IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAMFONTEIN

Case No: CCT 25/09

CPD Case No: 10013/07

In the matter between:

STEFAANS CONRAD BRUMMER	Applicant
and	
THE MINISTER OF SOCIAL DEVELOPMENT	First Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT	
OF SOCIAL DEVELOPMENT	Second Respondent
THE MINISTER OF JUSTICE AND	
CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE SOUTH AFRICAN HISTORY ARCHIVES TRUST	Amicus Curiae

WRITTEN SUBMISSIONS ON BEHALF OF THE AMICUS CURIAE

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INTRODUCTION

1. These submissions are made on behalf of the South African History Archives (SAHA), which has been admitted as amicus curiae in this matter and permitted to lodge written submissions with the Court.[1]

2. SAHA's intervention in these proceedings is primarily aimed at assisting this Court by providing evidence and argument in relation to the practical implications of the 30 day time period in terms of which a litigant must approach a court for relief, as contemplated by section 78 of the Promotion of Access to Information Act 2 of 2000 ("PAIA").

3. In brief, SAHA's submissions are that its experience as a frequent PAIA "requester" demonstrates that:

   3.1. The 30 day time period in section 78 is too short a period for the vast majority of litigants to approach a court for relief under PAIA.

   3.2. Section 78 is therefore in conflict with section 32 and 34 of the Constitution as it does not provide a "real and fair" opportunity for a litigant to approach a court for access to information.

   3.3. Even if section 78 of PAIA is interpreted to include a power of a court to condone non-compliance with the 30 day time period this

[1] Directions of the Chief Justice dated 21 May 2009.

does not sufficiently mitigate the harshness of the provision to render it constitutional.

3.4. SAHA's practical experience makes clear that the 30 day time bar, even if coupled with a power of condonation, will have a "chilling effect" on litigants wishing to exercise their rights in terms of sections 32 and 34 of the Constitution and section 82 of PAIA.

4. The structure of these submissions is as follows:

4.1. First, they deal briefly with SAHA's interest this matter;

4.2. Second, they set out this Court's jurisprudence in relation to the right of access to court and the test laid down in those cases;

4.3. Third, in light of SAHA's experience as a frequent requester for information from public bodies, they make submissions as to why it is that section 78 of PAIA violates the right of access to court; and

4.4. Finally, they address the question of an appropriate remedy.

SAHA'S INTEREST IN THIS MATTER[2]

5. SAHA is an Non-Governmental Organisation ("NGO") whose objective is *inter alia* to collect, preserve and catalogue materials of historic, contemporary, political, social, economic and cultural significance and to promote the accessibility of archival materials to the general public.

6. SAHA is an independent NGO archive dedicated to documenting and supporting the struggles for justice in South Africa. Established in the late 1980s and registered as a trust in 1994, its founding mission was to promote the recapturing of South Africa's lost and neglected history and to record history in the making, which informed a focus on documenting the making of democracy.

7. In 2001, SAHA launched its Freedom of Information Programme dedicated to using PAIA in order to extend the boundaries of freedom of information and to build up an archive of materials released under the Act for public use.

8. The Freedom of Information Programme aims to create awareness of, compliance with and use of PAIA through requests for information. The programme provides access to released materials and conducts

[2] Pigou, pages 2-4

research, information dissemination, lobbying, education and training in the use of the legislation.

9. In seeking to achieve these objectives, SAHA has made over 1000 requests for information from various government departments since 2001. It has brought eleven applications in the High Court arising out of refusals of these requests. In all of these applications, SAHA has had to seek the condonation of the High Court for the late filing of its application. In most of these cases, the application had been launched a significant time after the expiry of the 30 day period set out in section 78 of PAIA.

10. SAHA makes more requests for access to information held by Government Departments than any other NGO in South Africa.

11. SAHA therefore has a substantial interest in the outcome of these proceedings as it will affect applications to court presently contemplated by SAHA as well as have an enormous impact on future requests for information that SAHA will make.

