroleum Refineries (Pty) Limited**
1 Refinery Road
Prospecton
Durban
Tel: 031 480 1911

AND TO: The Registrar
KwaZulu Natal High Court, Durban

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and

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ENGEN PETROLEUM LIMITED

Third Respondent

**SHELL AND BP SOUTH AFRICAN
PETROLEUM REFINERIES
(PTY) LIMITED**

Fourth Respondent

FOUNDING AFFIDAVIT

I, the undersigned –

DESMOND D'SA

do hereby make oath and say that –

1. I am an adult male and the Co-ordinator of the first applicant. I am duly authorised to depose to this affidavit on behalf of the applicants.

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2. The facts set out in this affidavit are within my personal knowledge, except where the context indicates otherwise, and are true and correct.
3. Where I make submissions of a legal nature, I do so on the advice of my legal representatives, which advice I believe to be true and correct.

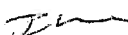
INTRODUCTION AND OVERVIEW

4. This is an application brought in terms of s 78(2) of the Promotion of Access to Information Act 2 of 2000 (“PAIA”) to set aside the refusal by the eThekweni Metropolitan Municipality’s deputy information officer (the first respondent) and the Municipality’s internal appeal authority (the second respondent) of two requests for information made by the applicants.
5. The applicants requested access to the atmospheric emission licences (“AELs”), and compliance reports relating to those licences, of the two petroleum refineries situated in the eThekweni Municipality: the Engen refinery (owned and operated by the third respondent) and the SAPREF refinery (owned and operated by the fourth respondent).
6. The Engen and SAPREF refineries are required to have AELs under the National Environmental Management: Air Quality Act, 2004 (“NEMAQA”), because they conduct “listed activities” (in terms of s 21 of NEMAQA), which are reasonably believed to result in harmful atmospheric emissions. The NEMAQA provisions requiring an AEL for listed activities (in terms of s 22 of NEMAQA) came into operation on 1 April 2010.

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7. Prior to that, the Engen and SAPREF refineries were required to have registration certificates for the conduct of "scheduled processes" under the Atmospheric Pollution Prevention Act 45 of 1965 ("APPA"). The registration certificates issued under the APPA remained valid until 1 April 2014. The APPA has been repealed by the NEMAQA, and its provisions are no longer operative.
8. The metropolitan and district municipalities are generally charged with implementing the atmospheric emission licensing system and performing the functions of the licensing authority. The applicants accordingly directed their information requests to the eThekweni Municipality, as the licensing authority for the Engen and SAPREF refineries.
9. The eThekweni Municipality's designated information officer refused both of the applicants' requests for information on the grounds of s 36(1)(a),(b) and (c) of PAIA. The refusals were upheld on appeal by the second respondent, on the grounds of s 36(1)(a) and (b) of PAIA.
10. The second applicant also directed a PAIA request for the same information to Engen and SAPREF, but no response was forthcoming from Engen and the request was refused by SAPREF.
11. Accordingly, the internal appeal process provided for in s 74 of PAIA has been exhausted, as have all other avenues for obtaining the requested information.
12. The structure of this affidavit is as follows:



- 12.1 The parties;
- 12.2 Standing and jurisdiction;
- 12.3 The laws regulating air pollution in South Africa;
- 12.4 The factual background;
- 12.5 The PAIA requests;
- 12.6 The grounds of refusal; and
- 12.7 The public interest override under s 46 of PAIA.

THE PARTIES

13. The first applicant is the **SOUTH DURBAN COMMUNITY ENVIRONMENTAL ALLIANCE** of 224 Austerville Drive, Austerville, Kwa-Zulu Natal ("**SDCEA**").

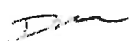
13.1 SDCEA is a non-profit, environmental justice organisation based in south Durban. It was formed in 1996 and is made up of 16 affiliate organisations. SDCEA engages in lobbying, reporting and researching industrial incidents and accidents in the south Durban area. It aims to help create awareness in the community around the health issues that confront the community members on a daily basis, and to fight to improve air quality within the area.

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- 13.2 In terms of its constitution, SDCEA aims, *inter alia*, to service the common interests of participating civil society organisations in the south Durban area; to provide a common structure through which different sectors of civil society can explore, strengthen and promote matters of common interest relating to environmental justice and sustainable development; and to create a culture of environmental justice and sustainability. A copy of its constitution is attached as "DD1".
- 13.3 SDCEA is registered under the Non-Profit Organisations Act 71 of 1997 with NPO number 028-964. By virtue of SDCEA's status as a registered non-profit organisation, it is an independent body corporate with the capacity to sue and be sued in its own name.
14. The second applicant is the **VAAL ENVIRONMENTAL JUSTICE ALLIANCE** of 54 Russels Building, President Kruger Street, Second Floor Room 24, Vanderbijlpark, Johannesburg ("**VEJA**").
- 14.1 VEJA is a non-profit, voluntary association established in 2005. The members of VEJA are non-profit, non-governmental and community-based organisations and volunteers operating in "the Vaal Triangle". This is an area of heavy industry and mining in the south of Gauteng, which straddles the tributaries of the Vaal River and includes Vanderbijlpark, Sasolburg and Vereeniging together with the smaller towns of Sharpeville, Boipatong, Bophelong, Sebokeng, Evaton, Orange Farm and Zamdela and Meyerton.

- 14.2 VEJA advocates for environmental justice and has as its objectives: promoting a culture of environmental awareness and sustainable development; performing an educational role; engaging with other role-players, including government, industry and commerce, to promote a healthy, safe and sustainable environment. VEJA places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices.
- 14.3 Under its constitution, VEJA has the capacity to sue and be sued in its own name. A copy of its constitution is attached marked "DD2". This constitution was adopted by VEJA's Steering Committee on 31 January 2015 and signed on the same date. VEJA has applied for registration in terms of the Nonprofit Organisations Act 71 of 1997, but the registration process has not yet been completed.
15. The first respondent is **THE DEPUTY INFORMATION OFFICER OF THE ETHEKWINI METROPOLITAN MUNICIPALITY** who is cited in his official capacity, at City Hall, Dr Pixley KaSeme Street (formerly West Street), Durban. He is cited in his official capacity, as the officer who decides whether requests for access to information, directed to the eThekweni Metropolitan Municipality in terms of PAIA, should be granted or refused, and who decided the PAIA requests made by the applicants at issue in this case.
16. The second respondent is **THE SPEAKER OF THE ETHEKWINI METROPOLITAN MUNICIPALITY ("THE SPEAKER")** who is cited in his



official capacity, at 1st Floor, City Hall, Dr Pixley KaSeme Street (formerly West Street), Durban. He is the relevant authority for the purposes of internal appeals against the decisions made by the Deputy Information Officer in respect of requests for access to information brought under PAIA.

17. The third respondent is **ENGEN PETROLEUM LIMITED**, a public company duly registered according to the laws of South Africa ("**Engen**") with registration number 1968/002086/06. Its head office is Engen Court, Thibault Square, Corner Riebeeck and Long Streets, Cape Town. Engen is cited for such interest as it may have in the relief sought by the applicants. No relief is sought directly against Engen, save for a costs order in the event of opposition.
18. The fourth respondent is **SHELL AND BP SOUTH AFRICAN PETROLEUM REFINIRIES (PTY) LTD ("SAPREF")**, a private company duly registered according to the laws of South Africa, with registration number 1960/000007/07. Its principal place of administration is Refinery Road, Prospecton, Durban. SAPREF is a joint venture between Shell SA Refining and BP Southern Africa. It is cited for such interest as it may have in the relief sought by the applicants. No relief is sought directly against SAPREF, save for a costs order in the event of opposition.

STANDING AND JURISDICTION

19. The applicants bring this application in their own interest, in the interests of their members as well as in the public interest in terms of section 38 of the

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Constitution of the Republic of South Africa ("**the Constitution**"), read with sections 24, 32 and 33 of the Constitution.

20. The Applicants further rely on the legal standing and protection afforded to them by section 32 of the National Environmental Management Act 107 of 1998 ("**NEMA**").

21. The High Court, KwaZulu-Natal has jurisdiction by virtue of section 78, read with the definition of "*court*" in section 1(b)(i)(cc) of PAIA on a series of bases, as:

21.1 The decisions to refuse access to information were taken within the jurisdiction of this Court;

21.2 The Municipality has its principal place of administration or business within the jurisdiction of this Court; and

21.3 SDCEA is ordinarily resident in Austerville, south Durban, KwaZulu Natal – within the jurisdiction of this Court.

THE LAWS REGULATING AIR POLLUTION IN SOUTH AFRICA

22. Before addressing the facts of the applicants' PAIA requests and refusals, it is necessary to explain the nature of the records requested. This requires some understanding of the legal framework regulating air pollution in South Africa.

