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

CASE NO:

In the matter between:

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST

Applicant

and

**THE MINISTER OF DEFENCE AND
MILITARY VETERANS**

First Respondent

**THE INFORMATION OFFICER:
DEPARTMENT OF DEFENCE AND
MILITARY VETERANS**

Second Respondent

FOUNDING AFFIDAVIT

↓ *BP*

I, the undersigned,

CATHERINE MOIRA KENNEDY

do hereby make oath and state the following:

- 1 I am director of the South African History Archive Trust, situated at the Women's Jail, Constitution Hill, 1 Kotze Street, Braamfontein, Johannesburg.
- 2 Save where otherwise stated or where the context indicates to the contrary, the allegations made in this affidavit are within my personal knowledge, and are to the best of my knowledge and belief both true and correct. Where I make legal submissions, I do so on the basis of advice of the applicant's legal representatives.
- 3 I am duly authorised to bring this application on behalf of the applicant. In this regard, I attach a copy of a resolution of the Trustees of the South African History Archive Trust marked "**CMK1**".

THE PARTIES

- 4 The applicant is **THE SOUTH AFRICAN HISTORY ARCHIVE TRUST ("SAHA")**, a non-governmental organisation constituted as a trust in terms of the laws of South Africa. SAHA requested the information, which forms the subject matter of this application, from the first and second respondents.



5 The first respondent is the **MINISTER OF DEFENCE AND MILITARY VETERANS** in the national government (“the Minister”), who is cited in her official capacity as the Minister responsible for the Department of Defence and Military Veterans (“Department”), with offices situated at Armscor Building, Block 5, Level 4, cnr Delmas Avenue and Nossob Street, Erasmuskloof, Pretoria. The first respondent is cited care of the State Attorney, Pretoria, whose address is Office of the State Attorney Pretoria, SALU Building, 255 Francis Baard Street. The first respondent is a member of the National Executive and is responsible for the records that were subject to the applicant's request for information under the Promotion of Access to Information Act 2 of 2000 (“PAIA”). The Minister or the person designated by him or her is the “relevant authority” for deciding appeals, in terms of section 1 of PAIA.

6 The second respondent is **THE INFORMATION OFFICER OF THE DEPARTMENT OF DEFENCE AND MILITARY VETERANS**, with offices situated at Armscor Building, Block 5, Level 4, cnr Delmas Avenue and Nossob Street, Erasmuskloof, Pretoria. The second respondent is cited in her official capacity, as the officer who decides whether requests to the Department of Defence and Military Veterans for access to information, in terms of PAIA, should be granted or refused.

7 In this affidavit, reference to “the Department” is a reference to both respondents, unless the context indicates otherwise.

NATURE OF THE RECORDS REQUESTED

8 This application concerns a request for access to information from the Department of Defence relating to:

8.1 policies and practices of the apartheid government primarily during the 1980's ; and

8.2 the domestic deployment of the military, the names of reports on unlawful intelligence activities and intelligence failures and where declassified the actual reports, or parts of reports, as the case may be.

9 The information is sought as part of research into the historical activities of the military under apartheid. Notably, the information sought relates in the main to the late 1970's and 1980's— information sufficiently old that it cannot possibly constitute a national security concern, as the respondents have suggested in their communication with SAHA and their refusal of the request.

10 Moreover, this application arises from a clear and persistent failure by the Department to comply with its statutory and constitutional obligations and to give effect to PAIA. Had the Department complied with the process and timelines prescribed in PAIA, this application could have been brought more than a year earlier. However, as I set out below, the Department chose instead to follow a different process that delayed and prejudiced SAHA in its attempts to obtain the requested information. In what follows, I set out the objectives and functions of SAHA and the context in which the requests at issue in this application were made. Thereafter I detail the correspondence between the parties and SAHA's



attempts to obtain the records to which it is entitled.

