

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**

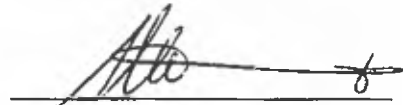
Second Respondent

FILING SHEET

Documents filed:

1. Applicant's replying affidavit

DATED at JOHANNESBURG on this the 8th day of August 2016



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(GAUTENG LOCAL DIVISION, JOHANNESBURG)

BY HAND

AND TO:

WERKSMANS ATTORNEYS

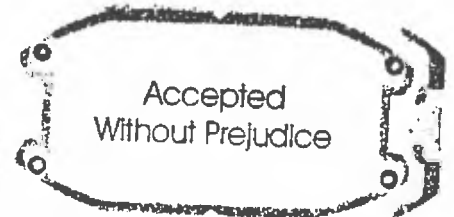
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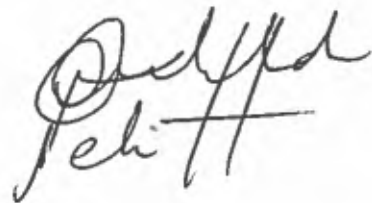
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BY HAND



08/08/2016 13:52

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Second Respondent

REPLYING AFFIDAVIT

I, the undersigned,

CATHERINE MOIRA KENNEDY

do hereby make oath and say:

1. I am the director of the applicant ("SAHA"). I am authorised to depose to this replying affidavit on SAHA's behalf.

1
VKD

2. The contents of this affidavit are within my personal knowledge, unless the context indicates otherwise, and are to the best of my belief true. Where I make legal submissions, I do so on the advice of SAHA's legal representatives.

INTRODUCTION

3. I have read the answering affidavit with annexures deposed to by Johannes Jurgens de Jager, on behalf of the respondents ("the answering affidavit").
4. In this affidavit, I set out SAHA's reply to the answering affidavit. Certain of the contentions in the answering affidavit are matters for legal argument and will consequently be dealt with in argument, to the extent necessary. In respect of allegations of fact not specifically dealt with in this reply, I stand by the allegations in the founding affidavit. To the extent that allegations in the answering affidavit are contrary to those contained in the founding affidavit, they are denied.
5. I turn now to deal with the answering affidavit. In doing so –
 - 5.1. I deal first with the following matters:
 - 5.1.1. The point in limine;
 - 5.1.2. SAHA's relief;
 - 5.1.3. The SARB's approach;
 - 5.1.4. The proper interpretation of the SARB's obligations under PAIA.
 - 5.2. I then, to the extent necessary, respond *ad seriatim* to the individual paragraphs of the answering affidavit.

6. Before I do that, I note that the SARB states that it does not have any relevant records relating to Mr Ricci, Mr Botha, Mr Ekon, Mr Williamson and Mr Basson. It has now complied with its obligations in terms of section 23(2) of PAIA in that regard. In the light of that belated compliance, SAHA no longer persists in this application in respect of records relating to those persons. In what follows below, I therefore do not deal with records relating to those persons.

7. I also wish to point out, at the outset, that where the SARB alleges that grounds exist for refusal of access to requested records, it generally does not identify each of the records to which that ground applies, and does not say why that ground applies to that record. Rather, blanket assertions are made in respect of unidentified records. I submit that this is impermissible and does not provide a lawful justification for refusal of access. To avoid unnecessary repetition, I do not repeat this in respect of each of the records requested, and the grounds on which access is refused.

THE POINT IN LIMINE

8. The SARB alleges that since this application may affect the interests of Mr Blaauw, Mr Hill, Mr Palazzolo, they should have been cited as parties to the application. I am advised and submit that this is not correct.

9. The fact that an individual may have an interest in the proceedings or its outcome and is not joined, does not automatically give rise to a non-joinder or render the applicant non-suited. The requirement of joinder of necessity operates to safeguard the interests of third parties. It is not to be ritualistically applied. Considerations of practicality must also play a role.

10. The provisions of PAIA provide the necessary protection for such parties. I refer in particular to Chapter 5 of PAIA, and Rule 3(5) of the Rules for section 78 applications, which have been made by the Rules Board for Courts of Law.
11. This will be addressed further in argument.

THE RELIEF SOUGHT BY SAHA

12. The SARB points out that prayer 2 erroneously refers to the Promotion of Administrative Justice Act. As is clear from paragraph 6 of the founding affidavit, the application is brought in terms of the Promotion of Access to Information Act, 2000. This error will be addressed by a notice of amendment.
13. The competence of the (amended) relief sought will be addressed in argument to the extent necessary.

