

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

**CASE NO: 05598/16**

In the matter between:

**THE SOUTH AFRICAN HISTORY ARCHIVE TRUST**

Applicant

and

**THE SOUTH AFRICAN RESERVE BANK**

First Respondent

**THE GOVERNOR OF THE SOUTH AFRICAN  
RESERVE BANK, L KGANYAGO**

Second Respondent

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**FIRST AND SECOND RESPONDENTS' HEADS  
OF ARGUMENT**

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**N G D MARITZ SC  
D CHABEDI  
E MULLER**

Chambers,  
Pretoria  
14 November 2016

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## INTRODUCTION

1. This is an appeal by SAHA<sup>1</sup> in terms of section 78, read with section 82, of the Promotion of Access to Information Act (“PAIA”).<sup>2</sup>
2. On 1 August 2014 SAHA submitted the PAIA request<sup>3</sup> to the South African Reserve Bank (“the SARB”), seeking access to “evidence obtained” by the SARB as part of investigations into any substantial contravention of, or failure to comply with the law in respect of significant fraud, gold smuggling or smuggling of other precious metals conducted during the period 1 January 1980 to 1 January 1995 into the affairs of eight individuals (“the PAIA request”).<sup>4</sup>
3. The SARB could only locate investigation files for three of the identified individuals, namely Mr Palazzolo, Brig Blaauw and Mr Hill. It has since been established that Messrs Palazzolo and Hill are still alive, and that Brig Blaauw is deceased.

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<sup>1</sup> The South African History Archive Trust (“Applicant”)

<sup>2</sup> The Promotion of Access to Information Act No 2 of 2000

<sup>3</sup> Annexure “FA2” to the Founding Affidavit pp 52 – 56

<sup>4</sup> The late Brigadier Johann Philip Derk (Jan) Blaauw (“Brig Blaauw”), the late Mr Giovanni Guisepppe Mario Ricci, the late Mr Stephanus Petrus (Fanie) Botha, Mr Robert Oliver Hill (“Mr Hill”), Mr Paul Ekon, Mr Vito Roberto Palazzolo, also known as Robert von Palace Kolbatschenko (“Mr Palazzolo”), Mr Craig Michael Williamson and Dr Wouter Basson

4. The SARB refused the PAIA request on 28 October 2015.<sup>5</sup>
5. SAHA persists with the appeal in respect of the documents relevant to Mr Palazzolo, the late Brig Blaauw and Mr Hill only – in so far as no documents have been identified by the SARB in relation to the other identified individuals.<sup>6</sup>
6. The SARB relies on the following defences, for purposes of opposing the application:
  - 6.1 SAHA is non-suited for having failed to join Messrs Palazzolo and Hill, who are still alive, to the proceedings;
  - 6.2 the scope of the PAIA request is unreasonably vague;
  - 6.3 the SARB contends that it may refuse disclosure of the information referred to in the PAIA request on the basis of justifiable exemption grounds provided for in PAIA;

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<sup>5</sup> Annexure “FA9” to the Founding Affidavit p 87

<sup>6</sup> Replying Affidavit para 6 p 352

6.4 the SARB contends that the public interest override, as provided for in section 46 of PAIA, does not apply to the PAIA request.

## JOINDER

7. SAHA elected not to join Messrs Palazzolo and Hill as respondents to the proceedings, despite SAHA having been afforded the opportunity to do so by the SARB on 15 April 2016.<sup>7</sup> The SARB also raised *in limine* the point of non-joinder in its Answering Affirmation.<sup>8</sup>

8. SAHA resists the non-joinder point on two grounds being:

8.1 SAHA contends that the rule 3(5)(a) notice process provided for in the PAIA Rules<sup>9</sup> replaced the joinder process contemplated in Rule 10 of the Uniform Rules of Court;

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<sup>7</sup> See letter addressed by the SARB's attorneys of record, Werksmans Attorneys ("Werksmans") dated 15 April 2016 addressed to SAHA's attorneys of record, the Lawyers for Human Rights ("LHR") annexure "JDJ1" to the Answering Affirmation p 194

<sup>8</sup> Answering Affirmation paras 8 – 20 pp 113 – 118

<sup>9</sup> *Rules of Procedure for Application to Court in terms of the Promotion of Access to Information Act, 2 of 2000*, published in GN R965 in GG 32622 of 9 October 2009, which came into effect on 16 November 2009 ("PAIA Rules")

8.2 SAHA asserts that “joinder of necessity” does not require Messrs Palazzolo and Hill to be joined to the proceedings.

**Third party notification process**

9. Chapter 5 of PAIA provides for third party notification and intervention. In terms of section 47 of PAIA, the information officer of a public body considering a request for access to records must take “reasonable steps” to inform third parties to whom the records relate. Third parties are then afforded an opportunity to make representations to the public body considering the request. Regardless of whether notification was so given, a public body may decide the request without the recommendations of the third party (section 49(2) of PAIA).
10. In terms of rule 3(5)(a) of the PAIA Rules, the public body served with an application in terms of section 78 of PAIA is required to “notify, in writing, all other persons affected, of the application” and to attach a copy of the application to such notice.
11. The purpose of these provisions is to ensure that third parties are kept in the loop about any request for information concerning them. They embody the principle of *audi alterem partem* to ensure fair administrative process.

12. As the person considering the PAIA request on behalf of the SARB at the relevant time (Mr Alexander Ellis, Specialist Legal Counsel of the SARB), was under the impression that Mr Hill had passed away, and that Mr Palazzolo was incarcerated somewhere in Italy, the approach was adopted by the SARB that it would be unreasonable to expect from the SARB to cause notices to be delivered to these individuals as contemplated in section 47 of PAIA.<sup>10</sup> Thus, the decision to refuse access to the records requested in the PAIA request was taken by the Deputy Information Officer of the SARB without recommendations from these individuals. It has since been established that Mr Hill is alive and that Mr Palazzolo is incarcerated in a prison in Spoleto, Italy. Accordingly, in complying with rule 3(5)(a) of the PAIA Rules, the SARB (through Werksmans) notified Messrs Palazzolo and Hill of the institution of the present proceedings.<sup>11</sup>
13. The issue is technical: Does the rule 3(5)(a) notice requirement on a public body (such as the SARB) excuse the aggrieved requester instituting application proceedings in a High Court from joining affected persons to the litigation proceedings?