OBJECTIVES AND FUNCTIONS OF SAHA

11 SAHA's objectives are to preserve, collect and catalogue materials of historic, contemporary, political, social, economic and cultural significance, and to encourage the accessibility of such materials to the public as a whole. I attach a copy of SAHA's trust deed marked "CMK2".

12 SAHA is an independent Non-Governmental Organisation ("NGO") dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. It was established by anti-apartheid activists in the late 1980's to promote the recapturing of South Africa's lost and neglected history and to record history in the making. SAHA aims to document, support and promote awareness of past and contemporary struggles for justice through archival practices and outreach, and the utilisation of access to information laws.

13 In 2001, SAHA launched its Freedom of Information Programme, which is dedicated to using PAIA as a method to test and extend the boundaries of freedom of information in South Africa. This programme further seeks to create awareness of, compliance with, and use of PAIA.

14 Since 2001, SAHA has made over 1800 requests for information from various government departments and it has brought numerous applications in the High Court arising out of refusals of such requests. It has also intervened as *amicus*

curiae in a number of PAIA applications.

- 15 SAHA has developed a comprehensive capacity training programme for NGOs and community based organisations on using PAIA. It has developed resource kits, workshop guides, PAIA case study DVDs, and a dedicated online management system for the submissions and monitoring of PAIA requests made by members of the PAIA Civil Society Network, an umbrella body of organisations, established in 2008, working to advance the right of access to information in South Africa. SAHA has also trained hundreds of activists, students, community members, representatives of NGOs, government officials, attorneys and paralegals in the use of PAIA.

THE NATURE OF THIS APPLICATION AND RELIEF SOUGHT

- 16 This application is brought in terms of section 78(2) read with section 82 of PAIA, in response to the first and second respondents' refusals of the applicant's requests for access to information.
- 17 During August and September 2013, SAHA submitted twelve requests for information to the Department in respect of records in the Department's possession. This application seeks relief in relation to two of those requests.
- 18 The manner in which the Department has dealt with the requests at issue in this case leads to the inescapable conclusion that the Department has misconstrued its obligations under PAIA and the Constitution. Alternatively, it indicates an unwillingness by the Department to give effect to its obligations under PAIA.

Whichever of these is correct - the effect is that the clear requirements of PAIA have not been adhered to and records which ought properly to have been provided to SAHA, have not been made available despite the passage of a protracted period of time.

19 The applicant has therefore been forced to approach this Court for relief. This application relates to two requests for information made to the Department by SAHA, during August 2013. This application has been brought in relation to both requests in order to avoid the duplication of costs, and because the respondents and the issues raised by the requests are substantially the same.

20 Notably:

20.1 SAHA made both the PAIA applications in issue,

20.2 the requests were refused by the same respondents, and

20.3 they raise common questions of fact and law.

21 It is therefore appropriate for both requests to be dealt with in this application.

JURISDICTION

22 I am advised and submit that this Court has jurisdiction to hear this application by virtue of the definition of 'court' in section 1 of PAIA, which provides that 'court' includes the High Court within whose area of jurisdiction the requester is domiciled or ordinarily resident.

23 Section 82(2) of PAIA provides that the court hearing an application of the present sort may grant any order that is just and equitable including orders:

“(a) confirming, amending or setting aside the decision which is the subject of the application concerned;

(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within period mentioned in the order;

(c) granting an interdict, interim or specific relief, a declaratory order or compensation;

(d) as to costs; or

(e) condoning non-compliance with the 180-day period within which to bring an application, where the interests of justice so require.”

24 The respondents constitute a "public body" within the meaning of that term as contemplated by section 1 of PAIA. Moreover, the applicants have exhausted the relevant internal appeal procedures in PAIA in that:

24.1 The second respondent refused (either explicitly or through a deemed refusal) both of the applications for access;

24.2 Internal appeals were lodged against such refusals in terms of section 74 of PAIA;

24.3 Section 77(7) provides that where the relevant authority fails to give notice of a decision on an internal appeal within the stipulated period, the authority is regarded as having dismissed the internal appeal.