THE SARB'S APPROACH

The proper approach to the records requested

14. I submit that on a proper interpretation of the request, it includes all documents or other records forming part of investigation files opened in relation to the alleged fraudulent and criminal activities of Mr Palazzalo, Mr Hill or Mr Blaauw.
15. PAIA acknowledges that the period prior to 1994 was characterised by a "secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations." It is this culture that PAIA seeks to overcome.

16. As a public body, the SARB bears an obligation to approach requests for access to information in a manner that fosters "a culture of transparency and accountability". The response of the SARB to SAHA's request is inconsistent with this obligation.
17. This will be addressed in argument to the extent necessary.

PROPER APPLICATION OF PAIA

Section 11(3) of PAIA

18. The SARB accepts that PAIA does not require the applicant to provide reasons for its request for access to records of a public body.
19. Section 46 does not merely state that a requester is not required to provide a motivation. Section 11(3) of PAIA states that a requester's right of access to a record "is not affected by" the reasons or the information officer's belief as to the reasons.
20. The SARB contends that it is entitled to take into account, and did take into account, the "*motivation*" or the "*reasons or purpose of the request*" when considering:
- 20.1. whether to grant or refuse access, in instances where refusal involves the exercise of a discretion; and
- 20.2. the public interest override in section 46.

21. The SARB acknowledges placing "significant" weight on its understanding of SAHA's "motivation and purpose of the request" in deciding whether to grant or refuse the request.
22. I submit that the SARB has misconceived and misapplied the Act in this regard. There is a fundamental difference between the applicant's "motivation" and the permissible matters which the public body may consider. This will be addressed in argument to the extent necessary.

Section 37(1)(b): Mandatory protection of confidential information

23. Section 37(2) provides that a record may not be refused in terms of section 37(1) if it consists of information about an individual who has consented in terms of section 48 or otherwise in writing to the disclosure to the requester concerned.
24. The SARB did not give Mr Palazzolo notice in terms of section 47 as it was required to do, and thus did not give him an opportunity to consent to disclosure in terms of section 48.
25. I submit that it is not permissible for the SARB to rely on section 37(1) as a basis for refusing disclosure in circumstances where it failed to take the required steps to locate and seek consent of the individual concerned.
26. The SARB speculates that certain information was provided to it "in confidence". It alleges no factual basis for conclusion. It does not even allege a factual basis for the speculation. The SARB admits in respect of Brig Blaauw that it "is not known as to how the documents came to be in possession of the SARB."
27. The SARB makes allegations of potential prejudice in terms of section 37(2).

28. There is no factual basis for this assertion. It fails to meet the threshold that the disclosure could "reasonably be expected" to prejudice the future supply of information from the same source.
29. It is inherently unlikely that the SARB's disclosure of information provided by an unidentified institution over 20 years ago would prejudice the future supply of information from that institution. The institution in question may well have changed - that is, if it still even exists. South Africa's legal and social landscape is fundamentally changed. Again, a blanket assertion by the SARB provides no justification for refusal of disclosure.

Third party disclosures in terms of section 34

30. Section 34(2) provides that a record may not be refused in terms of section 34(1) if the record consists of information about an individual who has consented in terms of section 48 or otherwise in writing to the disclosure to the requester concerned.
31. Again, in the light of the SARB's failure to give Mr Palazzolo notice in terms of section 47, it cannot permissibly rely on section 34(1) as a basis for refusing disclosure.

The public interest requires disclosure

32. Section 46 requires the information officer to weigh the public interest in the disclosure with the harm contemplated in the provision in question.

33. I set out in the founding affidavit from paragraphs 106 to 113 the reasons why the contents of the records are of profound public interest and importance.
34. The SARB states certain considerations that it contends limit the public interest in the disclosure of the information. But it misapplies the test in section 46 by weighing factors that, in its view, favour or do not favour the disclosure of the information. The SARB is required to consider the public interest in disclosure, and then weigh this against any harm that may arise. The "harm" is limited to the harm which the exclusionary sections seek to avoid.
35. The primary harms the SARB envisages if the records are disclosed are:
- 35.1. Abuse of information gathering powers of the SARB, and therefore damage to the economic interests of South Africa; (para 56.1)
- 35.2. Prejudice of future supply of similar information or information from the same or similar sources. (para 56.2)
36. Again, only blanket assertions of harm are made. There is simply no factual evidence that the regulated disclosure of any particular requested record obtained during the SARB investigations under PAIA would:
- 36.1. result in the "abuse of information gathering powers" of the SARB's officials;
- 36.2. harm the economic interests of South Africa;
- 36.3. harm the government's ability to manage the economy.
37. The blanket claim, without any factual underpinning, is simply far-fetched. It is far-fetched to claim that the disclosure of even one of the records requested, or

even part of one of the documents requested, would result in the consequences set out above. Yet the SARB refuses on these grounds to disclose a single document, or even a part of a single document. (It initially relied on this ground to refuse access even to records which are already in the public domain.)