12. SAHA is also uniquely placed to assist this Court in determining the constitutionality of section 78 of PAIA in view of its experience in utilising PAIA and in particular section 78 thereof.

THE RIGHT OF ACCESS TO COURT

13. Section 34 of the Constitution provides as follows:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

14. This Court has held that the right of access to court does not allow claimants an unbounded and indefinite right to institute legal proceedings whenever they choose to do so. It requires that they be afforded a "*real and fair"* opportunity to do so.

14.1. In **Mohlomi v Minister of Defence *1997 (1) SA 124 (CC)*** at para 12, this Court held that, "the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one".

14.2. In ***Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng* 2001 (11) BCLR 1175 (CC)** at para 6 this Court repeated that limitations on the time within which litigation has to be instituted are a common and legitimate feature of our law and that the right of access to court in terms of section 34 of the Constitution merely requires that the claimants are allowed a "*real and fair opportunity"* to enforce their rights.

14.3. Most recently, in ***Engelbrecht v Road Accident Fund and Another 2007 (6) SA 96 (CC)*** at para 31**,** this Court again reiterated that what is necessary to consider is whether the period is "*too short to amount to a 'real and fair' opportunity to access court*".

15. Section 78(1) of PAIA provides that a requester or third party may only apply to a court for relief in terms of section 82 after that requester or third party has exhausted any internal appeal preocedure against a decision of an information officer of a public body. Section 78(2) provides that a requester who is *inter alia* unsuccessful in an internal appeal, may "*by way of an application, within 30 days apply to a court for appropriate relief in terms of section 82*."

16. The 30 day period set by section 78 of PAIA is shorter than various time-limitations held by this Court to violate section 34.

16.1. In ***Mohlomi,*** the provision held to be unconstitutional was section 113(3) of the Defence Act 44 of 1957. It required summons to be issued within six months of the cause of action arising.

16.2. In ***Potgieter***, the provision held to be unconstitutional was section 68(4) of the Mental Health Act 18 of 1973. It required legal proceedings to be instituted within three months of the act occurring.

16.3. In ***Moise v Greater Germiston Transitional Local Council*** **2001 (4) SA 491 (CC)**, the provision held to be unconstitutional was section 2(1)(a) of the Limitation of Legal Proceedings Act 94 of 1970. It required written notice to be given with 90 days of the debt becoming due.

17. In addition to these cases, the time limits imposed by the following recent statutes are informative:

17.1. Section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 provides that a notice of intended legal proceedings must be served on the relevant organ of state within six months from the date on which the debt became due. It then allows a further two and half years for summons to be issued.

17.2. Section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") provides that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date of conclusion of any internal remedy or the date on which the person concerned became aware of the administrative action or might reasonably have been expected to have become aware of the action and the reasons.

18. It is therefore clear that the period imposed by section 78 of PAIA is extremely short in the context of other recent statutes involving litigation against government and in light of the jurisprudence of this Court.

19. It is submitted that there can be no justification for affording a litigant wishing to exercise his/her right to just administrative action 180 days to do so, whereas a litigant wishing to exercise his/her right of access to information is only afforded to 30 days to approach a court.

SAHA'S EXPERIENCE OF SECTION 78

20. SAHA's experience has been that 30 days is an extremely and prohibitively short period in which to expect a litigant to approach a court for relief.

21. In order to launch an application in the High Court for relief in terms of section 82 of PAIA, SAHA needs to do the following:

21.1. First, SAHA often needs to obtain legal opinion on the prospects of success of any application it may need to bring before officially launching a court application. This requires that attorneys and counsel are briefed and that, if necessary, additional funding is secured in order to do so. SAHA's limited funding inevitably means that Counsel is required to represent SAHA on a *pro bono*

basis or at very reduced rates. This process in and of itself often takes almost 30 days.[3]

21.2. Once SAHA has decided to bring a court application, it must get approval and authorisation from its Board of Trustees in order to litigate. This takes some time as a Board meeting needs to be called and all Trustees informed of the nature of the proceedings, the risks involved, the possibility of an adverse costs order and the prospects of success of the case. Trustees are located all over the country and as a result the process of authorisation can often take the better part of 30 days to complete.[4]