25 I submit below that either the late "decisions" by the second respondent were

ineffective because they were made after there was a deemed refusal as a matter of law, and after internal appeals had been lodged; or they are to be treated as decisions on appeal. In either event, the administrative process has run its course.

- 26 Accordingly, the applicant is entitled to bring this application in terms of section 78(2) read with section 82 of PAIA.

THE IMPORTANCE OF THE CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION AND THE ROLE OF PAIA IN GIVING EFFECT TO THE RIGHT

- 27 Section 32 of the Constitution establishes a right of access to information held by both public and private bodies. It states that:

"(1) Everyone has the right to have access to

a) any information held by the State; and

b) any information that is held by another person that is required for the exercise or protection of any right.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the State."

- 28 PAIA is the national legislation envisaged in section 32(2) of the Constitution. It was enacted in order to give effect to the right of access to information and to promote the values of openness, transparency, accountability and good governance – principles foundational to the Constitution.

- 29 The preamble of PAIA records that the system of government in South Africa before 27 April 1994 "resulted in a secretive and unresponsive culture in public

and private bodies which often led to an abuse of power and human rights violations". The preamble continues that PAIA is enacted to "foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information".

30 Section 9 of PAIA describes as its object, *inter alia*, the promotion of:

"... transparency, accountability and effective governance of all public and private bodies by including, but not limited to, empowering and educating everyone

to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;

to understand the functions and operation of public bodies;

to effectively scrutinise... decision-making by public bodies that affects their rights."

31 I am advised and submit that:

31.1 in terms of PAIA, public bodies are under a duty to provide access to a requested record, or part of it, unless refusal of the request is permitted or required by one or more of the grounds listed in PAIA; and

31.2 every request for access to information in terms of PAIA is an invocation of the section 32 right in the Constitution and entitles the requestor to access to the requested record, or part thereof, if that requestor complies with all the procedural and statutory requirements set out in the statute, unless there is a valid ground of refusal on which the private or public body may rely.

31.3 the Constitutional Court has repeatedly made clear that the right of access to information is fundamental to the realisation of the other rights guaranteed in the Bill of Rights.

32 I now turn to deal with the nature of the requests.

THE REQUESTS

33 On 23 August 2013, SAHA made four PAIA requests to the Department for records archived by the Department on behalf of the South African Defence Force. The records relate to the following archive groups:

33.1 Military intelligence,

33.2 Military Budgets, and

33.3 Operations by Chief of Staff.

34 One of these requests, SAH-2013-DOD-0008, is the subject matter of this application. To this request was attached an annexure – Annexure A – which itemised the documents that SAHA sought to obtain from the Department. Annexure A specifically identifies each set of records requested by box number and archive group. A copy of this request is attached and marked “**CMK 3**”.

35 On 27 August 2013, SAHA made a further PAIA request to the Department for all records:

"1. Listing all joint deployments of the South African National Defence Force and the South African Police Service for each of the financial or calendar years that are available for the period from 1 January 2003 to 31 July 2013, including for each of the deployments - noting the information is sought even if each additional piece of requested information listed below is not available:

- The description and nature of the deployment(s),*
- Start and end dates for the deployment(s),*
- Names of units deployed for each service, and*
- Number of units deployed for each service.*

2. Listing the names/titles of reports provided to the Inspector-General of Intelligence on unlawful intelligence activity or significant intelligence failure for those intelligence services/divisions in the South African National Defence Force that are accountable to the Minister of Defence and Military Veterans for each of the financial or calendar years that are available for the period from 1 January 2003 to 31 July 2013.

3. The declassified reports, or declassified parts of those reports (referred to in No. 2 above) provided to the Inspector-General of Intelligence for each of the financial or calendar years that are available for the period from 1 January 2013 to 31 July 2013."

36 A copy of this request is attached as annexure "CMK 4". SAHA's reference number in respect of this request is SAH-2013-DOD-0011.