The NEMAQA

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23. Amongst the many environmental permissions petroleum refineries require for lawful operation, all refineries must have an AEL issued in terms of s 40 of the NEMAQA. AELs must be obtained for the conduct of activities that are listed by the Minister or MEC in terms of s 21 of the NEMAQA. Section 21(1)(a) of the NEMAQA provides:

"The Minister must, or the MEC may, by notice in the Gazette –

(a) publish a list of activities which result in atmospheric emissions and which the Minister or MEC reasonably believes have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage".

24. The Minister has published a list of s 21 activities in the *Government Gazette*. The most recent list was published in GN893 in GG 37054 of 22 November 2013 ("**the Gazette Notice**"). Several of the industrial activities ordinarily conducted at the SAPREF and Engen refineries are listed in the Gazette Notice as "Activities which Result in Atmospheric Emissions which have or may have a Significant Detrimental Effect on the Environment, Including Health, Social Conditions, Economic Conditions, Ecological Conditions or Cultural Heritage". These activities fall under "*Category 2: Petroleum Industry, the production of gaseous and liquid fuels as well as petrochemicals, from crude oil, coal, gas or biomass*" and include the following subcategories:

24.1 combustion installations (subcategory 2.1);

24.2 catalytic cracking units (subcategory 2.2.);

24.3 sulphur recovery units (subcategory 2.3); and

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- 24.4 storage and handling of petroleum products (subcategory 2.4).
25. The atmospheric emissions caused by these activities are recognised to have significant detrimental effects on health and the environment. The activities are accordingly subject to minimum emission standards specified in the Gazette Notice, and to the licensing and emissions monitoring requirements set out in Chapter 5 of the NEMAQA and the Gazette Notice.
26. Under s 43 of the NEMAQA, the AEL must specify the conditions in terms of which the particular industry conducts its listed activities, including the period for which the licence is issued and when it may be reviewed; the maximum allowed amount, volume, emission rate or concentration of pollutants that may be discharged in the atmosphere (under normal working conditions and under normal start-up, maintenance and shut-down conditions); any other operating requirements relating to atmospheric discharges, including non-point source or fugitive emissions; and penalties for non-compliance.
27. The AEL must also specify requirements for emission measurement and compliance reporting by the licence holder. Section 43(1)(i) and (j) of NEMAQA thus provides that AELs must specify: "point source emission measurement and reporting requirements" and "on-site ambient air quality measurement and reporting requirements".
28. The Gazette Notice further specifies that AEL holders must submit emission compliance monitoring reports to the licencing authority annually, unless

otherwise prescribed in the AEL.¹ The contents of these reports are specified in paragraph 18 of the Gazette Notice, and must include:

- “(a) The name, description and license reference number of the plant as reflected in the Atmospheric Emission License.*
- (b) Where periodic emission monitoring is required for a listed activity, the report contemplated in paragraph (17) shall further include –*
 - (i) the name and address of the accredited measurement service-provider that carried out or verified the emission test, including the test report produced by the accredited measurement service-provider;*
 - (ii) the date and time on which the emission test was carried out;*
 - (iii) a declaration by the Atmospheric Emission License holder to the effect that normal operating conditions were maintained during the emission tests;*
 - (iv) the total volumetric flow of gas, expressed in normal cubic meters (Nm³) per unit time and mass flow (kg per unit time) being emitted by the listed activity or activities measured during the emission test, as the average of at least three (3) measurements;*
 - (v) the concentration or mass of pollutant for which emissions standards have been set in this Notice emitted by listed activity or activities as the average of at least three (3) measurements; each measured over a minimum sample period of 60 minutes and a maximum of 8 hours to obtain a representative sample, and*
 - (vi) the method or combination of methods used for determining the flow rate and concentration as contemplated in paragraphs (5); (6); and (7).*
- (c) Where continuous emission monitoring is required for a listed*

¹ Paragraph 17 of the Gazette Notice provides:

“Notwithstanding the compliance time frames established in terms of paragraphs (8); (9); and (10), the Atmospheric Emission License holder shall submit an emission report in the form specified by the National Air Quality Officer to the Licensing Authority -

- (a) within one (1) year of the date of publication of this Notice; and*
- (b) annually thereafter unless otherwise prescribed in the Atmospheric Emission License.”*

activity, the report contemplated in paragraph (17) shall further include –

- (i) results of the spot measurements or correlation tests carried out to verify the accuracy of the continuous emission measurements;*
- (ii) the most recent correlation tests; and*
- (iii) the availability of the system as contemplated in (15)(b) in terms of the number of full hours per annum that valid results were obtained.*
- (d) Following the compliance time frames established in terms of paragraphs (8); (9); and (10), an explanation of all instances where minimum emission standards were exceeded and remediation measures and associated implementation plans aimed at ensuring that the accidents do not re-occur.*
- (e) Any other relevant information as required by the National Air Quality Officer from time to time."*

29. The metropolitan and district municipalities are generally charged with implementing the AEL system under NEMAQA, and perform the functions of the licensing authority in their area of jurisdiction.² Accordingly, the AEL emission compliance monitoring reports must generally be directed to the municipality.

30. I point out that, under s 38(3) of NEMAQA, public participation is required for all applications for AELs. Section 38(3) was amended (under Act 20 of 2014, with effect from 19 May 2014) to provide that a copy of the AEL application must be made available to any interested persons. Section 38(3)(b)(iiA) was accordingly inserted to require an applicant for an AEL to indicate in the public notice of its application "where a copy of the application can be obtained".

² S 36 of the NEMAQA.

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31. Furthermore, the National Atmospheric Emission Reporting Regulations (published in GNR283, GG 38633 of 2 April 2015) now require all persons undertaking listed activities to register as data providers and to submit emission reports to an internet-based National Atmospheric Emission Inventory System (“NAEIS”).³ Failure to do so is an offence.⁴ The relevant authority (generally being the municipality in respect of s 21 listed activities) is authorised under regulation 12 to place the NAEIS data and information in the public domain, provided that it does not (a) promote unfair competition, (b) contravene s 36 of PAIA, or (c) contravene s 17 of the Statistics Act, 1999.

The APPA licensing regime

32. Under the Atmospheric Pollution Prevention Act 45 of 1965 (“APPA”) “registration certificates” (or permits) were previously required for the conduct of “scheduled processes” listed in the Second Schedule to the APPA.⁵ The scheduled processes included sulphide processes, hydrocarbon refining processes and hydrofluoric acid process (listed as scheduled processes 8, 14 and 21 of the Second Schedule), which are ordinarily conducted by petroleum refineries.
33. APPA was repealed by NEMAQA with effect from 1 April 2010.⁶ However, in terms of section 61 of NEMAQA, all APPA registration certificates remained valid until 1 April 2014, provided that, by 31 March 2013, all industries with

³ Regulations 5 and 8 National Atmospheric Emission Reporting Regulations GN R283, 2015.

⁴ Regulation 13.

⁵ Section 9 APPA.

⁶ Section 60 NEMAQA.

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APPA registration certificates had applied for their renewal. If such renewal application succeeded, the industry would be granted an AEL. This is often referred to as the process of "converting" APPA registration certificates to AELs.

34. The change in the atmospheric emissions licensing regime was precipitated by concerns over, amongst other things, the inadequacy of emissions standards and lack of transparency in decision-making under the APPA.

FACTUAL BACKGROUND

35. The South Durban Basin, which falls within the eThekweni Municipality, has been recognised as an air pollution "hotspot" by national government. It is recognised as one of the most highly industrialised and heavily polluted areas in the country.
36. The high level of air pollution in the South Durban Basin is attributable, in significant measure, to the Engen and SAPREF petroleum refineries. The other main contributing industries and factors are the emissions of the AECI Chemical Company Group and Mondi Paper Company, motor vehicle emissions and the domestic burning of fossil fuels.
37. To appreciate the importance of, and public interest in, the disclosure of the AELs and compliance reports requested by the applicants, I detail in this section:

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- 37.1 The nature of the air pollution caused by the Engen and SAPREF refineries;
- 37.2 The history of air pollution in the eThekweni Municipality, and the impact on the health of the surrounding communities; and
- 37.3 The importance of community awareness and civil society involvement for effective air pollution control.