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<sup>10</sup> Answering Affirmation para 66 p 142

<sup>11</sup> See Annexures "JDJ5" and "JDJ9" to Answering Affirmation at pp 212 – 214 and 224 – 235

14. SAHA submits that joinder is ordinarily governed by Rule 10 of the Uniform Rules of Court. Also, that PAIA rule 2(2), read with PAIA rule 3(5)(a), replaced Rule 10 joinder.<sup>12</sup> SAHA's argument is misplaced. Rule 10 of the Uniform Rules of Court deals with joinder of convenience (it permits a party to join another party when convenient to do so). The rule regarding the obligatory joinder of a party is a well-established rule of our common law.<sup>13</sup>
15. The test for joinder of necessity is trite. It requires that a person should be joined if such person has a direct and substantial interest in the subject matter of the litigation. That is, a legal interest in the subject matter of the litigation which may be affected by the decision of the court.<sup>14</sup> This has been found to mean that if the judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests of a party not joined to the proceedings, that such a party must be joined.<sup>15</sup>

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<sup>12</sup> SAHA's Heads of Argument para 121

<sup>13</sup> Erasmus (*Superior Court Practice*) Vol 2, D 1-123

<sup>14</sup> **Amalgamated Engineering Union v Minister of Labour** 1949 (3) SA 637 (A) at p 659, applied with approval by the Constitutional Court at several occasions, for example **Pheko v Ekurhuleni City** 2015 (5) SA 600 (CC) para 56

<sup>15</sup> **Gordon v Department of Health, KwaZulu-Natal** 2008 (6) SA 522 (SCA) para 9



16. The SARB submits that the common-law rule for obligatory joinder applies to proceedings under sections 78 to 82 of PAIA. This was recently also the approach adopted by the High Court (KwaZulu-Natal) in **Democratic Alliance v Acting Director of Public Prosecutions, KwaZulu-Natal**.<sup>16</sup>
17. Rule 2(2), read with rule 3(5)(a), of the PAIA rules do not override the common-law principles of joinder of necessity. The rule 3(5)(a) notice simply ensures that third parties are kept in the loop of developments.
18. It is submitted that the mere fact that the third parties have been notified of the proceedings, should not deprive them of the opportunity to be called on by a notice of motion to indicate whether they oppose proceedings and if so, to be afforded the opportunity to file answering papers. Such third parties may not realise that they have a right to also actively participate in the proceedings as rule 2(2) read with rule 3(5)(a) of the PAIA Rules do not make provision for the calling on third parties to do so.

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<sup>16</sup> 2016 (JDR) 0300 (KZP) (unreported judgment). The court applied the test for joinder as set out in the **Amalgamated Engineering Union** case (see judgment para 38)

19. To interpret the PAIA Rules in the manner as contended for by SAHA may deprive parties of a right to a fair trial, which is a right protected under section 34 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The court is enjoined to interpret the PAIA Rules in a manner consistent with the Constitution.<sup>17</sup>

**Necessary to join Messrs Palazzolo and Hill?**

20. SAHA is incorrect in contending that it is not necessary to join Messrs Palazzolo and Hill.
21. It cannot be gainsaid that the order sought by SAHA may prejudice the interests of Messrs Palazzolo and Hill. The records to which access is sought by SAHA concerns information relating to the financial transactions in which these individuals have been involved. In the premises, the records requested constitute "personal information" as contemplated in section 1 of PAIA.<sup>18</sup> Personal information is protected from disclosure in terms of section 34 of PAIA.

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<sup>17</sup> Section 39(2) of the Constitution

<sup>18</sup> Para (b) of the definition of "personal information" in section 1 of PAIA

22. In fact, SAHA takes issue therewith that the SARB did not notify these individuals in terms of section 47 of PAIA.<sup>19</sup> The SARB's duty to notify an individual would only arise if the record "might" be a record contemplated in sections 34(1) (personal information), 35(1) (records of SARS), 36(1) (commercial information), 37(1) (information submitted in confidence) or 43(1) (research information) of PAIA. By implication, SAHA concedes that the records sought by them might constitute records which may legitimately be protected from disclosure as provided for in the relevant sections of PAIA.
23. It is submitted that an extra-judicial notice (such as the notice in terms of rule 3(5)(a) of the PAIA Rules) may only cure a defect of non-joinder, should there be an unequivocal response from the relevant third parties that they abide by the decision of the court, which does not apply to the present case.<sup>20</sup>
24. SAHA is therefore not entitled to proceed with this application in the absence of a proper joinder of Messrs Palazzolo and Hill, or an unequivocal written response from the individuals that they abide the decision of this court.

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<sup>19</sup> Founding Affidavit paras 93 – 94 p 33

<sup>20</sup> Cf. **In Re BOE Trust Ltd and Others NNO** 2013 (3) SA 236 (SCA) at paras 19 and 20

## IS THE SARB ENTITLED TO RELY ON NEW GROUNDS?

25. In its Answering Affirmation the SARB relies predominantly on the same grounds as those relied on when the SARB's Deputy Information Officer took the decision not to disclose the records requested in the PAIA request.<sup>21</sup> To the extent that the grounds have been differently formulated, the issue arises whether the SARB is permitted to rely on new grounds for refusal in the appeal.
26. SAHA, relying on the **Afriforum v Emadlangeni Municipality** judgment ("Afriforum case"),<sup>22</sup> contends that it is not permissible for a public body to rely on new grounds. This judgment is, with respect, wrong in this regard. It negates the difference between a review and a wide appeal. The court's reliance on **National Lotteries Board v South African Education and Environment Project**<sup>23</sup> is misplaced. The *National Lotteries* case concerned a review under the Promotion

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<sup>21</sup> See annexure "FA9" to the Founding Affidavit p 87

<sup>22</sup> **Afriforum v Emadlangeni Municipality** (A286/2015) [2016] ZAGPPHC 510 (27 May 2016) at paras 26 – 28. See SAHA's Heads of Argument footnote 11

<sup>23</sup> 2012 (4) SA 504 (SCA). See **Afriforum** case para 27

of Administrative Justice Act.<sup>24</sup> It is trite that in review proceedings, an organ of state is not permitted to retrofit its decision.

27. The nature of the current proceedings is, however, a wide appeal. As correctly pointed out by the Constitutional Court in **President of the Republic of South Africa v M & G Media Ltd**,<sup>25</sup> the High Court entertaining an appeal under PAIA is not limited to “the decision of the information officer”. It decides the hearing *de novo*. As it constitutes a rehearing of the merits, SAHA is entitled to rely on new grounds of appeal and the SARB is entitled to rely on new grounds for refusal. This is so because the court of appeal has the power to disregard lesser irregularities of the original decision-maker.<sup>26</sup>

#### **DOES SAHA’S PAIA REQUEST LACK CLARITY?**

28. The logical point of departure in an application under PAIA for the disclosure of a record is: What was asked for? As acknowledged in **Afriforum NPC v Deputy Information Officer of the Presidency**,<sup>27</sup>

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<sup>24</sup> Act No 3 of 2000. See **National Lotteries** case para 6

<sup>25</sup> 2012 (2) SA 50 (CC) at para 14

<sup>26</sup> See **Tantoush v Refugee Appeal Board** 2008 (1) SA 232 (T) at para 90. For the distinction between a wide appeal and a narrow appeal see **Tikly v Johannes NO** 1963 (2) SA 588 (T) at 592A-E

<sup>27</sup> Unreported judgment 2015 (JDR) 2431 (GP)

("Afriforum NPC case") PAIA provides for access to recorded information. It does not facilitate "an open interrogation about 'information' more broadly".<sup>28</sup> PAIA is not an omnibus device to achieve public accountability from organs of state.<sup>29</sup> A document is identified by name and its contents. Importantly, the description given must afford a reasonable official with "sufficient particulars", as contemplated in section 18 of PAIA, to identify the document. A requester is not entitled to a "rolling request."<sup>30</sup>