37 This application concerns both requests: SAH-2013-DOD-0008 and SAH-2013-DOD-0011.

RESPONSES TO THE REQUESTS

38 The Department's response to the requests for information indicate a failure to follow the scheme of PAIA, and to comply with the obligations that flow from that scheme, as well as from the Constitution. Alternatively, the Department's attitude

is reflective of a complete disregard of the processes set out in PAIA.

- 39 I say this because the Department has consistently failed to respond to SAHA's requests in a timely manner, and in several instances, responded to the requests after there had already been a deemed refusal of the request and internal appeals had been filed. The Department's practice in this regard is out of step with the PAIA processes, and it frustrates SAHA's right of access to information.
- 40 Where it refused access to records, the Department's stated grounds (for such refusal) are a regurgitation of the provisions of PAIA, without any detail of why any of the grounds specified apply to the specific records requested.
- 41 Finally, despite the refusal of requests, the Department continued to engage with SAHA, giving the indication that it would provide access to records notwithstanding its refusals. On 15 June 2015, SAHA wrote to the Department seeking a clear decision on its outstanding requests and an opportunity to access any records to which access could be granted. I attach a copy of this email marked "**CMK 5.**"
- 42 In response, on 22 June 2015, the Department wrote to SAHA by letter attached hereto marked "**CMK 6.**" In relation to SAH-2013-DOD-0011, that letter indicated that the information had been requested from the Department of Defence Joint Operations Divisions. The records had been consolidated and would be submitted to the Director General's office as soon as the Chief of Joint Operations had signed the letter. Moreover, the letter stated that once the



records had been received by the Director-General's office, a process must be followed in order to determine whether the records can be made available to SAHA. This involves declassification, masking, legal recommendation before final decisions are taken by the Chief of South African National Defence Force and Secretary of Defence as to whether the records may be released. In relation to SAH-2013-DOD-0008, that letter indicated that the department was "co-ordinating" the request and would revert to SAHA upon finalisation of an internal report.

43 Notably, the above letter makes clear that:

43.1 Notwithstanding the fact that the Department has in both instances either refused access or failed to respond to the request thereby allowing a deemed refusal of access, it considers the requests to be open to being considered once more and is in the process of making that determination.

43.2 Moreover, the Department is of the view that the final decision as to whether or not the records ought to be released, lies with the Chief of South African National Defence Force and/or the Secretary of Defence. This is in direct conflict with the provisions of PAIA as I set out below.

43.3 In short, the letter makes clear that the Department has adopted a process for the evaluation of requests for information, which is contrary to the clear and unambiguous process set out in PAIA. This has resulted in the present situation, in which SAHA has allowed the Department an extended

period of time in the hope that it would be provided with the information requested, without the need to approach a court. However, the Department's letter of 22 June 2015 makes clear that no decision is imminent and even if it were, the process followed by the Department is so hopelessly inadequate and non-compliant, that SAHA has no recourse but to approach this Court for access to the records requested.

44 I now turn to deal with the Department's response to each of the two requests that this application concerns itself with:

The Department's Response to SAH-2013-DOD-0008

45 After submitting this request on 23 August 2013, SAHA sent letters to the Department, on 2 and 27 September 2013, and 7 October 2013, reminding the Department that PAIA required the Department to respond to requests for information within 30 days. These letters are attached and respectively marked "CMK 7", "CMK 8", and "CMK 9". None of these reminders yielded any response from the Department.

46 However, on 7 January 2014, at the Department's request, SAHA re-sent its original PAIA request. The Department's email requesting SAHA to re-send its original request, as well as SAHA's response attaching the request are attached as annexures "CMK 10" and "CMK 11" respectively.

47 SAHA therefore filed an internal appeal in terms of the Act, on the grounds that the Department's silence, past the 30-day period, amounted to a deemed refusal in terms of section 78(7) of PAIA. A copy of the internal appeal is attached and

marked "CMK 12".