38. I deny that the regulated disclosure of documents obtained by the SARB from third parties or institutions under PAIA would inhibit or prejudice the "future supply of similar information or information from the same source". Again, a blanket claim is made without identifying the document affected or the source of that document. This does not provide a justifiable basis of refusal. Further,

38.1. Information that should legitimately enjoy confidentiality is protected from disclosure in terms of PAIA.

38.2. The SARB may sever personal details of third parties in order to protect the personal information of natural persons. .

38.3. It is unlikely in the extreme that the SARB's disclosure of information provided over 20 years ago from institutions would prejudice the future supply of information from that institution – assuming that it still exists. The length of time that has passed since the information concerned was provided to the SARB renders it inherently unlikely that the release of the information will prejudice the future supply of information. Again, more than a blanket assertion is required in order to be able to rely on this justification.

39. Furthermore:

39.1. I deny that the potential for "speculative" or "unsubstantiated" commentary on documents provides justification for refusing the disclosure of

information. This potential "harm" is not one that justifies refusal under PAIA. The SARB misdirected itself and acted unlawfully in relying on this reason.

39.2. This is especially so when the information concerns alleged serious violations and criminal conduct.

39.3. I deny that there is no pressing current issue. The requested records relate to unlawful conduct and violations of human rights under the previous dispensation. Revealing the truth about this conduct is a pressing need and not merely one of "academic interest".

40. I also contend that:

40.1. The public interest in the disclosure of the documents relates to the contents of those documents, and not to the requester's reasons for requesting the records;

40.2. The public interest and importance of the information contained in the documents is not negated or diminished by the SARB's failure to store the documents properly.

RESPONSES TO EACH PARAGRAPH

41. I now respond *ad seriatim* to the answering affidavit. In doing so I will not repeat the allegations made above or those set out in my founding affidavit. The admissions, denials and contentions in the founding affidavit and in the preceding paragraphs should be taken as incorporated in the averments that follow.

42. Where a particular allegation is not specifically dealt with, either in the founding affidavit or in this affidavit, it should be taken as denied.

Ad paras 1 - 7

43. The allegations contained in these paragraphs are noted.

Section A: Ad paras 8 - 20

44. I have addressed these matters above, or they will be addressed in argument.

Section B:

Ad para 22 - 24

45. I have no knowledge of the allegations in this paragraph.

Ad para 25

46. I deny that the SARB could not have reasonably been expected to have done anything different in respect of the service of notices on Mr Blaauw and Mr Botha.

Ad para 33

47. I admit that these phrases are contained in the SAHA request.

48. At the time of the request, SAHA had not seen the records, and could not provide greater detail. I am advised and submit that the request was sufficiently specific to enable the SARB to find and provide all relevant records.

49. The SARB was required to adopt a broad and contextual interpretation of the request in accordance with the spirit, purport and objects of PAIA and the Constitution.

Ad para 34

50. I admit that the SARB wrote to SAHA on 27 July 2015 and that Annexure FA8 is a copy of that letter. I have no knowledge of the remaining allegations in this paragraph and accordingly deny them.

Ad para 35

51. The LHR's letter of 19 August 2015 responded to this request in detail and specifically in paragraphs 4 to 7.

52. I have no knowledge of the remaining allegations in this paragraph and accordingly deny them.

53. SAHA denies in particular that the SARB adopted the correct approach to the interpretation of SAHA's request.

Ad para 36

54. These are legal matters which will be addressed in argument if necessary.

Ad para 37 and 38

55. The protection which section 33 of the SARB Act provides in respect of information submitted to FinSurv is subject to the provisions of PAIA.

56. I deny that the information received is necessarily "of a confidential nature".
57. I have no knowledge of the remaining allegations regarding the process followed by the FinSurv Department.

Ad para 39 - 41

58. I have no knowledge of the allegations regarding the process followed by the FinSurv Department.
59. The remainder of these paragraphs consists of legal argument.

Ad para 42

60. I deny that information is always and necessarily submitted to the SARB "in confidence", or that this has any relevance to disclosure by the SARB under PAIA.
61. The fact that a bank may have a client relationship with a particular individual does not make that individual a client of the SARB when he or she applies to or through that bank for exchange control authorisation.