The air pollution caused by the Engen and SAPREF refineries

38. Petroleum refineries convert crude oil and other substances such as coal into fuel, namely petrol, diesel and paraffin. In simple terms, this process entails inter alia, heating and various other chemical reactions, which result in the emission of gases such as sulphur dioxide and nitrogen oxide as well as metals such as lead and small dust particles.
39. As part of the abovementioned process, the SAPREF and Engen refineries directly emit sulphur dioxide (SO₂), particulate matter 10 (PM₁₀),⁷ nitrous oxides (NO_x), including nitrogen dioxide (NO₂), hydrogen sulphide (H₂S) and total volatile organic compounds (TVOC), including benzene.

⁷ Particles smaller than 10 micrometres in diameter.

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40. In addition, the refineries' emissions give rise to further secondary pollutants. For instance, SO₂ and NO_x give rise to particulate matter 2.5 (PM_{2.5}),⁸ and TVOC and NO_x emissions contribute to the formation of ozone.
41. The World Health Organisation's *Air Quality Guidelines for Particulate Matter, Ozone, Nitrogen Dioxide and Sulphur Dioxide Guidelines*, attached hereto as "DD3" describes the health effects of these pollutants. Of particular relevance are the health effects of SO₂, PM and NO_x which are commonly emitted by the Engen and SAPREF refineries. These pollutants are all shown to have serious detrimental health effects, predominantly to the respiratory and cardiovascular systems.
42. Section 9 of the NEMAQA empowers the Minister to identify a national list of pollutants in the ambient atmosphere which present a threat to human health, well-being or environment, and to establish acceptable ambient air quality standards for such pollutants. Eight such pollutants have been identified to date: these include SO₂, PM_{2.5}, PM₁₀, NO₂ and benzene – all of which are emitted into the ambient atmosphere by petroleum refineries. Ambient air quality standards have been established and gazetted for all of these pollutants (GN 1210, GG 32816 of 24 December 2009 and GN 486, GG35463 of 29 June 2012).⁹
43. In addition to the atmospheric emission of pollutants caused by the Engen and SAPREF refineries' daily operations, there have been several incidents of

⁸ Particles smaller than 2.5 micrometres in diameter.

⁹ The latter Government Notice addressed the air quality standards applicable to PM_{2.5} pollutants.

fires and flaring at the Engen and SAPREF refineries over the years, which have resulted in heavy atmospheric emissions of fumes and smoke. These emissions have also impacted detrimentally on the quality of air in the surrounding area.

- 43.1 The Air Quality Management Plan for the eThekweni Municipality, 2007 (the relevant parts of which are attached marked "DD4") described the problem at p. 70:

"Over the last few years there have been numerous complaints of excessive flaring emissions from the two Durban refineries (Sapref and Engen, 60 % of national capacity). Flaring accounts for a significant proportion of air pollution complaints. For example, in the South Durban Basin (SDB), flaring accounts for 10% of pollution related complaints. At present, flaring emissions are poorly monitored or not monitored at all. Flaring pollutant emission rates and composition (toxicity) are essentially unknown, hence the environmental and health impact of these emissions are unknown.

What is known is that the flares of VOCs have emissions of soot in the form of particles, NO_x, SO₂, PAH and other substances. The flaring is also connected to odours down wind of the flares. This is especially when the flare is low and H₂S is in the gas that is flared. The concentration of H₂S is important. If the energy that of the flare is low the plume rise low. If this gas contains smelling substances odours are likely to arise because of poor combustion and that the flare is not designed for the low flowrate that is used. If the amount of flared gas is high the exhaust gas will have a substantial plume rise and the impact from the flaring will be quite some distance from the SDB. The air pollution will rise but this may be caused by recirculation or other sources to air pollution than flaring. This means that it is the small flares that are causing the largest air quality problem in SDB. To improve the impact to Air Quality from flaring focus should be kept on these incidents and not the large and famous incidents."¹⁰

¹⁰ eThekweni Metropolitan Municipality AQMP, 2007, p. 70.

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- 43.2 A record of the numerous polluting incidents which occurred at the Engen and SAPREF refineries between 1994 and 2011, compiled by the SDCEA, is attached marked "DD5". Also attached, as annexure "DD6", are several newspaper articles reporting on these incidents.
44. The Engen and SAPREF refineries have also been listed in the National Environmental Compliance and Enforcement Reports ("NECER") for non-compliance with environmental laws. These reports are published annually by the Department of Environmental Affairs ("DEA") to provide an overview of environmental compliance and enforcement measures taken by the various environmental authorities over the period of the financial year. The 2009-2010 and 2011-2012 NECERs cite the Engen and SAPREF refineries for non-compliance with environmental law obligations, including atmospheric emission licence conditions. Copies of the relevant pages of the NECERs are attached as annexure "DD7":
- 44.1 The 2009-10 NECER reported non-compliance by the SAPREF Refinery with conditions in its APPA permits, including lack of records to verify compliance with the emission limits. The Engen Refinery was reported, amongst other breaches, to have failed to submit certain reports.
- 44.2 While the 2010-11 NECER reported that the SAPREF and Engen Refineries had adequately addressed the DEA's concerns by furnishing the required information (although no further inspections were done), the 2011-2012 NECER reported that, for the Engen

Refinery, "Although it was reported in the previous NECER that no significant issues remained that justified the need for an enforcement intervention based specifically on the findings of the 2008 inspection, through the quarterly compliance meetings, the authorities have become concerned by the ongoing Section 30 emergency incidents taking place at the facility. Accordingly a pre-directive was issued to Engen Refinery by the KZN-DAEARD [KZN Department of Agriculture, Environment and Rural Development] in November 2011..."

The history of harmful air pollution in the eThekweni Municipality

45. A 2007 case study report, commissioned by the then Department of Environment and Tourism ("DEAT") on the implementation of air quality management planning in the South Durban Basin (attached marked "DD8"), describes the area and recent initiatives taken to address its high air pollution levels. The report explains:

"The South Durban Basin (SDB) is an area approximately 4 km wide and 24 km long, extending from the Durban Central Business District (CBD) southward to Umbogintwini. It contains a mixture of industrial (including heavy industry, chemical storage facilities, sewage works and a number of smaller industries) and residential areas in close proximity to one another. This was allowed to develop as a result of poor planning practices. The SDB is also a focal point of major transport routes, including highways, a harbour and an international airport. Topographical and meteorological complexities result in poor horizontal and vertical dispersion of pollutants, particularly during winter periods.

Communities in the SDB started to express concern about deteriorating air quality as far back as the 1960s, and efforts intensified in the 1980s and 1990s as air quality deteriorated even further. Persistent complaints to government about high pollution levels, odours, chemical

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leaks, flares, visible emissions and health complaints ultimately led to a national response. The (then) Minister of Environmental Affairs & Tourism, Mr Mohammed Valli Moosa, decided that "the peculiarities and worrying levels of pollution in the South Durban area warranted a singular and coordinated approach from government." Various issues of concern were debated between representatives of government, industry and community and a way forward to addressing the pollution "hot spot" problem was formulated. Subsequent to that the South Durban "Multi-Point Plan" was officially announced by Minister Moosa on 27 November 2000.

46. In an effort to address the high levels of air pollution in the area, the South Durban Basin Multi-Point Plan ("MPP") was initiated in late 2000, as a multi-stakeholder plan of action to reduce the air pollution levels in the area. The MPP was endorsed by Cabinet, and was allocated funds by national government.¹¹
47. The MPP comprised of several components, including: a commissioned health risk assessment and epidemiological study of exposure to air pollution in the area; the phasing out of dirty fuels; the establishment of an Air Quality Management System, under the control of the eThekweni Municipality (utilising numerous 'hotspot' air pollution monitoring stations); and the control of chemical and fugitive emissions of Volatile Organic Compounds (such as benzene).¹²
48. A key element of the MPP was multi-stakeholder engagement. Two panels were established under the MPP, and required to meet every two months: (i) the South Durban Inter-governmental Coordinating Committee, consisting of

¹¹ The DEAT, South Durban Basin Multi-Point Plan Case Study Report, 2007, p. 13, para 13.5: Legislative and Regulatory Context and Funding.