29. SAHA's PAIA request lacked clarity: It sought access to the following "record":

*"Copies of any and all records, or parts of records, of any evidence obtained by the bank at any time as part of investigations into any substantial contravention of, or failure to comply with, the law in terms of **significant fraud** (including fraud through manipulation of the financial rand dual currency, foreign exchange or forging Eskom bonds), **gold smuggling or smuggling of other precious metals** from 1 January 1980 to 1 January 1995 ..."* (emphasis added)

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<sup>28</sup> See **Afriforum NPC** case at para 7

<sup>29</sup> See **Afriforum NPC** case at para 7

30. The PAIA request was unreasonably cryptic, broad and vague.<sup>31</sup> The SARB is the central bank of South Africa. Its primary object is to protect the value of currency in the interest of balanced and sustainable economic growth in South Africa. It has eighteen departments, three of which are concerned with regulatory supervision and compliance with laws, namely the Financial Surveillance Department (previously known as the “Exchange Control Department”), the Bank Supervision Department and the National Payment System Department, respectively.<sup>32</sup> The SARB would only undertake investigations into economic crimes such as fraud, gold smuggling or smuggling, where such conduct or activity involves the alleged non-compliance with laws supervised and administered by the SARB. Its primary function is not to prosecute perpetrators involved in economic crimes.<sup>33</sup>
31. Thus, when considering the PAIA request, the SARB had difficulty in understanding exactly what was being requested by SAHA. This is so because an enquiry as to whether a document reveals “evidence”

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<sup>30</sup> See **Afriforum NPC** case at paras 10 and 27

<sup>31</sup> Answering Affirmation para 34 p 125; para 131.1 p 172

<sup>32</sup> Answering Affirmation paras 26 – 30 pp 121 – 122

<sup>33</sup> Answering Affirmation paras 31 – 32 p 124

inevitably involves a subjective analysis. Additionally, an investigation into “significant fraud” could conceptually have extended to investigations conducted by the SARB in departments such as the Bank Supervision Department (for example an illegal pyramid scheme).<sup>34</sup> Given that “evidence” is generally understood to mean material which may tend to prove a fact in issue, the SARB reasonably understood, and was entitled to understand, the PAIA request as referring to records which may tend to prove a substantial contravention amounting to significant fraud.

32. Werksmans requested SAHA to clarify the subject matter of the PAIA request.<sup>35</sup> SAHA failed to provide more specific details.<sup>36</sup>
33. Consequently, the SARB reasonably interpreted the PAIA request to mean and refer to records obtained by the SARB through formal investigations recorded in the register of investigations conducted by the Financial Surveillance Department into significant fraud (in the context of contraventions of exchange control contraventions) and to

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<sup>34</sup> Answering Affirmation paras 131.4 and 131.5 p 173

<sup>35</sup> See letter addressed by Werksmans dated 27 July 2015, annexure “FA8” to Founding Affidavit p 84 (see paras 6.1, 6.2 and 6.3 of letter)

<sup>36</sup> Answering Affirmation para 35 p 125



the extent that the records relate specifically and directly to the three individuals.<sup>37</sup>

34. The identification of the “record” was still not without difficulty, because the primary purpose of investigations into exchange control is to recoup capital exported illegally, and not to prosecute perpetrators.<sup>38</sup>
35. In its Replying Affidavit, SAHA attempted to reformulate the subject matter of the PAIA request. It contended that the PAIA request includes “all documents or other records forming part of investigation files opened in relation to the alleged fraudulent and criminal activities of Mr Palazzolo, Mr Hill or Mr Blaauw”.<sup>39</sup> SAHA furthermore alleged that the PAIA request includes all the documents considered by the Harms Commission.<sup>40</sup>
36. It is submitted that the PAIA request, as formulated, is unduly vague and broad. The SARB should not be required to speculate as to what is requested from it. The application should be dismissed for that reason alone.

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<sup>37</sup> Answering Affirmation para 35 p 125

<sup>38</sup> Answering Affirmation para 37 p 126

<sup>39</sup> Replying Affidavit para 14 p 353

<sup>40</sup> Replying Affidavit para 87 p 366

## SCOPE OF THE PAIA REQUEST

37. Despite the vague and unclear formulation of the PAIA request, the SARB endeavoured to evaluate the request to the best of its abilities. It established that investigation files were opened during the relevant time for Mr Palazzolo, Brigadier Blaauw and Mr Hill. The following approach was adopted in the analysis:

37.1 for each file (to the extent reasonable), it was considered whether the documents contained in the files potentially “reveal evidence” of a significant fraud or smuggling;<sup>41</sup>

37.2 the application of one or more of the exclusion grounds provided for in PAIA was considered;<sup>42</sup> and

37.3 the SARB considered the public interest override provision contemplated in section 46 of PAIA.<sup>43</sup>

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<sup>41</sup> Answering Affirmation para 71.2 p 143

<sup>42</sup> Answering Affirmation, para 71.3, p 144

<sup>43</sup> Answering Affirmation para 71.4 p 144

38. Mr Palazzolo's investigation file consists of one lever arch file containing the following documents: A copy of the Harms Commission report,<sup>44</sup> clips of newspaper articles, trust documents, Exchange Control index cards, proof of transactions by a family trust, copies of Mr Palazzolo's bank statements, investigator notes and calculations, documents submitted to the SARB by authorised dealers (such as reports on all the financial rand transactions for certain periods), correspondence and screen printouts from the Exchange Control electronic data base recording the closure of the case.<sup>45</sup>
39. Nothing became of the investigation as the file was closed and no attachment, blocking of funds or forfeiture steps were proceeded with against Mr Palazzolo.<sup>46</sup>
40. The SARB concluded that none of these documents in the investigation file revealed or constituted "evidence" that Mr Palazzolo was involved in significant fraud or smuggling.<sup>47</sup>

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<sup>44</sup> *Kommissie van Ondersoek na sekere beweerde ongerymdhede oor landsgrense heen – Eerste Verslag – Die Sg Palazzolo-De Pontes aangeleentheid*

<sup>45</sup> Answering Affirmation para 77 pp 146 – 148

<sup>46</sup> Answering Affirmation para 76 p 145

<sup>47</sup> Answering Affirmation para 81 p 150; para 82.1 p 150; para 83.1 p 152; para 84.1 p 153; para 85 p 154; para 86.1 p 155; para 87 p 156, para 88 p 156

41. It was established, after the institution of the application, that the Harms Commission report was available in the public domain. A copy of this report and the newspaper articles in the investigation file were subsequently made available to SAHA upon the delivery of its Answering Affirmation (see annexures “JDJ11 (pages 238-340) and “JDJ12” (pages 341-345)).
42. The investigation file for Brig Blaauw consists of two standard and one small lever arch file, containing the following documents: a letter from the Exchange Control Department addressed to the Commissioner of the South African Police Service recording that Brig Blaauw was allegedly involved in the contravention of the Exchange Control Regulations, annual financial statements, audited and accounting records, share registers, company registration documents and minute books of a company in which Brig Blaauw was a director, a few newspaper clippings, deed of transfer of property, vehicle registration documents, income returns and assessments and some accounting notes relating to the company.<sup>48</sup>