Ad para 43 - 45

62. I have no knowledge of the allegations regarding the process followed by the FinSurv Department.
63. The remainder of these paragraphs consists of legal argument.

Ad para 46 – 49 and 51 - 53

64. These paragraphs contain legal contentions which will be addressed in argument to the extent necessary.
65. I reiterate that section 33 of the Reserve Bank Act is subject to PAIA. It appears that the SARB now accepts that, contrary to its earlier position.

Ad para 50

66. The SARB provides no information on the interaction between banking laws and access to information laws in the cited jurisdictions. The skeletal account of central banking law in other jurisdictions is unhelpful unless one knows whether those countries have a constitutional right of access to information, as we do, and whether they have legislation which regulates access to public records, as we do.

Para 53.1

67. I agree that section 33 requires that the information officer must refuse a request for information in certain circumstances.
68. I deny that the SARB has provided an appropriate or accurate example. The question before the information officer in exercising his or her discretion in terms of section 34(1) is whether the record falls within the definition of "personal information" in PAIA, and then whether it is excluded from 34(1) under 34(2) of PAIA.

Ad para 54

69. I deny that the "motivation and purpose of the request" is a relevant, significant or appropriate consideration in the determination of whether to refuse an application for access to information.
70. I deny that a requestor of access to information must provide a factual basis to substantiate the public interest in disclosure before the information officer can "properly consider" the request.
71. Section 18 of PAIA, which specifies the form of a request, imposes no duty on a requester to provide any such information.

Ad para 55 - 58

72. These paragraphs contain high-level approach which is so general that they provide little assistance unless they are applied to the specific facts of a case and the specific records which are requested. Generalised statements about what may "potentially" be the situation, or what happens "to a large extent", are of little or no assistance in determining whether there is a right of access to a particular record.

Ad para 59

73. I have no knowledge of the allegations in this paragraph.

Ad para 60 - 61

74. I admit that Mr Ellis wrote the letter to SAHA on 14 August 2014.

75. I admit that LHR responded on 26 September 2014. I deny that it did so "in vague and general terms."

76. I deny the remaining allegations in this paragraph. In particular, I deny that the motivation for the request is a relevant consideration.

Ad para 62 - 64

77. I have no knowledge of the allegations in this paragraph.

Ad para 65

78. The SARB was not entitled to rely on the allegedly "vague and sketchy motivation" as a reason for refusing disclosure. It in fact relied on reasons which were unlawful and invalid, including the contention that section 33 of the Reserve Bank Act overrides PAIA.

Ad para 66

79. I note the SARB's admission that it did not comply with section 47 in respect of Mr Hill, Brig Blaauw and Mr Palazzolo.

80. I have no knowledge of the remaining allegations in this paragraph.

Ad para 68- 70

81. While the SARB may seek to provide justifiable reasons for refusal in its answering affidavit, these were clearly not the reasons which operated at the time of the refusal.

Ad para 71 - 72

82. I note the approach adopted by the SARB in considering whether it persists with its decision to refuse access to the requested records. I deny that this was the correct or appropriate approach.

D: Mr Palazzolo:

Ad para 76 - 77

83. I have no knowledge of the allegations in these paragraphs.

84. I note the SARB's contention that certain documents contain "nothing of significance". I submit that in these circumstances, the SARB should favour transparency over secrecy by adopting a default position of granting access rather than a default position of denying access.

Ad para 78

85. I note the contents of this paragraph.

86. I dispute the SARB's interpretation of SAHA's request.

Ad para 79 – 80: Harms Commission Report and newspaper articles

87. If (as the deponent states) there was an investigation by the FinSurv Department into a possible substantial contravention of the law, all of the documents relevant to that investigation plainly fall within the scope of the PAIA request. This includes all of the documents considered by the Harms Commission.

Ad para 81: Trust documents

88. The Trust documents were located in Mr Palazzolo's investigation file. This file was opened as part of a formal investigation into possible contraventions of Exchange Control Regulations. The documents must have been considered at least potentially relevant to the investigation.
89. The Trust Documents are therefore evidence relating to Mr Palazzolo "obtained by the SARB" between 1980 and 1995 "as part of investigations" into contravention of or failure to comply with the law.