¹² At pp. 14-20, paras 4.1-4.9.

representatives from national, provincial and local government and interested departments; and (ii) the South Durban Basin Stakeholders Consultative Forum, which included representatives from the eThekweni Municipality, the community (represented by the SDCEA), labour, industry and business.¹³

49. The 2007 report on the MPP (annexure "DD8"), describes various improvements in air pollution monitoring, stakeholder and community engagement, and in the reduction of certain emission levels – most notably, a 40% reduction in sulphur-dioxide emissions.¹⁴ However, the report recorded a number of "outstanding issues". These included:¹⁵

- *"There remain challenges in terms of short term exceedances (10 minute and 24-hour averaging interval) for SO₂..."*;
- *"Reductions have occurred in respect of a few aspects out of a whole host of other pollutants. There has been an emphasis on SO₂ and it has been an important starting point. There now needs to be a shift in focus to other pollutants in the SDB. More recently benzene, NO₂ and PM₁₀ are undergoing increased analysis";*
- *"Data shows that PM₁₀ has not been as responsive as SO₂ concentration in terms of the emission reductions achieved...."; and*
- *"There are gaps in the modelling and the model hasn't really been tested. The modelled averages are on average 75% of the measured concentrations. The timing of the concentrations and transport of the pollutants is good, but the level is generally too low. This could be caused by two things: the dispersion is too fast or the emissions are estimated poorly. It is probably a combination of the two..."*

50. The health risk assessment study commissioned as part of the MPP (**"the South Durban Health Study"**) was conducted between May 2004 and

¹³ At p. 2, para 3.4.

¹⁴ At p. 30, para 8.1.

¹⁵ At pp. 30-31, para 8.3.

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February 2005. The final report was completed in July 2006, and the findings were published in February 2007. A copy of the executive summary of the final report of the Health Study and a summary of its findings are attached marked "DD9". I also attach, marked "DD10", a peer-reviewed journal article by the authors of the study, which describes the methodology and results ('Ambient pollution and respiratory outcomes among schoolchildren in Durban, South Africa, *South African Journal of Child Health* (2013) 7(4): 127-134).

51. As appears from the executive summary, the study (conducted by the Centre for Occupational and Environmental Health at the University of KwaZulu-Natal and the Department of Environmental Health Sciences at the University of Michigan) entailed monitoring of a population-based sample of 422 school children, at four primary schools in south Durban and three primary schools in north Durban. The study consisted, amongst other aspects, of four intensive 3-week phases where air pollutant exposures were monitored with simultaneous bihourly lung function assessments of students while at school.
52. The findings of the South Durban Health Study provide evidence that the levels of air pollution in the south Durban basin cause acute adverse effects among susceptible children, and suggest that industrial pollution (including that of the Engen and SAPREF refineries) impact on the respiratory health of children in the area. The executive summary records that:

"In summary, we found that relatively moderate ambient concentrations of NO₂, NO, PM₁₀ and SO₂ were strongly and significantly associated

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with decrements in lung function among children with persistent asthma and/or genetic polymorphisms associated with reduced ability to respond to oxidative stress. Moreover, attending primary school in south Durban, as compared to the north, was significantly associated with increased risk of persistent asthma and for marked airway hyperreactivity in covariate-adjusted regression models. For adults, residing in the south was significantly associated with hayfever, and marginally associated with chronic bronchitis, wheezing and shortness of breath, and hypertension."

53. While the South Durban Health Study focused on the links between the air pollution in the area and respiratory health, it also recorded substantial levels of carcinogens (including volatile organic compounds, especially benzene) in the ambient air, and the estimated lifetime cancer risk at three sites sampled were well above guideline levels. The study recommended that measures to reduce emissions of carcinogens were warranted and that a separate study on cancer risks was required. The study further noted (at p. 74) that *"health-based standards and guidelines are exceeded for multiple pollutants:*

- *Particulate matter: Both PM10 and PM25 frequently exceeds short- and long-term standards and most or all sites in eThekweni, including the 5 sites operated by the Metro and the 7 school-based sites established for this study. PM is associated with a range of adverse acute and chronic health effects, including respiratory hospital admissions, bronchodilator use, cough and lower respiratory symptoms, changes in peak expiratory flow, cardiovascular stress, and mortality.*
- *SO2: While concentrations have come down from historical highs, SO2 continues to frequently exceed short-term standards and guidelines in the DSIB [Durban South Industrial Basin] area. SO2 peaks of 1-hr duration can adversely affect lung function ... SO2 exposure over a 24 hour period has been shown to affect mortality (total, cardiovascular and respiratory) and hospital emergency admissions for total respiratory causes and chronic obstructive pulmonary disease."*

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54. In April 2007, the eThekweni Municipality published its Air Quality Management Plan ("AQMP", the relevant pages are attached as annexure "DD4"), as required under section 15 of NEMAQA. The AQMP summarised the air pollution problems in the region, and identified the priority areas for the Municipality, which included: emissions of sulphur dioxide, PM10, flaring from refineries, and benzene (p. 47).

54.1 The AQMP confirmed that "*Generally there has been a 45% reduction in SO2 emissions from various sources in eThekweni from 1997-2006*". However, it noted that there remained "*exceedance of the legislation for short term averages*", and that "*The concentration of SO2 is highest in the industrialised areas where emissions of SO2 are highest (the Refinery corridor Engen, Sapref and Mondi, Mobeni and Jacobs)*" (p. 12).

54.2 A table on p. 13 of the AQMP records that, in 2005, the highest SO2 emitters, by far, were the Engen and SAPREF refineries, each emitting over 17.8 tons of SO2 per day and more than 300,000 tons per year.

54.3 Benzene, nitrogen dioxide and hydrogen sulphide concentrations were noted to be particularly concentrated in "the refinery corridor" and around petroleum storage and processing sites (pp. 12, 14-18, 50-56).

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55. Despite the Municipality's initiatives under the MPP and AQMP, air pollution in the eThekweni Municipality, and within the South Durban Basin in particular, remains a serious concern. The poor state of the air quality in the eThekweni Municipality has been repeatedly recognised and reported in the National Air Quality Frameworks:

55.1 After the partial entry into effect of the NEMAQA in 2005, and the subsequent development of the 2007 National Framework for Air Quality Management, the Department of Environmental Affairs attempted to identify areas of concern within the Republic with emphasis mostly on Metropolitan and District Municipalities. In doing so, the DEA developed "table 24" of the 2007 National Framework. The National Framework classified municipalities as either: (i) Acceptable - generally good air quality; (ii) Potentially Poor - air quality may be poor at times or deteriorating; or (iii) Poor - ambient air quality standards regularly exceeded. The eThekweni Metropolitan Municipality was classified as "poor".¹⁶

55.2 The 2012 National Framework for Air Quality Management records the continued classification of eThekweni Metropolitan Municipality as having "poor" air quality.¹⁷

55.3 Copies of the relevant pages of these documents are attached marked "DD11".

¹⁶ 2007 National Framework for Air Quality Management, table 24, p. 47.

¹⁷ 2012 National Framework for Air Quality Management, table 18, p. 54.

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56. The ambient air quality in the South Durban Basin is documented in Quarterly Air Quality Monitoring Reports issued by the eThekweni Municipality, as well as in annual reports issued by the National Air Quality Officer.¹⁸ While these reports evidence some improvement in the region's air quality, they also document that air pollution continues to remain a problem in the region.
57. This includes in the monitored areas close to the Engen and SAPREF refineries, namely Settlers and Southern Works. I attach, marked "DD12", a map which indicates the position of these monitoring stations in relation to the two refineries. The map is taken from a power-point presentation made by the eThekweni Municipality to stakeholders in 2014.¹⁹
58. For instance –
- 58.1 As regards, sulphur dioxide pollution: While there has been a significant reduction in SO₂ levels, harmful exceedances are still periodically reported at monitoring stations located near the Engen and SAPREF refineries (i.e. the Settlers and Southern Works monitoring stations).
- 58.1.1 The 2009 eThekweni Air Quality Monitoring Network Annual Report attributed exceedances in SO₂ emissions, recorded at Settlers, to the Engen and SAPREF refineries,²⁰ and

¹⁸ These reports are available online, at the South African Air Quality Information System website: <http://www.saaqis.org.za/Downloads.aspx?type=AQ>.

¹⁹ 'Current State of Air Quality in South Durban Basin', eThekweni Municipality presentation for stakeholder engagement (19 September 2014), p. 9.

²⁰ eThekweni Air Quality Monitoring Network Annual Report 2009, p. 4.