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<sup>48</sup> Answering Affirmation para 97 p 160

43. It appears that the file was opened and several documents collected, and that nothing further became of the investigation.<sup>49</sup>
44. As with Mr Palazzolo, the SARB ultimately concluded that none of the documents in Brig Blaauw's investigation file revealed or constituted "evidence" that Brig Blaauw was involved in significant fraud or smuggling.<sup>50</sup>
45. Mr Hill's investigation file consists of forty-three archive boxes, which were not indexed or sorted.<sup>51</sup> Thirty of the boxes contain files compiled by forensic auditors.<sup>52</sup>
46. The SARB concluded that the documents could potentially reveal or constitute evidence that Mr Hill was involved in significant fraud. However, for reasons more fully explained below, the SARB is of the view that it has a justifiable basis to refuse the disclosure of these documents.

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<sup>49</sup> Answering Affirmation paras 96 and 97 p 159

<sup>50</sup> Answering Affirmation para 98 p 160

<sup>51</sup> Each archive box contains an average of 5 lever arch files, and in some instances, loose documents

<sup>52</sup> Answering Affirmation para 109 p 164

47. As indicated in its Answering Affirmation, the SARB has no objection to making any of the files available to the court for a “judicial peek”.<sup>53</sup>

### **EXCLUSION GROUNDS**

48. The grounds of refusal relied on by a public body must be evaluated objectively. The question is not whether the “best evidence” to justify the refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed.<sup>54</sup>
49. The SARB relies on several grounds for refusal. From an institutional perspective, it relies on section 37(1)(b) and/or 42(1) of PAIA (for the refusal to disclose all the documents subject to the PAIA request). Broadly speaking, the SARB contends that it has an interest in protecting the integrity and sanctity of investigations conducted by it. In addition to these grounds, reliance is placed by the SARB on section 34(1) (mandatory protection of personal information), section 36(1)(b) (commercial information), section 45 (unreasonable diversion of resources) and section 46 (public interest privilege) of PAIA, respectively.

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<sup>53</sup> Answering Affirmation para 163 p 191

**Sections 37(1)(b) and 42(1) of PAIA: Integrity of investigations**

50. The SARB contends that, broadly speaking, the mere disclosure of the contents of its investigation files to a member of public should be guarded, in the absence of a compelling public interest in the disclosure of the information.
51. The SARB formulated its duty to protect the integrity of its investigations under the exclusion grounds contained for in sections 42(1) and/or 37(1)(b) of PAIA.
52. In terms of section 42(1) of PAIA an information officer of a public body **may refuse** a request for access to a record of the body if its disclosure would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic.
53. Investigators conducting investigations on behalf of the SARB rely predominantly on **statutory powers** to enable them to gather relevant information.<sup>55</sup> Generally speaking, it is in the public interest that the

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<sup>54</sup> **President of the Republic of South Africa v M&G Media Ltd** 2012 (2) SA 50 (CC) at para 25

<sup>55</sup> For investigations in the **Bank Supervision Department**, the powers of investigators are governed by sections 11 and 12 of the South African Reserve

sanctity of these investigations be guarded. A member of the public should not be allowed to misuse the information gathering powers statutorily entrusted to a regulator.<sup>56</sup>

54. Furthermore, investigators rely on the **co-operation** of institutions and third parties to supply relevant information to the SARB. The flow of information to a public body is protected under section 37(1)(b) of PAIA, as recently been acknowledged and applied by the full bench of the Gauteng Division in **South African Pork Producers Organisation v National Council of Societies for the Prevention of Cruelty to Animals**.<sup>57</sup> The SARB contends that it is similarly justifiable for the SARB to refuse access to information based on the provisions of section 37(1)(b) of PAIA.
55. Firstly, it is reasonable to infer from the evidence that there is a reasonable expectation that information supplied by persons and

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Bank Act No 90 of 1989, read with the relevant provisions of the Inspection of Financial Institutions Act No 80 of 1998 (which replaced Act No 38 of 1984). For investigations in the **Exchange Control Department**, investigators rely on the powers provided for in Regulation 19 of the Exchange Control Regulations initially promulgated in 1961 under the Currency and Exchanges Act No. 9 of 1933 ("the Exchange Control Regulations")

<sup>56</sup> Answering Affirmation para 56.1 p 137

<sup>57</sup> 2016 JDR 0285 (GP). See also obiter remark by Hartzenberg J in **CCII Systems (Pty) Ltd v Fakie and Others NNO** 2003 (2) SA 325 (T) at para 20



institutions to the SARB, is supplied in confidence.<sup>58</sup> This is so because the SARB is, save for a few exceptions, duty bound to treat the information as secret and/or confidential in terms of the provisions of section 33 of the South African Reserve Bank Act 90 of 1989 (“SARB Act”).<sup>59</sup> The mere fact that the information officer may lawfully disclose information submitted to the SARB (section 5 of PAIA read with section 33 of the SARB Act) cannot detract from the fact that, objectively evaluated, it is reasonable to infer that the supplier of the information relied on the statutory protection afforded by section 33 of the SARB Act when the information was supplied.

56. Unlike the position of commercial banks, there is, generally speaking, not a contractual relationship between the SARB and members of the public (including the clients of commercial banks) governing the confidentiality of information.<sup>60</sup> The position is governed by statute (section 33 of the SARB Act). In fact, secrecy provisions in the governing Acts of central banks are encountered internationally to deal with the confidentiality of information. Examples include the governing

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<sup>58</sup> Answering Affirmation para 56.2 p 137

<sup>59</sup> Answering Affirmation paras 48 and 49 pp 131 – 132

<sup>60</sup> Answering Affirmation para 50 p 132

statutes of the central banks in Canada, Australia and England.<sup>61</sup> Unlike SAHA's contentions, the detail and context of these provisions are not important for this application, only the fact that they exist. Perspective is important. SAHA's contention that the secrecy historically adopted by the SARB is attributable to "corruption under apartheid" seems to disregard the role of a central bank and the absence of banker-client contractual relationships.