Ad para 82: Exchange Control Index Cards

90. I deny that mere disclosure of the index cards may cause harm to the integrity of the SARB's record system, and that this is likely to materially jeopardise the economic interests or financial welfare of South Africa or the ability of the government to manage the economy. The SARB provides no factual basis for this quite remarkable allegation. If the concern of the SARB is that the removal of the record cards may in some unexplained way cause its record system to collapse, it may provide access through copies or inspection. The fact that the cards are the property of the SARB is irrelevant.

Ad Para 82.3

91. Section 34(2) provides that a record may not be refused in terms of section 34(1) if the record consists of information about an individual who has consented in terms of section 48 or otherwise in writing to the disclosure to the requester concerned. Mr Palazzolo was not given notice by the SARB in terms of section

47 (para 82.4) and was therefore not provided with an opportunity to consent to the disclosure in terms of section 48. He has since been given notice of this application, and of the order which SAHA seeks. He has not opposed it. (This reply applies to each of the paragraphs of the answering affidavit in which the SARB relies on the fact that Mr Palazzolo has not consented in terms of section 47 to the disclosure of the records. I do not repeat this in each instance.)

92. The SARB's position appears to amount to this: where a card relates to an individual's financial affairs, and he or she does not object to its disclosure, it nevertheless will (and must) refuse to make disclosure unless the public interest override applies. I submit that this demonstrates a misconception and misapplication of the provisions of PAIA.

Ad para 82.4 – 82.5

93. I refer to what I have said above with regard to section 47.
94. Section 49(2) of PAIA cannot justify the SARB's failure to give notice in terms of section 47. The SARB did not take "all reasonable steps" to inform him: it took no steps at all, until after this application had been launched.

Ad para 82.6

95. I have addressed above the question of joinder.

Ad para 83: Family Trust

96. The Trust documents were located in Mr Palazzolo's investigation file. The file was opened as part of a formal investigation conducted into possible

contraventions of Exchange Control Regulations. They must have had relevance to the investigation, and were "obtained by the SARB" between 1980 and 1995 "as part of investigations" into contravention of or failure to comply with the law.

97. I deny that the documents are protected from disclosure under section 34(1).

98. I deny that it would be unreasonable to require the SARB to give notice to the trustees in terms of section 47. The SARB took no steps at all in this regard. It is of course a simple matter to approach the Master of the High Court to obtain the addresses of the trustees of a trust.

Ad para 84.1: Bank Statements

99. Again, the bank statements were located in Mr Palazzolo's investigation file. The file was opened as part of a formal investigation conducted into possible contraventions of Exchange Control Regulations.

100. The bank statements are therefore evidence relating to Mr Palazzolo "obtained by the SARB" between 1980 and 1995 "as part of investigations" into contravention of or failure to comply with the law.

Ad para 84.3

101. I deny that there is any factual basis for refusal in terms of section 37(1)(b) or section 42(1) of PAIA, for the reasons set out above.

Ad para 85: Investigator Notes

102. The investigator notes were located in Mr Palazzolo's investigation file and relate to the investigation into Mr Palazzolo's conduct. This file was opened as part of

a formal investigation conducted into possible contraventions of Exchange Control Regulations. They must have some actual or potential relevance to that investigation.

103. The investigator notes are evidence relating to Mr Palazzolo "obtained by the SARB" between 1980 and 1995 "as part of investigations" into contravention of or failure to comply with the law.

104. I submit that the SARB is required to consider whether the documents fall within SAHA's request taking into account the full context of the location of the documents within a file relating to the investigation into Mr Palazzolo.

Ad para 86: Documents from authorised dealers

105. The documents from authorised dealers were located in Mr Palazzolo's investigation file and relate to the financial affairs of Mr Palazzolo. This file was opened as part of a formal investigation conducted into possible contraventions of Exchange Control Regulations.

106. The documents are most likely to have been forwarded to the SARB by an authorised dealer pursuant to the investigation into these contraventions.

107. The documents from authorised dealers are evidence relating to Mr Palazzolo "obtained by the SARB" between 1980 and 1995 "as part of investigations" into contravention of or failure to comply with the law.

Ad para 86.3

108. I deny that there is a basis for refusal in terms of section 37(1)(b) or section 42(1) of PAIA for the reasons set out above.

Ad para 87: Correspondence

109. The correspondence was located in Mr Palazzolo's investigation file.

110. This file was opened as part of a formal investigation conducted into possible contraventions of Exchange Control Regulations. The correspondence must have been considered actually or potentially relevant to that investigation.

111. The correspondence is therefore evidence relating to Mr Palazzolo "obtained by the SARB" between 1980 and 1995 "as part of investigations" into contravention of or failure to comply with the law.