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noted that *"the highest SO₂ concentrations measured at Southern Works was from the direction of Mondi and Sapref. Similarly, the highest SO₂ concentrations measured at Settlers was from the direction of Engen and some contribution from the Jacobs area and Sapref... the industries from the SDB are the major source of SO₂ emissions"*.²¹

- 58.1.2 The 2013 quarterly eThekweni Ambient Air Quality Monitoring report, and a 2014 presentation by the eThekweni Municipality also records exceedances of SO₂ at the Settlers monitoring station (from 2006 to 2013) and at the Southern Works monitoring station (from 2006 to 2010 and 2012).²²
- 58.1.3 The 2014 State of the Air Report includes a graph showing the 9-year trend for SO₂ emissions in eThekweni from 2004 to 2013. The graph shows that while SO₂ levels have remained below the annual standard, the recorded levels are erratic from year to year, with the 2013 levels recorded at Southern Works (in the refineries' vicinity) being no better or worse than the 2008-2011 levels.²³

²¹ EThekweni Air Quality Monitoring Network Annual Report 2009, p. 5.

²² EThekweni Quarterly Ambient Air Quality Monitoring Report Q4 2013, p 3; and 'Current State of Air Quality in South Durban Basin', eThekweni Municipality presentation for stakeholder engagement (19 September 2014), pp. 19 and 20.

²³ 2014 State of the Air Report and National Air Quality Indicator, p 10.

58.1.4 To avoid unduly burdening these papers, I attach copies of only the relevant pages of these reports (with cover page), marked "DD13.1".

58.2 As regards nitrogen dioxide pollution: A 2014 presentation by the eThekweni Municipality, entitled 'Current State of Air Quality in South Durban Basin', contains a graph showing the annual averages of NO₂ emissions from 2004 to 2013. There is little change in NO₂ concentrations in the SDB in recent years. With regard to Southern Works in particular, the ten years from 2004 to 2013 have seen an increase in concentrations, with the level in 2013 exceeding the National Ambient Air Quality Standard ("NAAQS").²⁴ A copy of this graph is attached marked "DD13.2".

58.3 As regards Benzene pollution:

58.3.1 The 2013 Quarterly eThekweni Ambient Air Quality Monitoring Report notes that, although below the NAAQS applicable at the time, in June and July 2013 levels were above the new standards applicable from 1 January 2015.²⁵

58.3.2 The 2012-2013 NAQO report also noted that "Urgent action is required to minimise the benzene concentrations at several of the sampling points. Many of the sites will not

²⁴ 'Current State of Air Quality in South Durban Basin', eThekweni Municipality presentation for stakeholder engagement (19 September 2014), p. 22.

²⁵ EThekweni Quarterly Ambient Air Quality Monitoring Report Q4 2013 at p 12.

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comply with the stricter standards that will be effective from the 1 January 2015".²⁶

58.3.3 The 2014 eThekwini presentation contains a graph showing the annual benzene levels measured at the Settlers monitoring station from 2011 to 2013. This shows a marked increase in the benzene averages for 2012 and 2013, and demonstrates how close these averages were to exceeding the new NAAQS for benzene applicable from 1 January 2015.²⁷

58.3.4 The relevant pages of these reports are attached marked "DD13.3".

58.4 As regards Particulate Matter pollution: A graph in the 2014 State of the Air Report, which displays the 9 year trend for PM10 in eThekwini, shows that in 2013, while there has been a general decline (particularly from 2008), one monitoring station (Ganges) exceeded the 2015 NAAQS and in a number of previous years that standard was exceeded also.²⁸ The PM annual averages from 2004 to 2013

²⁶ National Air Quality Officer Report 2012-2013, at p.14.

²⁷ 'Current State of Air Quality in South Durban Basin', eThekwini Municipality presentation for stakeholder engagement (19 September 2014), p. 27.

²⁸ State of the Air Report 2014, at p 9.

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are also graphically represented in the 2014 eThekwini presentation.²⁹

A copy of the graphs in these reports are attached marked "DD13.4".

The importance of community awareness and civil society participation in effective air quality governance

59. The importance of community awareness and civil society participation for the effective reduction of air pollution levels, was demonstrated in the implementation of the South Durban Basin's MMP. The DEAT's 2007 report on the MPP initiative (annexure "DD8") recognised the critical importance of the multi-stakeholder approach, transparency and community engagement for its successful implementation. It noted that:

"A critical component in the implementation of the MPP has been the multi-stakeholder involvement. The MPP represents a significant departure from the planning and implementation processes of the past, one of the key features being the facilitation of multi-stakeholder co-operation, thus ensuring that the concerns of all interest groups are appropriately raised, heard and dealt with" (South Durban Basin MPP Newsletter No. 2, July 2003). Each element of the MPP has been based on transparent planning to ensure industry and community are democratically involved in the process. This is essential to the challenging task of managing sustainable industrial development in the SDB [South Durban Basin], while at the same time endeavouring to improve air quality. Thus, government, community and industry are given the opportunity to constructively work together towards a common goal." (Para 3.4, p. 12)

60. The eThekwini Municipality's AQMP (annexure "DD4") records a clear commitment to promoting stakeholder engagement, including through "an

²⁹ 'Current State of Air Quality in South Durban Basin', eThekwini Municipality presentation for stakeholder engagement (19 September 2014), p 26.

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active information dissemination strategy". It describes the strategy and its importance as follows:

"An active information dissemination strategy, using the internet (etc., such as active dissemination methods to persons, using SMS, e-mail ('push' methods)

The strategy involves many stakeholders and that they work together towards a common goal. This means that the flow of information should be one of the main activities. This means that the identified stakeholders and others that is interested in getting information should have this readily available. There should be different information channels that the stakeholders could choose from. This should be possible to subscribe to different services according to interest and needs. The information should contain both pull and push services" (Para 3.3, p. 24);

and

"The air quality management plan has as one of its fire engines the centrality of stakeholder involvement. Stakeholders map the way forward and ensure there is continual improvement. For meaningful stakeholder participation there has to be an effective communication strategy. Existing means of conveying information and knowledge on air quality to stakeholders has brought some results but this has a very narrow focus. The idea is to reach out to the broader society as air quality affects all citizens in the eThekweni. So the strategy [will] have two approaches.

The first approach is to ensure existing strategies involving information dissemination and reporting (push and pull factors) are made more effective. This strategy must also overcome the challenges to successful information communication by:

- (iv) broadening the dissemination of the results of data collection and processing,*
- (ii) the data generated must be transformed into information that can be directly used by decision-makers, and*
- (iii) the information must be easy to understand and act upon,*
- (iv) the information must be readily available in the adequate form.*

The second long range approach aims to have a societal level impact. First this would have to overcome some of the challenges in communicating information to society. There is a need to reach out by

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breaking the barriers: the barrier is two fold: information (technical) and psychological. People are receptive to change when they have a problem. Problems are understood when there is good information to explain the nature of the problem and its root cause. An example of this could be when mothers are informed that children are more vulnerable if exposed in a polluted area and they are more vulnerable due to their higher metabolic rate than adults.

The goal is push out information to encourage participation and engagement and to seek the information that flows from them. The feedback processes will inform governmental plans to improve the environment.” (p. 74)

61. The 2012 National Air Quality Framework, which revises and amends the 2007 National Framework for Air Quality Management, underscores the importance of community involvement and, in particular, of public access to information. The Framework states that:

“5.4.2 Awareness-raising

The AQA does not provide specifically for awareness-raising activities, however, awareness-raising is one of the strategies identified in the air quality governance cycle depicted in Figure 1 aimed at addressing air pollution problems. In contrast to the formulation of policy and legislation, and the setting of norms and standards, awareness-raising aims to bring about positive changes in air quality by voluntary rather than forced means. Improvements in public knowledge through environmental education, sharing of knowledge and experience, and access to information, can lead to voluntary changes that are often more sustainable than forced changes initiated by legislation.

Awareness-raising is directly linked to two of the cross-cutting issues in the National Framework, namely capacity development (See paragraph 5.9.2) and information dissemination (See paragraph 5.9.3). By raising awareness, community well-being and empowerment is promoted and a contribution is made to capacity development. It is important to recognise the value and potential of well-informed and committed citizens for effecting positive change in air quality. Meaningful public involvement in air quality management issues will be strongly encouraged (See paragraph 5.9.1). Access to information is a key factor in raising awareness and increasing the knowledge of the public (See paragraph 5.2.1).