57. The potential harm is this: should it become known that information may readily be disclosed by the SARB following a request under PAIA, the SARB may encounter difficulties in obtaining **co-operation** from institutions and third parties in future. The SARB confirmed in its Answering Affirmation that this could prejudice the future supply of information from the same or similar sources.<sup>62</sup>

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<sup>61</sup> Answering Affirmation para 50 p 132, footnotes 7, 8 and 9. See in this regard the following legislation: Bank of Canada Act (R.C.S., 1985, c.B-2), section 16 read with schedule and section 33, Reserve Bank Act No 4, 1959 (Australia), section 79A and 79B and The Bank of England Act 1998, Chapter 11, Schedule 7 read with section 17(1) and para 9 of Schedule 2

<sup>62</sup> Answering Affirmation para 56.2 p 138

58. It is in the public interest that similar information, or information from the same source, should continue to be provided to the central bank of the Republic.<sup>63</sup>
59. Thus, the SARB may potentially refuse the disclosure of information obtained in confidence as contemplated in section 37(1)(b) of PAIA and/or in terms of section 42(1) of PAIA.<sup>64</sup>
60. These considerations have been acknowledged on an international level (albeit in a different context). In **Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners**<sup>65</sup> the House of Lords in England had to consider whether it was appropriate to order revenue commissioners to disclose documents collected in an investigation in litigation against Crompton. The commissioners relied on public interest privilege and objected against the disclosure of the information. They contended that, if it were known that information of this kind was liable to be disclosed, the third-party informants would no longer give the commissioners such information, which would hamper them in the execution of their duties. The House of Lords upheld the

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<sup>63</sup> Answering Affirmation para 56.2 p 138

<sup>64</sup> Answering Affirmation para 56.2 pp 137 – 138

<sup>65</sup> [1974] 2 AC 405 (HL)

commissioners' objection. The Freedom of Information Act has since been incorporated in the United Kingdom in 2000 (codifying the "public interest privilege"). It is submitted however, that broadly speaking the considerations remain relevant. The point is this: the public interest in protecting the integrity of investigations conducted by state organs relying on the co-operation of third parties, is not far-fetched or fanciful and has received recognition in international jurisdictions.

61. Importantly, the SARB concedes that it would be unjustifiable to rely on these exclusions as a principle, divorced from the facts. Its view is that it would disclose the contents of its investigation files in the event of a compelling need for the disclosure of the information.<sup>66</sup> Both sections 37(1)(b) and 42(2) of PAIA affords the information officer a discretion to refuse (it "may" refuse).
  
62. It is for this reason that the SARB (through Werksmans) requested SAHA to provide the reasons for the PAIA request.<sup>67</sup> It is so that a requester of records is not obliged to give reasons for a PAIA request submitted to a public body, as provided for in section 11 of PAIA. However, without facts motivating the PAIA request, the information

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<sup>66</sup> Answering Affirmation para 58 p 139

<sup>67</sup> See letter Annexure "FA6" to the Founding Affidavit para 4 p 79

officer is not properly positioned to exercise a discretion in favour of the disclosure of the PAIA request.

63. SAHA provided a scant response: it motivated the PAIA request as follows<sup>68</sup>:

*[5] Our client is a non-profit, non-governmental organisation which seeks to archive and preserve records evidencing past and contemporary struggles for justice. Of particular importance to our client is ensuring public access to historical records relating to struggles for justice and to prevent the loss of such records. In this vein, our clients use the Promotion to Access to Information Act 2 of 2000 (“PAIA”) as one of its primary tools to seek access to records.*

*[6] The principle focus of our client’s work is the preservation and archiving of documents relating to struggles for justice. SAHA has historically demonstrated an interest in records relating to the work of the Truth and Reconciliation Commission (“the TRC”). In this particular case the records requested relate to your client’s work in an attempt to make records relating to the work of the TRC more widely accessible (something which was a specific recommendation of the TRC itself).” (emphasis added)*

64. In considering the PAIA request, the SARB was not convinced that the motivation for the disclosure of the contents of the investigation files was sufficiently compelling.

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<sup>68</sup>

See letter Annexure “FA7” to the Founding Affidavit paras 5 and 6 p 80

65. In its Founding Affidavit, SAHA explains that the main reason for seeking access to the documents contained in the investigation files, is for purposes of collecting and analysing apartheid era archival material for the purposes of a book that will focus on the procurement practices and public accountability during apartheid.<sup>69</sup> The SARB persists with its contention that the motivation for the PAIA request does not outweigh the public interest in protecting the sanctity and integrity of investigations conducted by or on behalf of it, especially in view thereof that the information is in principle protected from disclosure.<sup>70</sup>

**Section 34: Unreasonable disclosure of personal information**

66. In terms of section 34(1) of PAIA, the information officer of a public body must refuse a request for access to a record if the disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual. The provision is mandatory. Section 34 of PAIA seeks to protect the right to privacy

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<sup>69</sup> Founding Affidavit paras 10 p 9

<sup>70</sup> The absence of statutory provisions prohibiting the disclosure of information has been considered to be a relevant consideration in weighing the considerations for and against disclosure. See **Right2know Campaign v Minister of Police** [unreported judgment] case no 2013/32512 para 25. By parity of reasoning, the converse argument should also apply

under section 14 of the Constitution, and to some extent the right to dignity enshrined in section 10 of the Constitution.

67. The SARB relied on section 34 of PAIA as an exclusion ground for refusing access to the following documents relating to Mr Palazzolo:

67.1 Exchange Control index cards;<sup>71</sup>

67.2 documents concerning transactions involving the family trust;<sup>72</sup>

67.3 Mr Palazzolo's bank statements;<sup>73</sup> and

67.4 documents submitted to the SARB by authorised dealers.<sup>74</sup>

68. As explained above, the SARB did not give Mr Palazzolo notice in terms of section 47 of PAIA. It nevertheless decided to refuse the disclosure of the documents, as it was entitled to do, in terms of section 49(2) of PAIA.

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<sup>71</sup> Answering Affirmation para 82.3 p 151

<sup>72</sup> Answering Affirmation para 83.2 p 153

<sup>73</sup> Answering Affirmation para 84.2 p 154

<sup>74</sup> Answering Affirmation para 86.2 p 155

69. In its Replying Affidavit SAHA takes the point that the SARB was not entitled to rely on section 34 of PAIA in circumstances where the SARB did not comply with the third-party notification process as provided for in section 47 of PAIA.<sup>75</sup> SAHA is, respectfully, incorrect in its assertion in this regard. In **Van der Merwe v National Lotteries Board**<sup>76</sup> it was held that the failure by a public body to follow section 47 does not automatically entitle a requester to access the records, as the public body is entitled to refuse access in terms of section 49(1) and (2) of PAIA.<sup>77</sup>
70. The enquiry as to what type of information would qualify for protection under section 34 of PAIA was dealt with by the Eastern Cape High Court (per Alkema J) in **Centre for Social Accountability v Secretary of Parliament**.<sup>78</sup> The court applied the approach adopted in **Bernstein v Bester**,<sup>79</sup> where privacy rights were weighed against the public's interest in compelling the disclosure of private information at

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<sup>75</sup> Replying Affidavit para 31 p 356

<sup>76</sup> 2014 JDR 0844 (GP)

<sup>77</sup> **Van der Merwe** case at para 33

<sup>78</sup> 2011 (5) SA 279 (ECG)

<sup>79</sup> 1996 (2) SA 751 (CC)



insolvency enquiries. The court adopted a two-stage enquiry test: First, it is required to be established whether the information constitutes personal information; If so, does the individual subjectively harbour a legitimate and reasonable expectation that the information will be protected by the right to privacy? Secondly, it is required to be established whether objectively society has a legitimate and reasonable expectation, that such information is protectable. If so, then the disclosure of the information will be “unreasonable”.<sup>80</sup>

71. Personal information as defined in section 1 of PAIA, includes, *inter alia*, information relating to financial transactions in which the individual in question has been involved.<sup>81</sup> All the documents identified above, fall within the purview of this definition. Thus, the documents constitute personal information as defined.
72. SAHA reiterates in its heads of argument that the requester’s reasons for requiring the record is irrelevant.<sup>82</sup> The reality is that a public body considering a request (such as the SARB) cannot properly consider the request where it has a discretion to disclose the record in the

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<sup>80</sup> **Centre for Social Accountability** case at para 74

<sup>81</sup> Definition of “personal information” in section 1 para (b) of PAIA

<sup>82</sup> SAHA’s Heads of Argument para 27

absence of a factual basis indicating that the disclosure may be reasonable in the circumstances. In the premises, the SARB contends that the disclosure would be unreasonable.