21.3. Once Board approval has been obtained, SAHA has to ensure that it has available the services of attorneys who are willing to act in the case on a *pro bono* basis or at very reduced rates. Counsel must then draft the necessary application.[5]

21.4. It is often very difficult to retain counsel that both have an expertise in PAIA applications and are willing and able to consult and draft papers within 30 days as contemplated by section 78 of PAIA.[6]

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3 Pigou, page 8, para 23.1 and 23.4
4 Pigou, page 7, para 23.2
5 Pigou, page 8, para 23.3
6 Pigou, page 8, para 23.5

22. SAHA and its employees are steeped in the workings of PAIA. For an ordinary litigant, the process of getting to court is even more difficult than for an NGO like SAHA. An individual litigant, is in all likelihood, not well versed in the workings of PAIA, may not be aware of the 30 day time bar, nor is he/she able to easily obtain attorneys and Counsel who are willing to act on a *pro bono* basis and in the very short period that will inevitably be the case.

23. Moreover, the prospect of litigation is a daunting and difficult one for an individual litigant. Often such a litigant requires some time to assess his/her financial and emotional ability to approach a Court for relief. 30 days in which to do all of this, is not sufficient time and therefore seriously impacts on the ability of litigants to approach a Court.[7]

24. SAHA is an organisation which has as one of its primary areas of focus, the making of requests for access to information which is relevant to the public and which SAHA believes is necessary to archive for the use of present and future generations. If the 30 day period operates harshly as against an organisation like SAHA which understands and daily utilises PAIA, the operation of the time bar in relation to organisations that do not make frequent use of PAIA and in relation to individuals who seek to obtain information on their own behalf, is even more severe and will have a chilling effect on litigation.

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[7] Pigou page 8-9 paras 24-25

The implications of a condonation power

25. There is no provision in PAIA allowing a court to condone non-compliance with the 30 day time period. Zondi J in the court *a quo* held that a court has a discretion as to whether to condone non-compliance with the time limit and that section 78 does not take away such power.[8]

26. However, even with this condonation power, the problems set out above for SAHA and ordinary litigants remain.

27. Zondi J in the court *a quo* held that the test for condonation was that of "good cause".[9] The factors that the honourable judge held that a court is obliged to take into account in determining whether good cause exists include, the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice, the reasonableness of the delay, the importance of the issue to be raised and the prospects of success.[10]

28. In practical terms, the application of these factors do not sufficiently take into account the very real and virtually inevitable reasons that an organisation such as SAHA or an individual litigant has been unable to approach a court within 30 days. Therefore condonation will in practice, it is submitted, very rarely be granted. This is because often the

[8] Brummer v Minister of Social Development and Others, Case No 10013/07 unreported judgment of Zondi J in We
[9] At paras 23-24
[10] Brummer, para 24

reasons for seeking condonation are simple, everyday logistical ones that will not satisfy a court as good cause for the delay. This is clear from the following:

28.1. In all of the eleven cases SAHA has sought to litigate it has not once been able to do so within the 30 day time period in section 78. In all these cases, it has had to seek condonation of the Court for the late filing of its application. I

28.2. In most of the eleven cases SAHA has litigated, the question of condonation has been of great concern to SAHA, as the refusal of condonation means that the application as whole must be dismissed and this may have cost implications for SAHA. As an organisation dependant on outside funding, the threat of an adverse costs order has enormous implications for SAHA.[11]

28.3. The need to apply for condonation has at least in one recent case, resulted in SAHA not approaching a court for relief but rather, choosing to make a fresh request for the same information to the same bodies, in order that it could comply with the 30 day period when its internal appeal ultimately is again unsuccessful.