Strategies to raise awareness will emphasise the adverse impacts of

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air pollution, climate change and ozone layer protection, human health and the environment; and the benefits of clean air. All spheres of government have a responsibility to raise awareness around air quality issues amongst the public, the private sector and their own departments...."

62. The 2012 National Framework for Air Quality Management also expressly recognises that –

"The public and civil society groups... have an important watchdog role to play in bringing to the attention of the authorities through their municipal AQO [Air Quality Officer] matters of concern or of non-compliance" (para 3.5);

and

"Government plays a crucial role in achieving and maintaining clean air in South Africa, but it cannot reach this goal alone. Active participation and contributions from individual citizens and citizen groups is of utmost importance in developing, implementing and enforcing air quality management decisions within the context of the AQA. The potential benefits of public participation are numerous. If well planned and managed, public participation can bring new and important knowledge to the table, mediate conflicting perspectives early in the process and facilitate more efficient air quality governance. Equally important, public participation in air quality management plays a vital role in strengthening and deepening democracy in South Africa and giving effect to the constitutional right to an environment which is conducive to health and well-being." (para 5.9.1.1).

63. I attach copies of the relevant pages of the 2012 National Framework as annexure "DD14".
64. Despite the precedent of the MPP and promulgated environmental management principles, the applicants have battled to obtain the AEL records and compliance reports for petroleum refineries. These records are necessary

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for community representatives and civil society groups, such as the applicants, to play an informed and constructive role in air quality governance.

65. In 2013, VEJA launched a strategic project to evaluate compliance by the petroleum refineries in South Africa with their environmental law, particularly air quality, obligations. This project entailed, amongst other things, the gathering of information on the operation and emissions of South Africa's petroleum refineries by submitting requests for information under PAIA.
66. From April to December 2013, VEJA made PAIA applications for access to the atmospheric emission licences and compliance reports (under the NEMAQA and APPA) of all six petroleum refineries in the country. In addition to the Engen and SAPREF refineries in south Durban, these are: Chevron South Africa (Pty) Ltd refinery in Cape Town, Western Cape; National Petroleum Refineries of South Africa (Pty) Limited refinery co-owned by Sasol Limited and Total South Africa (Pty) Limited, in Sasolburg, Free State; Sasol Limited Secunda refinery, in Secunda, Mpumalanga; and PetroSA (Pty) Limited refinery, in Mossel Bay, Western Cape.
- 66.1 On 10 April 2013, VEJA submitted a PAIA request to the DEA in respect of all six refineries. On 7 May 2013 the DEA transferred the PAIA request submitted to it to the relevant municipal licensing authorities of eThekweni, Fezile Dabi, City of Cape Town, Gert Sibande and Eden District municipalities, in terms of section 20 of PAIA.

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- 66.2 During 2013, VEJA also made separate PAIA requests to the relevant municipalities responsible under the NEMAQA for the licencing and monitoring of compliance of the refineries in their area of jurisdiction.
- 66.3 In December 2013, VEJA submitted further PAIA requests to four of the refineries directly. These included requests to the Engen and SAPREF refineries, both of which were sent on 10 December 2013. Copies of these requests are attached marked "DD15".
67. The result of these requests was as follows:
- 67.1 The City of Cape Town Metropolitan Municipality granted full access as requested. It disclosed the APPA registration certificate for the Chevron Refinery in Cape Town, a copy of its AEL application, and Chevron's 2011 and 2012 annual compliance reports submitted in terms of APPA. (The City of Cape Town subsequently disclosed the AEL for the Chevron refinery, following a PAIA request made by groundWork on 20 August 2014.)
- 67.2 VEJA also received redacted copies of AELs and redacted copies of compliance reports in respect of the National Petroleum Refiners of South Africa (Pty) Ltd ("Natref") Refinery in Sasolburg, the Sasol Secunda Refinery in Sasolburg, and PetroSA's Refinery in Mossel Bay. (The applicants subsequently obtained a complete and unredacted copy of Natref Refinery's annual emissions report from the



website of Natref's environmental consultants, SRK Consulting (Pty) Ltd.

- 67.3 The PAIA requests that VEJA submitted to the eThekweni Municipality for the Engen and SAPREF refineries were both refused in their entirety by the first and second respondents, as detailed below.
- 67.4 As regards VEJA's PAIA requests to Engen and SAPREF, VEJA received no response from Engen, and received a refusal from SAPREF on the basis of section 68(1)(a),(b) and (c) of PAIA. A copy of SAPREF's refusal is attached marked "DD16".
68. For its part, the SDCEA has sought to participate meaningfully in a number of local environmental governance initiatives aimed at addressing the air quality problems caused by industry in south Durban. However, a lack of access to information and a lack of transparency by industry and the eThekweni Municipality have hampered these initiatives.
- 68.1 The SDCEA have participated in stakeholder engagement meetings in respect of the AEL applications of various industries in the south Durban area, including Engen and SAPREF. During these processes SDCEA requested access to the licence application documents on which eThekweni's decisions were based. However, eThekweni Municipality and industry have refused to make this information available.

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68.2 At a joint meeting between stakeholders, the eThekweni Municipality and other government representatives on 16 September 2014, it was agreed that meetings would be held once a month to provide requested information. Pursuant to this agreement, meetings were held in October and November 2014 respectively. However, since then no further meetings have taken place, nor has any information been shared with stakeholders as agreed.

68.3 SDCEA attended a meeting with industry and government in respect of the Cutler Complex in the Durban Harbour, on 20 October 2014, yet the relevant authorities and industries refused to make any information concerning AELs and compliance reports available.

69. Against this background, we address the applicants' PAIA requests directed to the eThekweni Municipality and the responses thereto.

THE PAIA REQUESTS

The VEJA request and its refusal

70. On 10 April 2013, the Centre for Environmental Rights ("the CER") submitted a request for access to information on behalf of VEJA, in terms of s 18(1) of PAIA, to the eThekweni Municipality ("the VEJA request"). A copy of the request (Form A) is attached as "DD17".

71. The VEJA request sought the following information:

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- 71.1 The AELs for the SAPREF and Engen petroleum refineries, alternatively (if the AELs had not been granted) a copy of the applicable APPA permits and the pending application for an AEL; and
- 71.2 The most recent annual reports reporting on compliance with the AELs submitted to eThekweni for the above refineries, alternatively (if there had not been reports on compliance in terms of the relevant AELs or if the AELs had not yet been granted) the most recent APPA permit compliance reports.
72. Before responding to the request, the eThekweni Municipality sought two extensions and confirmed that notice of the request had been sent to both Engen and SAPREF on 4 June 2013, in terms of s 47 of PAIA. Copies of the correspondence in this regard are attached marked "DD18".³⁰
73. The Deputy Information Officer refused the request on 3 July 2013. A copy of the notice of refusal is annexed hereto marked "DD19". The notice recorded only that "*The refusal is based on section 36 of the Act*" (with the provisions of section 36 (1)(a), (b) and (c)(i) and (ii) of PAIA quoted in full). No further explanation for the refusal was given.

³⁰ Section 47 of PAIA places an obligation on an information officer to inform a third party to which/whom a requested record relates, of the PAIA request, if such record might constitute trade secrets, information supplied in confidence or otherwise fall within the grounds of refusal provided for in PAIA. The third party, once informed, is then entitled, within 21 days, to make representations as to why the request should be refused or to give written consent to the disclosure of the record.

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The VEJA internal appeal

74. On 30 August 2013, the CER lodged an internal appeal against the refusal. The VEJA notice of internal appeal is attached as "DD20". The appeal was brought on the following grounds:

- 74.1 In refusing to grant the request, the eThekweni Municipality had failed to apply its mind to the request (paragraphs 15.1, 16 and 17);
- 74.2 The eThekweni Municipality had not appropriately interpreted PAIA so as to promote transparency and in favour of disclosure (paragraphs 15.2, 18 to 23);
- 74.3 The eThekweni Municipality had not discharged its onus of proof (paragraphs 15.3, 25 to 32);
- 74.4 The documents requested did not fall within the scope and ambit of section 36(1) and can therefore not be refused on these grounds (paragraphs 15.4, 33 to 47);
- 74.5 Even if it were accepted that some or all of documents did fall within the scope and ambit of section 36(1) of PAIA (which it is not), the request ought nevertheless to have been granted in the public interest in terms of s 46 of PAIA, and eThekweni Municipality ought to have relied on s 28 of PAIA to sever any protected information and disclose the rest (paragraphs 15.5, 48 to 56);

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74.6 eThekweni Municipality had failed to give adequate reasons for the refusal, and thus did not comply with s 25(3) of PAIA (paragraphs 15.6, 57 to 58).