73. Thus, the SARB contends that the documents identified above are protected from disclosure in terms of section 34(1) of PAIA.

**Section 36(1)(b): Commercial information**

74. In terms of section 36(1)(b) of PAIA an information officer of a public body must refuse a request for access to a record if it contains 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.

75. The SARB relies on the provisions of section 36 of PAIA as exemption in respect of the provision of documents contained in the investigation file compiled for Brig Blaauw, relating to the company in which Brig Blaauw was a director.<sup>83</sup>

76. The SARB did not cause a notice in terms of section 47 of PAIA to be delivered to the company, as the SARB considered that it would be unreasonable for it to be expected to have traced the whereabouts of

the company. The SARB therefore refused the disclosure of the information without any input from the company, relying on the provisions of section 49(2) of PAIA.<sup>84</sup>

77. SAHA's main criticism levelled against the SARB relying on section 36 is that it has provided no factual basis for its contention that the disclosure of the information would cause financial or commercial harm to the company.<sup>85</sup>

78. The SARB contends that, despite it not being in a position to produce "best evidence" that the disclosure of the information is likely to cause harm to the company, it is at least probable that the disclosure of the information is likely to cause harm to the company, especially in circumstances where the input of the directors was not sought and considered.<sup>86</sup>

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<sup>83</sup> Answering Affirmation para 97 p 160 read with para 99 p 161

<sup>84</sup> Answering Affirmation para 100 p 161

<sup>85</sup> SAHA's Heads of Argument para 62

<sup>86</sup> Answering Affirmation para 104.2 p 163

79. Unlike the position in the **BHP Billiton case**<sup>87</sup> (relied on by SAHA in its Heads of Argument),<sup>88</sup> the information is not already in the public domain.
80. Thus, the SARB contends that its reliance on section 36(1)(b) of PAIA to refuse the PAIA request is justifiable.

**Section 45: Unreasonable diversion of resources**

81. Section 45(1)(b) of PAIA provides that an information officer may refuse a request for access to a record if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.
82. The SARB relies on section 45 of PAIA as an exclusion ground in relation to the forty-three archive boxes full of documents relating to Mr Hill.<sup>89</sup> The SARB explained that the processing of the documents would require a person familiar with the investigations followed in the Exchange Control Department to perform the exercise. Investigators and managers in the Financial Surveillance Department are involved in

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<sup>87</sup> **BHP Billiton PLC Inc v De Lange** 2013 (3) SA 571 (SCA) at para 28

<sup>88</sup> SAHA's Heads of Argument para 61

<sup>89</sup> Answering Affirmation para 116 p 166

current investigations on a full-time basis and their capacity is overstretched. To analyse forty-three archive boxes on an average of 2 to 3 days per box is likely to take up approximately 86 to 129 days (the reference to 141 days in paragraph 117 of the SARB's Answering Affirmation is a calculation error). It would be unreasonable to expect the SARB to divert specialised resources to carry out this exercise.<sup>90</sup>

83. Additionally, the SARB is concerned about the vast number of third parties that may be affected by the disclosure of the information, and whether it would be feasible to notify the relevant third parties of the PAIA request in terms of section 47 of PAIA. Taking a random sample of 10 files from the archive boxes, it established that there are at least 148 third parties referred to in the documents considered.<sup>91</sup>

84. The contention by SAHA, as raised in its heads of argument that the SARB has failed to comply with its obligations under the National Archives and Records Services of South Africa Act,<sup>92</sup> regarding management and care of these public records,<sup>93</sup> is without foundation,

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<sup>90</sup> Answering Affirmation para 117 p 167

<sup>91</sup> Answering Affirmation para 118 p 167

<sup>92</sup> Act No 43 of 1996

<sup>93</sup> SAHA's Heads of Argument para 83

as this allegation was for the first time raised in SAHA's Replying Affidavit.<sup>94</sup> It is trite that SAHA is not entitled to rely on new matter set out in its Replying Affidavit.<sup>95</sup> Be that as it may, the SARB has filed a Supplementary Affirmation confirming that it has indeed complied with its obligations under the National Archives and Record Services of South Africa Act.<sup>96</sup>

85. The SARB confirms its view that the processing of the PAIA request pertaining to Mr Hill would unreasonably divert the SARB's resources.

#### **PUBLIC INTEREST OVERRIDE (SECTION 46)**

86. SAHA submits that the public interest in the disclosure of the records clearly outweighs the harm contemplated in any of the exclusion grounds relied on by the SARB to refuse the PAIA request. In the premises, SAHA contends that the records must be disclosed as contemplated in section 46 of PAIA.<sup>97</sup>

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<sup>94</sup> Replying Affidavit para 144 p 377

<sup>95</sup> **Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd** 1974 (4) SA 362 (T) at 368H-369B; **Minister of Environmental Affairs and Tourism v Phambile Fisheries (Pty) Ltd** 2003 (6) SA 407 (SCA) at 439G-H

<sup>96</sup> See the SARB's Supplementary Affirmation paras 8 to 15 at pages 388 to 390

<sup>97</sup> SAHA's Heads of Argument paras 96 to 114

87. Section 46 provides that the information officer of a public body must grant a request for access to a record (despite falling within the ambit of one of the exemption grounds listed in section 46 of PAIA) if:

87.1 the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law; and

87.2 the public interest in the disclosure of the record clearly outweighs the harm contemplated in the exclusion grounds.

88. The information officer must undertake a careful balancing, on the facts of the specific case, of the harm that would ensue from permitting disclosure of the record, and the public interest in its disclosure. The enquiry in each case is fact-specific.<sup>98</sup>

**Substantial contravention of the law**

89. The starting point of the enquiry is to establish whether the disclosure would reveal evidence of a substantial contravention of the law.