112. The SARB is required to consider whether the documents fall within SAHA's request taking into account the context of the location of the documents within a file relating to the investigation into Mr Palazzolo.

Ad para 88: Screen printout

113. The screen printout was located in Mr Palazzolo's investigation file. This file was opened as part of a formal investigation conducted into possible contraventions of Exchange Control Regulations. It must have been considered actually or potentially relevant to the investigation.

114. The screen printout is therefore part of the investigation file containing evidence relating to Mr Palazzolo "obtained by the SARB" between 1980 and 1995 "as part of investigations" into contravention of or failure to comply with the law.

115. The SARB is required to consider whether the documents fall within SAHA's request taking into account the context of the location of the documents within a file relating to the investigation into Mr Palazzolo.

Ad para 89: Public Interest override

116. I have no knowledge of the allegations in this paragraph.

117. I deny that the SARB properly applied section 46 in accordance with the purpose, object and spirit of PAIA and the Constitution.

Ad para 90

118. I deny that the SARB has properly engaged with the relevant factors. This will be addressed in argument.

Ad para 91

119. I note the considerations taken into account by the SARB, but deny that the SARB's application of those considerations is correct or that these considerations bear weight in the balancing exercise required by section 46.

Ad para 91.3 and 91.4

120. The blanket and generalised speculation, not based on any facts relating to the content of the records, does not provide any basis for refusal.

Ad para 92

121. I note the SARB's view that the public interest in disclosure was not compelling. I deny that this was correct. This will be addressed in argument.

E: Brig Blaauw

Ad para 94

122. I deny the allegations in this paragraph. Brig Blaauw's conduct raises allegations of the contravention of law.

Ad para 95 - 97

123. I have no knowledge of the allegations in this paragraph. However, it is clear that there was an investigation into alleged contravention of exchange control regulations. The SARB must have considered the matter serious, because it sent an affidavit in that regard to the SAPS.

124. The SARB inexplicably refuses to give access even to the letter which it wrote to the SAPS informing it of the alleged contravention of the Exchange Control Regulations, and attaching an affidavit which is apparently not on this file. That letter would likely make it possible for this matter to be further investigated with the SAPS, because it would presumably identify the person who dealt with the

matter on behalf of the Commissioner of the SAPS, and would presumably also contain other identifying references. Yet the SARB will not even provide access to the letter. The SARB seems determined, for reasons which are difficult to understand, to make any such investigation impossible.

Ad para 98

125. I note the SARB's view on the documents and its refusal to grant the request to access to information. I deny that this is correct.

126. I submit that the SARB is required to consider whether the documents fall within SAHA's request taking into account the context of the location of the documents within a file relating to the investigation into Mr Blaauw for alleged contravention of Exchange Control Regulations.

Ad para 99

127. I deny that the information, dating back many years, is protected from disclosure in terms of section 36(1) of PAIA. This will be addressed in argument.

Ad para 100

128. The SARB did not take any steps to comply with section 47 of PAIA. It is a simple matter to obtain the address of a company. It is available from CIPRO, as are the addresses of its auditors and directors. The SARB offers no explanation for why it did not take this elementary step. The attempted reliance on section 49(2) subverts the third party notification process. I submit that section 49(2) of PAIA is not applicable. This will be addressed in argument.

Ad para 101

129. The SARB provides no factual basis for this speculation, or for the conclusion it reaches.

130. I deny that the SARB is justified in refusing the information under section 37(1)(b) or section 42(1) of PAIA.

Ad para 102: Public Interest

131. I have no knowledge of the allegations in this paragraph.

132. I deny that the SARB properly applied section 46 in accordance with the purpose, object and spirit of PAIA and the Constitution.

Ad para 103

133. I deny that the SARB has properly engaged with the relevant factors for the reasons set out above. This will be addressed further in argument.

Ad para 104

134. I note the considerations taken into account by the SARB but deny that the SARB's application of those considerations is correct.

135. I deny that the SARB's view of whether the documents fall within the request is relevant to the public interest in disclosure. The public interest enquiry in section 46 assumes that the documents fall within the request.

136. I deny that there is any factual basis to anticipate that the disclosure of the documents may cause harm to the company or infringe its rights under PAIA.

Ad para 105

137. I note the SARB's view that the public interest in disclosure was not compelling. I deny that this was correct.

F: Mr Hill

Ad para 106

138. I note the contents of these paragraphs.

Ad para 107

139. I admit the allegations in this paragraph.

Ad para 108

140. I have no knowledge of the allegations in this paragraph.

141. I note that Mr Ellis relied on his "impression" that Mr Hill had passed away and clearly did not take reasonable steps required by section 47.