75. After an extensive delay, and repeated requests for the decision from the CER, the appeal decision was received on 21 October 2014. The appeal decision (dated 15 October 2014) is attached marked "DD21". The Speaker upheld the Deputy Information Officer's decision to refuse access, and provided the following reasons for the decision:

- "5.1. I am satisfied that the relevant officials involved in the handling of this application have duly applied their minds to the request and have appropriately interpreted not only the PAIA but also the general spirit of the Act.*
- 5.2. The information requested by the requester contains information relating to confidential operations and technology of the third parties; this information is commercially sensitive. Its disclosure may cause harm and prejudice to the operations of the two third parties.*
- 5.3. The requested information fall [sic] within the ambit of section 36(1)(a) and (b) of PAIA and therefore the record cannot be disclosed.*
- 6. I am mindful of the overriding provisions of sections 46 of PAIA. I have not been advised in what respects the disclosure of the record would reveal substantial contravention of the law or an imminent and serious threat to public safety or environmental risk. The submissions by the requester do not substantiate enough public interest element they seek to rely on in asking for the override powers of section 46 to be invoked I accordingly rule against invoking the said provision."*

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The SDCEA request and internal appeal

76. On 29 October 2014, the CER submitted a PAIA request to eThekweni Municipality on behalf of the SDCEA ("**the SDCEA request**"). A copy of this request is attached marked "**DD22**". The SDCEA requested copies of:
- 76.1 The AELs for the SAPREF and Engen refineries; and
 - 76.2 The most recent annual reports reporting on compliance with the AELs submitted to eThekweni for the above refineries;
 - 76.3 Alternatively, if the AEL compliance reports had not been submitted, the most recent annual reports reporting on compliance with the APPA registration certificates.
77. On 28 November 2014, eThekweni refused the SDCEA request, in identical terms to the refusal of the VEJA request. Thus the notice stated simply that "*the refusal is based on section 36 of the Act*", followed by the quotation of section 36(1)(a), (b), and (c)(i) and (ii) of PAIA. A copy of the notice of refusal is attached as "**DD23**".
78. On 9 December 2014, the CER (acting on SDCEA's behalf) lodged an internal appeal against the refusal of its request, citing the same six grounds as were invoked in the VEJA internal appeal. A copy of the notice of appeal is attached marked "**DD24**".

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79. The CER received the internal appeal decision on 27 January 2015. A copy of the appeal decision (dated 19 January 2015) is attached marked "DD25". The Speaker upheld the Deputy Information Officer's decision to refuse access to the requested information, for precisely the same reasons given in respect of the VEJA request. The reasons given by the Speaker were, in fact, a carbon copy of the reasons given in the appeal decision for VEJA's request. (This includes the same misspelling of Engen as "Engine" in paragraph 5 of the appeal decision.)

THE GROUNDS OF REFUSAL

80. I am advised that in terms of the Constitution and PAIA, access to information held by an organ of state or a public body must be granted unless one of the specified grounds enumerated in Chapter 4 of PAIA are present. The default position with respect to information held by the state is that access should be granted, unless one of the enumerated grounds of refusal is present. This follows from:

- 80.1 section 32(1)(a) of the Constitution, which confers a right on every person to "any information held by the State"; and
- 80.2 section 11 of PAIA, which provides that a requester must be given access to a record of a public body if the requester complies with the procedural requirements in PAIA for access and no ground for refusal of access under PAIA exists.

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81. It is therefore crucial to determine whether any of the grounds of refusal contemplated in Chapter 4 of PAIA apply to this case. If they do not, that is the end of the matter and the information sought must be disclosed. In that event, the decisions by the first and second respondents to refuse the applicants' PAIA request must be reviewed and set aside.
82. I am further advised that where a party relies on a ground of refusal under PAIA, it must adduce evidence to show that the harm contemplated will or might happen if the information sought is disclosed. It does not suffice to merely repeat the provisions of PAIA and assert harm in a vague and unparticularised manner, as the first and second respondents have done.
83. I wish to record the applicants' concerns over the eThekweni Municipality's blanket refusal of the applicants' requests for information, and the careless attitude with which both the Deputy Information Officer and Speaker dealt with the requests.
- 83.1 In the first instance, there were significant delays by the eThekweni Municipality in responding to the requests, most notably the delay of more than a year for the determination of the second applicant's (VEJA's) internal appeal.
- 83.2 In refusing the requests, the Deputy Information Officer did no more than recite s 36(1) of PAIA to justify his refusal of the requests, without any explanation for the alleged application of its provisions.

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83.3 Likewise, the Speaker relied solely on bald allegations to justify his decision, and provided no explanation or substantiation for the alleged application of s 36(1) of PAIA.

83.4 It is evident that both the Deputy Information Officer and the Speaker did no more than copy the contents of their letters of refusal from the VEJA application in answering the SDCEA application – as epitomised in the erroneous spelling of “Engine” in both the VEJA and SDCEA internal appeal decisions. The officials thus plainly failed to apply their minds to the SDCEA application at all, let alone properly and lawfully.

83.5 No consideration at all was given to severance and disclosure of at least part of the requested records, as required under s 28 of PAIA.

84. The nature of the Deputy Information Officer and the Speaker's decisions is such that the applicants are left with no more than the mere “say-so” of these officials that the grounds under s 36 of PAIA apply. This is patently inadequate, and does not constitute “adequate reasons” as required under s 25(3)(a) of PAIA.

Section 36 of PAIA

85. The first respondent's refusal of both applicants' requests was based on all the grounds listed under section 36(1)(a), (b) and (c) of PAIA. The decision of

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the second respondent in the internal appeals was limited to s 36(1)(a) and (b). Section 36(1) reads as follows:

"36. Mandatory protection of commercial information of third party —

(1) *Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains—*

- (a) *trade secrets of a third party;*
- (b) *financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or*
- (c) *information supplied in confidence by a third party the disclosure of which could reasonably be expected—*
 - (i) *to put that third party at a disadvantage in contractual or other negotiations; or*
 - (ii) *to prejudice that third party in commercial competition."*

86. The grounds under section 36(1) of PAIA are subject to the limitations under s 36(2), which provides:

"(2) A record may not be refused in terms of subsection (1) insofar as it consists of information-

- (a) *already publicly available;*
- (b) *about a third party who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned; or*
- (c) *about the results of any product or environmental testing or other investigation supplied by a third party or the result of any such testing or investigation carried out by or on behalf of a third party and its disclosure would reveal a serious public safety or environmental risk.*

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(3) For the purposes of subsection (2)(c), the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation."

87. It is notable that neither the first or second respondent appeared to have any regard to the internal limitations in s 36(2) of PAIA. There is no mention of these provisions in the notices of refusal or appeal decisions, nor any evidence that the first and second respondents considered them.
88. This is of particular concern in respect of the requested compliance reports, which clearly fall within the scope of the s 36(2)(c). These records, by their very nature, are required to contain results of environmental testing and/or investigations pertaining to the atmospheric emissions caused by the activities that are the subject of the AEL (or APPA permit). In light of the serious air quality problems in the south Durban area; the nature of the atmospheric pollutants emitted by Engen and SAPREF; and the fact that the Engen and SAPREF refineries have histories of non-compliance with environmental obligations (as indicated above), it moreover appears that the disclosure of these results would indeed reveal "a serious public safety or environmental risk".
89. On this basis alone, and regardless of whether or not the compliance reports contain any information contemplated in s 36(1)(a), (b) or (c), the compliance reports must be disclosed.

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90. As indicated, the first and second respondents' reliance on the grounds under section 36(1) to refuse the applicants' requests is entirely unsubstantiated. Given that the eThekweni Municipality notified Engen and SAPREF of the PAIA requests before responding to the applicants' requests, it ought to have been in a position to furnish reasons, including a properly substantiated explanation of the application of the alleged grounds to the requested records. The fact that the Municipality did not do so suggests that there is no proper basis for the Municipality's reliance on s 36(1).