28.4. That particular request related to the records of the Eugene De Kock amnesty application, the Truth and Reconciliation Commission ("the TRC") victims' database and transcripts of the section 29 in camera hearings of the TRC. The nature of the

[11] Pigou, page 9-10

information requested was of such importance to SAHA for archival and historical reasons that it could not take the chance that its application would be refused for non-compliance with the 30 day time period and the possibility of an adverse costs order against SAHA. In that case, the reasons for SAHA's delay were related to the fact that its Board of Trustees was in the process of being properly reconstituted. In addition to this, SAHA had unsuccessfully sought the intervention of the Human Rights Commission to mediate between the Department of Justice and SAHA in an attempt to avoid having to go to Court. All of this took significantly longer than 30 days.[12]

29. It could not, it is submitted, have been the intention of the legislature that a litigant would abandon its rights to approach a court for relief in order to exercise its right of access to information in these circumstances.

30. The effect of a condonation provision in a similar context was assessed by the Court in ***Moise*** where Somyalo AJ held at paras 14 and 15:

> **"***Moreover, the condonation opportunity afforded to a prospective claimant by s 4 does not render the impediment immaterial. The obstacle remains regardless of this potential amelioration of its harshness. This is particularly so if one takes into account that many potential litigants (arguably the majority) are poor, sometimes illiterate and lack the resources to initiate legal proceedings within a short period of time. Many are not even aware of their rights and it*

[12] Pigou, pages 10-11

takes time for them to obtain legal advice. Some come by such advice only fortuitously. For them a mere 90 days from the commission of the delict within which to serve formal notice on the debtor(s) is, in the words of Didcott J in Mohlomi, not a 'real and fair' 'initial opportunity' to approach the courts for relief.

It should also be noted that s 4 does not afford a defaulting creditor carte blanche. The power of a court under the section is confined to extending the period for notice and is by no means open-ended. The jurisdictional criteria for the grant of the indulgence are quite clearly circumscribed and are not mere formalities. As the plaintiff in Abrahamse found to his cost, condonation may well be refused despite a hard-luck tale." (emphasis added)

31. It is therefore submitted that interpreting section 78 of PAIA so as to include a condonation power is not sufficient to render the section constitutional.

AN APPROPRIATE REMEDY

32. In this Court, the Minister of Justice and Constitutional Development contends that, if any declaration of invalidity is to be made, it should be suspended in order to allow Parliament to correct the defect.

33. It is submitted that such a suspension would not be just and equitable unless it were, at the very least, coupled with a temporary reading-in which substantially extended the 30 day period in section 78 of PAIA. That such an order is permissible, has already been recognised by this Court in the case of ***South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others 2009 (1) SA 565 (CC) at paras 41 - 44***

34. Attention has already been drawn to the fact that Parliament has chosen to enact periods of approximately six months in the Institution of Legal Proceedings Against Certain Organs of State Act, and PAJA. Both statutes also allow for condonation to be granted in this regard.

35. In the circumstances, it is submitted that if a temporary reading-in is to be granted, it should allow for at least a six month period for PAIA applications to be brought. This should be coupled with a broad power of condonation in the interests of justice if the application is launched outside of this time.

CONCLUSION

36. For all the reasons set out in these submissions, it is submitted that this Court should confirm the declaration of invalidity.

37. If this Court determines that it is necessary to suspend the declaration of invalidity for any period of time, it should temporarily read a period of six months into section 78 instead of the 30 day period, coupled with a broad condonation power in the interests of justice.

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Chambers, Sandton

25 May 2009

LIST OF AUTHORITIES

South African Authorities

1. **Engelbrecht v Road Accident Fund and Another 2007 (6) SA 96 (CC)**
2. **Giddey NO v J C Barnard and Partners 2007 (5) SA 525 (CC)**
3. **Mohlomi v Minister of Defence 1997 (1) SA 124 (CC)**
4. **Moise v Greater Germiston Transitional Local Council 2001 (4) SA 491 (CC)**,
5. **Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng 2001 (11) BCLR 1175 (CC)**
6. **South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others 2009 (1) SA 565 (CC)**

International Authorities

1. **Stubbings v United Kingdom (1997) 1 BHRC 316**