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<sup>98</sup> **Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd** 2013 (3) SA 315 (SCA) at para 14

90. In **Centre for Social Accountability v Secretary of Parliament**<sup>99</sup> it was held that the requester must show on a balance of probability that the disclosure would reveal evidence of the required contravention or failure. In that case the court was concerned with the disclosure of information relating to the “Travelgate” scandal. Members of Parliament and travel agents were involved in the fraudulent abuse of the parliamentary travel voucher system. Evidence before the court revealed that 23 members and ex-members of Parliament had been arrested on criminal charges of fraud. An affidavit of the investigating officer was also filed in support of the allegations of fraud. The court was satisfied that the applicant (i.e the requester) discharged the onus.<sup>100</sup>
91. In any event, and whoever bears the onus, there must be some evidence that the disclosure of the documents would reveal evidence of a substantial contravention of the law, or a failure to comply with the law.<sup>101</sup>

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<sup>99</sup> 2011 (5) SA 279 (ECG) at paras 92 (last sentence) and 94

<sup>100</sup> See **Centre for Social Accountability** case at para 94

<sup>101</sup> **Van der Merwe v National Lotteries Board** 2014 JDR 0844 (GP) at para 54



92. The SARB submits that there is no evidence that the records contained in the investigation files of Mr Palazzolo and Brig Blaauw would reveal evidence of a contravention of the law as contemplated in section 46:

92.1 SAHA does not produce any positive evidence to this effect in its Founding Affidavit;

92.2 SAHA's allegations against Mr Palazzolo are contained in paragraphs 120 to 122 of the Founding Affidavit (pages 42 to 45). The high-water mark of SAHA's case on Mr Palazzolo is contained in the last sentence in paragraph 121 (page 44):

*"... particularly relevant to this request, the Sunday Times reported that Palazzolo was described in an internal Reserve Bank document at the time as a 'highly exceptional case', and that unnamed senior authorities had intervened to authorise the bending of exchange control rules in order to allow R14,5 million in Financial Rands to be released to him (the standard limit for immigrants was R100,000)."*

The SARB confirmed in its Answering Affirmation that Mr Ellis reported that he could find no trace of the alleged "internal Reserve Bank document" referred to in the Sunday

Times article.<sup>102</sup> Applying the long-established principles laid down in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**<sup>103</sup> regarding the resolution of factual disputes, the court is required to accept that the document could not be found (and therefore may in fact not exist);

92.3 SAHA's allegations against Brig Blaauw are contained in paragraphs 116 and 117 of SAHA's Founding Affidavit (page 41). It raises not a single allegation that Brig Blaauw was involved in a contravention of the exchange control laws in any way; and

92.4 the SARB considered all the documents contained in the investigation files for Mr Palazzolo and Brig Blaauw and concluded that not one of the documents seemed to reveal any evidence of a contravention of the law as contemplated in section 46 of PAIA.

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<sup>102</sup> Answering Affirmation para 75 p 145

<sup>103</sup> 1984 (3) SA 623 (A)

93. For Mr Hill, the SARB concedes that it is possible that the forty-three archive boxes could reveal evidence of a substantial contravention of the law.

94. For purposes of the second leg of the enquiry, the SARB nevertheless weighed the competing interests in respect of all three individuals.

**Weighing exercise**

95. SAHA contends that the SARB misapplied the test by weighing several factors and not only those allowed for in section 46 of PAIA.<sup>104</sup> SAHA's view is untenable. In substance, it submits that the "public interest in the disclosure of the record" is confined to how the requester has formulated and defined the interest.

96. What SAHA fails to recognise is that the factors considered by the SARB in dealing with the public interest override are either relevant to determine where the public interest lies in the disclosure of the information (on the one hand) or the harm contemplated by the exclusion grounds (on the other hand).

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<sup>104</sup> SAHA's Heads of Argument para 102

97. For purposes of evaluating the “public interest in the disclosure of the record”, the SARB did not merely accept SAHA’s considerations (summarised in paragraph 101 of its heads of argument). It also considered other factors relevant to establishing the public interest in the disclosure of the information. For example, the SARB is of the view that the interest in the access to the documents is of academic interest only (for the publishing of a book). This is not a pressing issue. SAHA is not seeking a report or memorandum, but loose documents which may, out of context – result in speculative and unsubstantiated commentary. For the documents relating to Mr Hill, the SARB considered the fact that the information had been documented elsewhere to be a relevant consideration. It is submitted that this approach cannot be faulted.
98. Having weighed the various interests, the SARB was not satisfied that the public interest in the disclosure of the information clearly outweighs the harm contemplated by the exclusion grounds.
99. From an institutional perspective, the SARB relies on two public interest exclusion grounds, namely the possible abuse of information gathering powers (protected by section 42(1) of PAIA) and the prejudice to the future supply of information to the SARB (protected under section 37(1)(b) and/or 42(1) of PAIA). SAHA contends that there is no factual evidence that disclosure would result in any harm.

This is incorrect. The evidence of the SARB suggests otherwise (this has been dealt with above).

100. For its reliance on section 45 of PAIA (unreasonable diversion of resources), the SARB explained in detail why the processing of the documents in all the boxes would be cumbersome (this has been dealt with above).
101. In respect of the grounds of refusal contemplated in section 34(1) (personal information of Mr Palazzolo) and 36(1)(b) (commercial information of company related to Brig Blaauw) of PAIA, the SARB is not able to produce “best evidence” of harm. It is reasonable to infer that it is likely that harm may arise for the relevant individuals and/or company.
102. Thus, it is contended that the public interest override does not find application, especially in view thereof that the PAIA request pertains to documents collected by the SARB decades ago.
103. The table below summarises the considerations evaluated by the SARB for the public interest override concerning Mr Palazzolo:

Public interest override – Palazzolo				
Public interest in disclosure – considerations		Exemptions and harm- considerations		
	Reference			Reference
SAHA seeks disclosure of investigation files for purposes of documenting history in book – thus of academic interest. <b>No pressing and current issue</b>	Founding Aff para 10 p 9	42(1)	<p><b>All documents in file:</b> sanctity of investigations</p> <p><b>Harm:</b> to allow person easy access to information obtained in the course of investigations may result in abuse of information gathering powers specifically entrusted to regulator. May jeopardise ability of government to manage the economy, as contemplated in s 42(1) of PAIA</p>	Answering aff para 56.1 p 137; para 90 p 157
Having regard to nature of documents, divorced from context, may result in <b>speculative and unsubstantiated commentary</b>	Answering Aff para 91.1 p 157	37(1)(b) 42(1)	<p><b>All documents in file:</b> protection of information supplied to bank in confidence</p> <p><b>Harm:</b> could prejudice future supply of information to bank, bank may encounter difficulties in future to obtain information</p>	Answering Aff para 56.2 pp 137 – 138; para 90 p 157
		34(1)	<p><b>Trust documents. proof of transactions by trust. exchange control index cards. bank statements. documents submitted authorised dealers = personal information.</b></p> <p><b>Harm:</b> disclosure may cause harm to trust, without considering input from trustees, may infringe privacy rights of trust</p>	Answering Aff paras 82.3; 83.2; 84.2; 86.2; para 91.4

104. The table below summarises the considerations evaluated by the SARB for the public interest override concerning Brig Blaauw:

Public interest override – Brig Blaauw				
Public interest in disclosure – considerations		Exemptions and harm- considerations		
	Reference			Reference
No factual basis or allegation that Brig Blaauw involved in exchange control contraventions	Answering Aff para 104.1 p 162	42(1)	<p><u>All documents in file:</u> sanctity of investigations</p> <p><b>Harm:</b> to allow person easy access to information obtained in the course of investigations may result in abuse of information gathering powers specifically entrusted to regulator. May jeopardise ability of government to manage the economy, as contemplated in s 42(1)</p>	Answering aff para 56.1 p 137; para 103 p 162
SAHA seeks disclosure of investigation files for purposes of documenting history in book – thus of academic interest. <b>No pressing and current issue</b>	Founding Aff para 10 p 9	37(1)(b)  42(1)	<p><u>All documents in file:</u> protection of information supplied to bank in confidence</p> <p><b>Harm:</b> could prejudice future supply of information to bank, bank may encounter difficulties in future to obtain information</p>	Answering Aff para 56.2 pp 137 – 138; para 103 p 162
		36(1)	<p><u>Information relating to the company:</u> Commercial information</p> <p><b>Harm:</b> disclosure may cause harm to company. Without considering input from directors, may infringe company’s privacy rights</p>	Answering Aff para 104.2 p 163

105. The table below summarises the considerations evaluated by the SARB for the public interest override concerning Mr Hill:

Public interest override – Mr Hill				
Public interest in disclosure – considerations		Exemptions and harm- considerations		
	Reference			Reference
SAHA seeks disclosure of investigation files for purposes of documenting history in book – thus of academic interest. <b>No pressing and current issue</b>	Founding Aff para 10 p 9; Answering Aff para 125.2 p 170	42(1)	<b>All documents in file:</b> sanctity of investigations  <b>Harm:</b> to allow person easy access to information obtained in the course of investigations may result in abuse of information gathering powers specifically entrusted to regulator. May jeopardise ability of government to manage the economy, as contemplated in s 42(1) of PAIA	Answering aff para 56.1 p 137; para 124 p 169
Having regard to nature of documents, divorced from context, may result in <b>speculative and unsubstantiated commentary</b>	Answering Aff para 125.1 p 169	37(1)(b)  42(1)	<b>All documents in file:</b> protection of information supplied to bank in confidence  <b>Harm:</b> could prejudice future supply of information to bank, bank may encounter difficulties in future to obtain information	Answering Aff para 56.2 pp 137 – 138; para 124 p 169
Information <b>elsewhere documented:</b> <i>Torwood Properties (Pty) Ltd v South African Reserve Bank 1996 (1) SA 215 (W); South African Reserve Bank v Torwood Properties (Pty) Ltd 1997 (2) SA 169 (A)</i>	Answering Aff para 125.3 p 170	45	All 43 archive boxes: unreasonable diversion of resources  <b>Harm:</b> unreasonably expect SARB to divert specialised resources to process information contained in boxes	Answering Aff paras 117-120 p 163



## **SEVERABILITY**

106. SAHA's contention that the SARB relied on generic and blanket objections in respect of "unidentified" records, is unsubstantiated. The SARB identified the constituent parts of the records, as far as practically and reasonably possible. For some parts of the records, the SARB categorised the documents, for example "copies of Mr Palazzolo's bank statements".
107. SAHA itself, in its Founding Affidavit, states that what a public body is required to do, "is to identify which of the requested records (or classes of requested records) would result in the disclosure of protected information" (see paragraph 80 of the Founding Affidavit).
108. The mere categorisation by the SARB of a vast number of records, cannot justify a conclusion that it relied on "blanket assertions". The various exclusion grounds relied on by the SARB, relates to the respective categories of documents, as identified. By having regard to the contents of the Answering Affidavit, the court will have a clear idea of the type of documents contained in the investigation files, as processed and analysed by the SARB.
109. The examples listed by SAHA in paragraphs 93 and 94 of its heads of argument do not assist. As stated above, the SARB reported that the "internal Reserve Bank document" referred to in the Sunday Times

article could not be traced. The issue of severability cannot apply to a document that cannot be found and may not exist.

110. It is submitted that the SARB complied with its duties under section 28 of PAIA.

### **CONCLUSION**

111. In conclusion, the SARB submits that the application should be dismissed with costs, inclusive of the costs of three counsel.

**NG D MARITZ SC**  
**D CHABEDI**  
**E MULLER**  
Chambers  
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## LIST OF AUTHORITIES

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- 2 Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A)
- 3 Pheko v Ekurhuleni City 2015 (5) SA 600 (CC)
- 4 Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA)
- 5 Democratic Alliance v Acting Director of Public Prosecutions, KwaZulu-Natal 2016 (JDR) 0300 (KZP) (unreported judgment)
- 6 Extracts from the Constitution of the Republic of South Africa, 1996 (Sections 10, 14, 34 and 39)
- 7 BOE Trust Ltd and Others NNO 2013 (3) SA 236 (SCA)
- 8 Afriforum v Emadlangeni Municipality (A286/2015) [2016] ZAGPPHC 510 (27 May 2016)
- 9 National Lotteries Board v South African Education and Environment Project 2012 (4) SA 504 (SCA)
- 10 President of the Republic of South Africa v M & G Media Ltd 2012 (2) SA 50 (CC)
- 11 Tantoush v Refugee Appeal Board 2008 (1) SA 232 (T)
- 12 Tikly v Johannes NO 1963 (2) SA 588 (T)
- 13 Afriforum NPC v Deputy Information Officer of the Presidency (Unreported judgment) 2015 (JDR) 2431 (GP)
- 14 South African Pork Producers Organisation v National Council of Societies for the Prevention of Cruelty to Animals 2016 JDR 0285 (GP)
- 15 CCII Systems (Pty) Ltd v Fakie and Others NNO 2003 (2) SA 325 (T)
- 16 Section 33 of the South African Reserve Bank Act No. 90 of 1989
- 17 Bank of Canada Act (R.C.S., 1985, c.B-2), section 16 read with schedule and section 33

- 18 Reserve Bank Act No 4, 1959 (Australia), section 79A and 79B
- 19 The Bank of England Act 1998, Chapter 11, Schedule 7 read with section 17(1) and para 9 of Schedule 2
- 20 Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners [1974] 2 AC 405 (HL)
- 21 Right2know Campaign v Minister of Police [unreported judgment] case no 2013/32512
- 22 Van der Merwe v National Lotteries Board 2014 JDR 0844 (GP)
- 23 Centre for Social Accountability v Secretary of Parliament 2011 (5) SA 279 (ECG)
- 24 Bernstein v Bester 1996 (2) SA 751 (CC)
- 25 BHP Billiton PLC Inc v De Lange 2013 (3) SA 571 (SCA)
- 26 Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T)
- 27 Minister of Environmental Affairs and Tourism v Phambile Fisheries (Pty) Ltd 2003 (6) SA 407 (SCA)
- 28 Qoboshiyane NO v Avusa Publishing Eastern Cape (Pty) Ltd 2013 (3) SA 315 (SCA)
- 29 Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)
- 30 Torwood Properties (Pty) Ltd v South African Reserve Bank 1996 (1) SA 215 (W)
- 31 South African Reserve Bank v Torwood Properties (Pty) Ltd 1997 (2) SA 169 (A)