91. In any event, the applicants contend that none of the grounds under s 36(1) can reasonably be said to apply to the AELs and compliance reports requested by the applicants. In support of this contention, we refer to:

91.1 The AEL for the Chevron refinery, Cape Town (valid for the period 31 March 2014 – 31 March 2019), which was publically disclosed by the City of Cape Town Metropolitan Municipality to Groundwork (a non-profit organisation that campaigns, among other things, for environmental justice in the south Durban area) on 28 October 2014, upon a PAIA application made by Groundwork. A copy of the Chevron refinery's AEL is attached as annexure "DD26". There is no information in this AEL that falls to be protected under s 36(1), and there is no reason to believe that the contents of the AELs issued for the Engen and SAPREF refineries would contain materially different information.

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- 91.2 The annual emission report submitted by Natref to the Fezile Dabi District Municipality, under the NEMAQA, for the reporting period July 2013-June 2014. As indicated, the Natref report was published on the website of the company's environmental consultants. This report is attached marked "DD27".
- 91.3 The 2011 and 2012 annual emission reports submitted by Chevron to the City of Cape Town Metropolitan Municipality, under APPA. The Chevron reports were disclosed to VEJA by the City of Cape Town, pursuant to VEJA's PAIA request in April 2013. These reports are attached marked "DD28" and "DD29".
- 91.4 The Chevron refinery's second quarter 2014 emissions and compliance report to the Chief Air Pollution Control Officer (CAPCO), submitted in terms of APPA. The City of Cape Town furnished groundWork with this report in October 2014, upon groundWork's PAIA request. groundWork was advised that Chevron had, at that stage, not yet completed its annual emissions and compliance report for its AEL, under the NEMAQA. The City accordingly disclosed Chevron's latest quarterly compliance reports. The CAPCO report contains materially the same emission and compliance monitoring information as is collated into the annual emission reports. A copy of this report is attached as "DD30".

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91.5 A copy of Chevron's registration certificate under APPA, marked "DD31". This was disclosed to VEJA by the City of Cape Town, pursuant to VEJA's PAIA request in April 2013.

92. These records evidence that neither the atmospheric emission licences nor the compliance reports (under APPA and the NEMAQA) contain trade secrets; information that would be likely to cause harm to the commercial or financial interests of the company concerned; or information supplied in confidence and which could reasonably be expected to place the company at a contractual or commercially competitive disadvantage. In particular, I point out that:

92.1 The Chevron AEL, in summary, contains only the following information: (i) the general licence terms and conditions; (ii) the listed activities that apply to the refinery; (iii) a description of the nature of the processes conducted at the refinery associated with the listed activities; (iv) a description of the raw materials used and products produced in the refinery's processes; (v) a description of the atmospheric emissions and residues generated through the refinery's processes; (vi) control measures imposed to prevent or reduce air pollution; (vii) maximum emission rates for the listed activities and monitoring requirements for the emissions; and (viii) contingency plan requirements.

92.2 The Chevron and Natref annual emissions compliance reports, in summary, contain only the following information: (i) pollution emission

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trends (recorded emission results with details of when the sampling was conducted); (ii) greenhouse gas emissions (recorded emission results with details of when the sampling was conducted); (iii) compliance audit reports; (iv) general descriptions and status updates of major upgrade projects; and (v) a list of complaints received and air related incidents.

93. There is nothing to support an argument that any of these records is supplied "in confidence" to the municipal licensing authorities. To the contrary, the same information that is disclosed in these documents must be contained in the application for an AEL, which is required under s 38(3) of NEMAQA to be made publically available.
94. I point out further that, while the Speaker found that the requested records "may cause harm and prejudice to the operations of the two third parties", this is not the correct standard for the application of the grounds under s 36(1)(b) and (c).
95. It is therefore denied that the contents of the requested records fall under section 36(1)(a), (b) or (c) of PAIA. However, even if it were so that the requested records could be withheld on any of the grounds under section 36(1)(a), (b) or (c) of PAIA, section 28 of PAIA obliged the Municipality to sever the portions of the record that constitute trade secrets, information supplied in confidence or information that would result in harm if disclosed, and to grant the applicants' access to the remaining portions of the record.

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The first and second respondents failed to consider and apply the requirements of s 28.

96. Further, as I proceed to explain, the disclosure of the requested records is required in the public interest, on the basis of section 46 of PAIA.

THE PUBLIC INTEREST OVERRIDE UNDER S 46 OF PAIA

97. Section 46 of PAIA provides for the mandatory disclosure of records by a public body in the public interest. Where its terms are met, s 46 does not vest any discretion in the decision-maker. Section 46 stipulates that:

“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 ... 36(1)... 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.”*

98. There is no evidence that the respondents properly weighed the harm contemplated under section 36 of PAIA against the public interest in disclosure, as they were obliged to do under section 46 of PAIA. On this ground alone, the first and second respondents' refusals to disclose the requested records falls to be set aside.

99. The Speaker simply concluded that s 46 did not apply because he had "*not been advised in what respects the disclosure of the record would reveal substantial contravention of the law or an imminent and serious threat to public safety or environmental risk*", and because "*The submissions by the requester do not substantiate enough public interest element they seek to rely on in asking for the override powers of section 46 to be invoked*". This reasoning is entirely inadequate, especially given that the Municipality itself has intimate knowledge of the air pollution problems in the area.

100. Moreover, there is a palpable public interest in the contents of the records. This emerges from the facts set out in this affidavit as a whole. I emphasise in particular that:

100.1 The Engen and SAPREF refineries are based in south Durban, an area notorious for high levels of industrial air pollution, and are known to be significant contributors to the air pollution in the area;

100.2 Engen and SAPREF refineries are known to emit substances that are harmful to health and the environment, including sulphur dioxide (SO₂), particulate matter, nitrous oxides (NO_x), hydrogen sulphide (H₂S) and total volatile organic compounds (TVOC), of which benzene is a component.

100.3 The residents of the south Durban area are known to suffer from health problems that are caused by harmful atmospheric emissions; and

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- 100.4 Both the Engen and SAPREF refineries have a history of non-compliance with environmental obligations.
101. Accordingly, the applicants contend that the disclosure of the requested records is required in the public interest as the disclosure of the record would likely reveal evidence of an imminent and serious public safety or environmental risk, which public interest outweighs the harm contemplated in section 36.
102. Alternatively, and at the very least, the disclosure of the requested records is required to determine:
- 102.1 Whether or not the SAPREF and Engen refineries are complying with their AELs and obligations under NEMAQA and s 24 of the Constitution; and
- 102.2 Whether the atmospheric emissions are within the lawful limits, deemed to be adequately protective of human health and the environment.
103. I am advised and submit that, on a proper constitutional interpretation, this is sufficient for the public interest override under s 46 of PAIA to be triggered.
104. The applicants are actively involved, as public interest organisations, in monitoring the air pollution emitted by the Engen and SAPREF refineries. The SDCEA, in particular, plays a vital role in reporting to the local

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communities in the south Durban Basin on harmful air pollution levels in the area. The SDCEA's activities include the monitoring of emissions from industries, including the Engen and SAPREF refineries; alerting local communities of emissions of harmful air pollutants; and advising surrounding communities of the impact of emitted pollutants on the health and wellbeing of people and the environment.

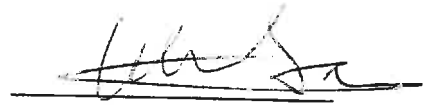
105. Access to the requested records of Engen and SAPREF would enable the applicants to more effectively perform this role. This in turn would enable the affected community members to take such remedial measures as they can to protect their own health and well-being, and that of their children.
106. In light of the above facts, the applicants submit that disclosure of the requested records is manifestly in the public interest, and further that any harm that may arise out of the disclosure of the requested records (as contemplated in section 36(1) of PAIA) is clearly outweighed by the public interest in the disclosure of the records.
107. Accordingly, even if the first and second respondents correctly took the view that the requirements of sections 36(1) of PAIA were met, the public interest requires the disclosure of the requested information.

CONCLUSION

108. In the premises, I pray for an order in terms of the Notice of Motion.

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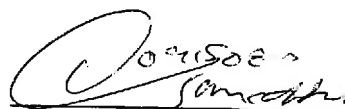
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DESMOND D'SA

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I certify that:

1. the deponent acknowledged to me that –
 - (a) he knows and understands the contents of this declaration;
 - (b) he has no objection to taking the prescribed oath;
 - (c) he considers the prescribed oath to be binding on his conscience;
2. the deponent thereafter uttered the words "I swear that the contents of this declaration are true, so help me God";
3. the deponent signed this declaration in my presence at the address set out hereunder on 2015/04/19 2015.



Commissioner of oaths

Name: Zimacibe

Address: SAPS Wentworth

Capacity: Sgt