Ad para 109 - 114

142. I have no knowledge of the allegations in this paragraph.

143. I note that the SARB does not provide information as to how the information was accessed.

144. Section 13(4) of the National Archives and Records Service of South Africa Act 43 of 1996 authorises the National Archivist from time to time to issue directives and instructions, which shall not be inconsistent with the regulations, as to the management and care of public records in the custody of governmental bodies. The SARB is a governmental body in terms of that Act. The National Archivist has exercised this power, inter alia through issuing the Records Management Policy Manual of 2007. It requires a governmental body such as the SARB to ensure "the proper creation, maintenance, use and disposal of records throughout their life cycle to achieve efficient, transparent and accountable governance".¹ The SARB has plainly not done this.

Ad para 115

145. I submit that the SARB is required to consider whether the documents fall within SAHA's request taking into account the context of the location of the documents within a file relating to the investigation into Mr Blaauw.

Ad para 116 - 117

146. I deny the allegations in this paragraph. In particular, I deny the SARB's estimates of the time involved to determine which documents fall within SAHA's request.

¹ National Archives and Records Service of South Africa, 2007 "Records Management Policy Manual" [online available from: https://www.nationalarchives.gov.za/sites/default/files/Records_Management_Policy_Manual_October_2007_1.pdf last accessed 8 August 2016].

147. SAHA has twice received over 13 000 pages from the Department of Justice in response to a PAIA request for TRC section 29 hearing transcripts.
148. I deny that the exercise would require a person familiar with investigation process followed by an exchange control investigation. The release requires consideration of Chapter 4 of PAIA.
149. The SARB fundamentally misdirected itself in basing its decision on the contention that the material is sought for "merely for archival purposes". No-one who has read the PAIA request and related correspondence, or this application, could reach that conclusion.
150. The SARB's failure to index and archive the documents cannot constitute a justifiable reason to refuse disclosure.
151. If it is truly not reasonably practicable for the SARB to undertake a consideration of each of the documents in these files, it should at the very least identify those files which appear to have the greatest relevance, and deal with the documents in those files. The SARB offers no reason for not doing this. It is what a reasonable institution, seeking to give effect to the spirit, purport and objects of the Constitution and PAIA, would do. Instead, the SARB again resorts to a blanket refusal.

Ad para 118 and 120

152. I deny that the SARB's obligation to notify affected parties constitutes a justification to refuse disclosure.



153. To the extent that third parties are merely "referred to" in the documents, the information is not likely to fall within the definition of personal information for the purposes of section 34.

154. The SARB could in any event redact any personal information from these documents.

Ad para 120

155. I note that the SARB persists in its decision to refuse to disclose the information on the grounds that:

155.1. The effort and resources to contact all third parties would be prohibitive;
and

155.2. it would involve unreasonable disclosure of personal information of third parties.

156. I deny that this is a justifiable decision. It is difficult to understand how the second ground in particular can be advanced, and advanced in support of a blanket refusal, when the SARB on its own version has not considered the documents

Ad para 121

157. I deny that the SARB is justified in refusing the information under section 37(1)(b) or section 42(1) of PAIA.

Ad para 122: Public Interest

158. I admit the contents of this paragraph.

Ad para 123

159. I have no knowledge of the allegations in this paragraph.

160. I deny that the SARB properly applied section 46 in accordance with the purpose, object and spirit of PAIA and the Constitution.

Ad para 124

161. I deny that the SARB has properly engaged with the relevant factors for the reasons outlined above.

Ad para 125

162. I note the considerations taken into account by the SARB but deny that the SARB's application of those considerations is correct.

Ad para 125.3

163. I note the SARB's admission that certain of the information is already in the public domain.

164. It is however a perverse logic that this is used to justify a refusal to make any disclosure at all.

Ad para 126

165. I note the SARB's view that the public interest in disclosure was not compelling.

166. I deny that this was correct for the reasons set out above.

AD SERIATIM RESPONSE

167. The majority of the allegations in this section repeat the SARB's contentions in the main body of the answering affidavit. I accordingly only deal with new matter.

Ad para 131.6

168. SAHA made several suggestions regarding the manner in which the request could be narrowed.

169. The SARB rejected these suggestions, but put forward no suggestions of its own.

Ad para 134.2

170. SAHA submitted this request on 1 August 2014. There was no correspondence relating to this request earlier in 2014.

171. On 14 August 2014 the SARB's attorneys wrote to SAHA's attorneys stating that the SARB had received 14 requests in total from SAHA, and saying that the submission of the requests was vexatious and an attempt to "intimidate" the Bank. The SARB further noted that the requests required third party notification, and requested "reason/s why and purposes" for the information requests.