48 SAHA's internal appeal was filed on 31 October 2013, but when it appeared that the email attaching the appeal form might not have gone through to the Department, SAHA sent it again on 20 January 2014. Annexure "CMK 13" is a copy of SAHA's email of 20 January 2014, attaching the internal appeal.

49 Notwithstanding the provisions of section 77(3), which require the relevant authority to decide on an appeal within 30 days, the Department responded to SAHA's request over a year later (on 13 November 2014).

50 This response is attached marked "CMK14". It granted access to certain of the requested records, advising SAHA that these records had been declassified and were ready for perusal. However, the Department also provided a list of records falling within SAHA's request, the description of which did not correspond with the Department's archival "box numbers" and further declined to grant SAHA access to 28 of the requested files, on the following grounds:

50.1 Section 41(1)(a)(i) and (ii) in that the records can reasonably be expected to cause prejudice to the defence or the security of the Republic.

50.2 Section 41(1)(b)(i),(ii) and (iii) in that if disclosed, the information would reveal information:



- 50.2.1 supplied in confidence by or on behalf of another state or an international organisation.
- 50.2.2 supplied in confidence by or on behalf of another state or an international organisation in terms of an arrangement or international agreement (contemplated in section 231 of the Constitution) with the State or organisation, that the information so supplied would be held in confidence.
- 50.2.3 the release of which would reveal information required to be held in confidence by an international agreement or customary international law, as contemplated in section 231 or 232 of the Constitution.
- 50.3 Section 41(2)(b) in that the release of the record would reveal information required to be held in confidence regarding the purpose of intelligence relating to:
- 50.3.1 The defence of the Republic;
- 50.3.2 The detection, prevention and suppression or curtailment of subversive or hostile activities; or

50.3.3 Another state or international organisation used by on behalf of the Republic in the process of liberation and consultation in the conduct of international affairs.

50.4 I point out that the Department stated that it relied for its refusal on section 41(2)(b) but then proceeded to quote section 41(d). For present purposes we assume that the reference to section 41(2)(b) was an error and the Department intended to rely on section 41(2)(d).

50.5 Section 41(2)(c)(i) and (ii) in that the release of the records would reveal information about or relating to the characteristic, capabilities, vulnerabilities, performance, potential, deployments or functions of:

50.5.1 Any military force, unit, or personnel; or

50.5.2 Any body or person responsible for the detection, prevention, suppression or curtailment of subversive or hostile activities.

50.6 Section 41(2)(d)(i) and (ii) in that the requested records "are kept closed" for intelligence purposes relating to the defence of the Republic and the "detection, prevention, suppression or curtailment of subversive or hostile activities". This appears to be a repetition of the reliance on section 41(2)(d) referred to above.

50.7 Section 41(2)(e) in the requested records contain information on methods



of, and scientific or technical equipment for, collecting, assessing or handling information.

50.8 Section 41(2)(f) in that the requested records contain information on the identity of a confidential source and any other source of information.

50.9 Section 34(1) in that the disclosure of the information "would involve the unreasonable disclosure of personal information about a third party, including a deceased individual".

51 Not only is the Department's reliance on the above provisions not justified, but the Department does not appear to accurately apply the relevant provisions. In fact, it misconstrues the substance of at least one provision:

51.1 For example, section 41(2)(b) of the Act allows for a refusal of requests if the requested information contains information relating to: -

"the quantity, characteristics, capabilities, vulnerabilities or deployment of: (i) weapons or any other equipment used for the detection, prevention, suppression or curtailment of subversive or hostile activities; or (ii) anything being designed, developed, produced or considered for use as weapons or such other equipment."

52 Section 41(2)(b) does not allow for a refusal on the basis that the information requested contains information relating to "any military force, unit, or personnel", as the Department states in its refusal letter referred to above. The Department's reliance on this provision, in refusing access, is therefore, without merit.