172. On 6 and 11 August 2014 emails were automatically sent via SAHA's online PAIA Tracker System requesting confirmation of receipt of the PAIA request. On 5 and 15 September 2014 further automated emails were sent noting the failure to respond within the statutory time frame and requesting that the SARB contact SAHA in order to resolve the issue. These reminders received no response.

173. On 26 September 2014 SAHA's attorneys wrote to the SARB's attorneys noting that SAHA denied that our requests were vexatious or intended to intimidate, that SAHA was not obliged to provide reasons, and that a requester's right of access is not affected by its reasons for requesting. Nevertheless, in a spirit of collegiality, reasons were provided.
174. On 30 September 2014 SAHA's PAIA Tracker sent out automated correspondence on two other requests submitted to the SARB in 2014, noting that SAHA intended making an internal appeal against the SARB's failure to provide decisions within the statutory timeframe. On the same day, the SARB's attorneys wrote to SAHA's attorneys requesting that SAHA direct future correspondence and PAIA requests to them, and noting that the SARB takes the position that it has no internal appeal mechanism. SAHA's attorneys responded the same day via email saying that SAHA had noted the SARB's position regarding internal appeals, and apologising for automated correspondence that may have indicated the contrary. They stated that while SAHA would through its attorneys direct future correspondence on existing requests to the SARB's attorneys, SAHA would submit any new requests to the Information and Deputy Information Officers of the SARB in line with the requirements of PAIA.
175. On 25 November 2014 SAHA's attorneys wrote to the SARB's attorneys noting that they had received no substantive response to the letter of 26 September 2014, and requesting a response by 2 December 2014. On the same date receipt was acknowledged by the SARB's attorneys.

176. All correspondence thereafter in relation to this request from the SARB's attorneys was well outside of the 30 day time frame and after the launch of litigation.

177. The failure to respond timeously to the PAIA request was therefore not due to the correspondence.

Ad para 141

178. In SAHA's experience it is not unusual for bodies which wish to co-operate with requesters to invite the inspection of records in order to assist in the narrowing of a request. SAHA has previously been invited by other bodies to do this. It was on this basis that SAHA suggested it could send researchers to the SARB. SAHA's attorneys in letters dated 19 August 2015 and 14 and 22 October 2015 noted that the SARB has a duty under section 19 of PAIA to provide SAHA with assistance. In their letter of 19 August 2015, SAHA's attorneys suggested as an alternative way in which the SARB could assist SAHA under section 19, that SAHA be provided with a copy of the SARB's filing plan or similar archival finding aid, as SAHA could possibly in this way narrow the request. In a letter dated 26 August 2015 from its attorneys, the SARB refused to provide SAHA with a copy of its filing plan, on the basis that the volume of and unique manner in which records are archived at the SARB mean that, in the SARB's view, its finding aid would not be of assistance in narrowing the request.

179. In a letter dated 14 October 2015, SAHA's attorney's invited the SARB to make reasonable suggestions as to how assistance can be provided in terms of section 19 of PAIA. No such suggestion was made.

Ad para 169

180. I am advised and submit that in the light of the principles laid down by the Constitutional Court in the *Biowatch* case, a court ought not to award costs against SAHA if this application is unsuccessful.

181. I submit that if this application is unsuccessful, the SARB should nevertheless be ordered to pay the costs or a substantial part thereof, having regard to its conduct in making the application necessary: it refused access on grounds which it abandoned when the application was launched; it was only after this application had been launched that it provided a response as required by section 23 in respect of records which it said could not be found; and until this application was launched it refused access to records which were in the public domain and which, it subsequently admitted, it was obliged to disclose.



 DEPONENT

The Deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn to or solemnly affirmed before me at Johannesburg on this the 8th day of August 2016, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



 COMMISSIONER OF OATHS

Full Names: DUNISANI MATHIBA
 Capacity: SENIOR REGISTRAR CLERK
 Designation: SENIOR REGISTRAR CLERK
 Address: No. 01 Hospital Street, Braamfontein
2017

Dunisani Mathiba

 KOMMISSARIS VAN EDE EX OFFICIO
 COMMISSIONER OF OATHS

AMP/RANK Senior Registrar Clerk

 CONSTITUTIONAL COURT/KONSTITUSIONELE HOF S.A.
 1 HOSPITAL STREET
 CONSTITUTIONAL HILL
 BRAAMFONTEIN 2017