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

CASE NO:19/36248

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC **Applicant**

And

SERVICES SECTOR EDUCATION AND TRAINING AUTHORITY **First Respondent**

GRAYSON REED CONSULTING (PTY) LTD **Second Respondent**

APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

1 The applicant is the Organisation Undoing Tax Abuse ("**OUTA**"), a non-profit organisation that aims to hold government accountable by challenging the abuse of authority, challenging irrational policy and legislation, and engaging with the community and authorities in resolving issues pertaining to administration and service delivery within all spheres of government.

2 During 2018 OUTA was given information by several whistle blowers about tender irregularities within the first respondent ("**SETA**"). In particular, there were

allegations of irregularities in a tender that was awarded by SETA to the second respondent, a private company ("**Grayson**").[1]

3 In order to verify the information obtained from the whistle blowers, OUTA formally requested access to SETA's records pertaining to that tender using the mechanism set out in the Promotion of Access to Information Act 2 of 2000 ("**PAIA**").

4 These records all pertain to the tender that was awarded to Grayson in 2017 and which lapsed in March 2020. In light of the fact that the records pertain to a contract with a public body, they cannot be construed in any way as confidential or commercially sensitive. They do not reveal trade secrets or any other commercial interest.[2]

5 SETA granted access to some of the records requested by OUTA (items 1 to 4 on annexure "FA2") but refused OUTA's request in respect of all of the other records on the basis that the second respondent objected to the information as it allegedly contained commercially sensitive and confidential information.

6 OUTA exercised its right to an internal appeal in accordance with sections 74 and 75 of PAIA. This was also refused.[3] The appeal was refused on the basis of section 36(1) and section 44 of PAIA.

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[1] FA para 9 page 6 of the record.
[2] FA para 11 page 8 of the record. This is not disputed by SETA in its answering affidavit.
[3] At the time that this application was filed and served on SETA, SETA had not given OUTA any answer in respect of its internal appeal. SETA only refused the internal appeal on 17 October 2019, the day after the application was served upon it.

7 Accordingly OUTA has no option but to turn to this Court for relief in accordance with the provisions of section 78 read with section 82 of PAIA.

8 SETA has filed an answering affidavit in which it averred that it refused to provide OUTA with the records that were requested because "there is not [sic] clarity as to how the first respondent should address the conflicting interests, but that the first respondent seeks clarity on the appropriate response". Importantly, Grayson has not opposed this application at all.

9 It is submitted that there is no justifiable basis for SETA to have refused OUTA's request for information. OUTA is accordingly entitled to the relief that it seeks with costs.

OUTA IS ENTITLED TO THE RECORDS REQUESTED

10 Section 32(1) of the Constitution confers on everyone the right of access to any information that is held by the State.

11 Section 195 of the Constitution sets out the values and principles that govern public administration, including SETA. This includes, among others, the following:

11.1 Public administration must be accountable; and

11.2 Transparency must be fostered by providing the public with timely, accessible, and accurate information.

12 The applicant accordingly has a right to access the information held by SETA and SETA has an obligation to foster accountability and transparency.

13 PAIA gives effect to section 32 of the Constitution. Section 11 of PAIA provides that the applicant must be given access to a record held by a public body (such as SETA) if the request complies with all procedural requirements in terms of that Act and access is not refused in terms of any ground of refusal set out under that Act. As the Constitutional Court held: "under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exemption".[4]

14 The importance of the right of access to information cannot be understated. In *President of the RSA v Mail & Guardian Ltd* the Supreme Court of Appeal held as follows:[5]

> "Open and transparent government and a free flow of information concerning the affairs of the State is the lifeblood of democracy. That is why the Bill of Rights guarantees to everyone the right of access to 'any information that is held by the state', of which Ngcobo J said the following in *Brummer v Minister for Social Development and Others*:
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> > 'The importance of this right … in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency

[4] *President of the RSA v Mail & Guardian Ltd* 2012 (2) SA 50 (CC) at paragraph 9 ("***M&G (CC)***").
[5] "2011 (2) SA 1 (SCA) at paragraph 1 ("***M&G (SCA)***")

> must be fostered by providing the public with timely, accessible and accurate information.'"

15 In terms of section 11(3) of PAIA the applicant's right of access is not affected by any reasons given by the applicant for requesting access, or the information officer's belief as to what the applicant's reasons are for requesting access.

16 Section 81(3) of PAIA provides that the burden of establishing that the refusal of a request for access complies with the provisions of PAIA rests with the party claiming that it does – in this case, the respondents and in particular SETA. The burden accordingly fell on the respondents to demonstrate that the refusal of OUTA's request was justifiable under the provisions of PAIA.

17 In *Mail & Guardian (CC)* the Constitutional Court described the manner in which an organ of state may justify its refusal. It held as follows:[6]

> "The recitation of the statutory language of the exemptions claimed is not sufficient for the state to show that the record in question falls within the exemptions claimed. Nor are mere *ipse dixit* affidavits proffered by the state. The affidavits for the state must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the state is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.

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[6] *M&G (CC)* (note 4 above) at paragraphs 24 – 25.

> Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify 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."

18 Sections 36, 37 and 44 of PAIA each set out a number of grounds for refusal. A party relying on those proceedings would have to adduce evidence in support of its averment and could not merely make the allegation that the record falls within the scope of these provisions.

19 In *M&G (SCA)* the Court held that ordinarily the material facts in an application of this sort would fall within the peculiar knowledge of the public body.[7] It is therefore clear that in this matter that it fell upon the respondents to adduce evidence to demonstrate that there were valid grounds for refusing OUTA's request to information.

20 The respondents have not shown that the refusal was justifiable under PAIA. Grayson has not opposed this application. SETA appears to indicate that it refused OUTA's request solely on the basis of Grayson's objection.[8] It does not provide any independent justification for its decision.

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[7] At paragraph 31.
[8] See AA paragraph 46 at page <x> and AA paragraph 57 at page <x> of the record.

21 This Court has previously criticised an organ of state for conducting itself in this manner. In *De Lange v Eskom Holdings (Pty) Ltd* Eskom was criticised for its conduct on the following basis:[9]

> "In terms of section 25(3)(a) of PAIA Eskom was enjoined or expected to provide adequate reasons for the refusal. It is my considered view that Eskom did not comply with the requirements of the above section. From Eskom's answering affidavit it appears also that Eskom only gave due regard to representations from Billiton not to grant the applicants' request for access to the information. That falls foul of section 49(1)(a) of PAIA. Eskom is in my view being nudged from behind by Billiton to refuse to disclose and it is helplessly trudging forward or being strung along."

22 Similarly, it was not open to SETA to refuse OUTA's request simply on Grayson's say-so.

23 On 17 October 2019, a day after this application was issued and served on the respondents, SETA sent a letter to OUTA in which it rejected OUTA's internal appeal.[10] It did so on the basis of section 36(1) and section 44(1) and (2) of PAIA. Strangely, it does not rely on section 44 at all in its answering affidavit.

24 Section 36 of PAIA provides for the protection of three discrete categories of commercial information belonging to a third party:

24.1 The trade secrets of that third party (section 36(1)(a));

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[9] 2012 (1) SA 280 (GSJ) at paragraph 129 ("***De Lange***").
[10] Annexure "AB8" to the answering affidavit at page <x> of the record.

24.2 The financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party (section 36(1)(b)); and

24.3 Information supplied in confidence by a third party the disclosure of which could reasonably be expected to put that third party at a disadvantage in contractual or other negotiations, or prejudice that third party in commercial competition (section 36(1)(c)).

25 In *De Lange* this Court held that the onus falls on the party relying on section 36(1)(b) or section 36(1)(c) of PAIA to show that it is probable that it would suffer the harm contemplated in those provisions (at paragraphs 84 – 85).

26 It is likewise submitted, in accordance with the provisions of section 81(3) of PAIA, that the onus is on the respondents to show that the information requested by OUTA pertains to Grayson's trade secrets.

27 Section 37 also provides for the protection of two discrete kinds of confidential information. It provides that an information officer of a public body:

> "(a) must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement; or
>
> (b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party-

(i) the disclosure of which could reasonably be expected to prejudice the future supply of similar information, or information from the same source; and

(ii) if it is in the public interest that similar information, or information from the same source, should continue to be supplied."

28 If the respondents are unable to show that any harm would arise as contemplated in section 36(1)(b) or (c) then 37(1)(a) will not be applicable.[11] At any rate section 37(1)(a) contemplates a duty of confidence that arises from an agreement and no such agreement has been placed before this Court.

29 The respondents have also not made out a case for the ground of refusal set out in section 37(1)(b). OUTA sought information pertaining to a tender that was awarded to Grayson. There would not have been any "future supply" of further information that would be prejudiced if this information was released.

30 The records that were requested by OUTA are at any rate neither confidential, nor do they disclose any trade secrets or any other commercially sensitive information. The records requested pertain either to the decision of SETA to award the tender to Grayson or to the implementation of the tender and the invoicing and payment of money in accordance with the provisions of the tender.

31 At best for the respondents, it may be that the documents submitted by Grayson in response to SETA's request for bids in respect of the tender may include some

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[11] *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at paragraph 57; *De Lange* (note 9 above) at paragraph 123.

commercial information from 2017, in respect of a tender that lapsed in March 2020. That information would now be obsolete and could no longer constitute a basis for either section 36 or 37 of PAIA.

32 To the extent that the basis for the refusal of OUTA's request was premised on section 44 of PAIA, the respondents have again failed to give adequate reasons in order to sustain that provision. Merely repeating the words of the provision is insufficient.[12]

33 SETA has not explained the basis upon which it relies on this provision. OUTA cannot be expected to infer what harm may arise to SETA if this information were disclosed.

34 The respondents accordingly have not demonstrated before this Court that any of the grounds of refusal are justified in this matter. OUTA is accordingly entitled to the order it seeks.

35 To the extent that this Court finds that any of the grounds of refusal raised by the respondents were justified, it is then submitted that the information sought by OUTA should be disclosed in accordance with section 46 of PAIA. This section provides that a request for access to a record must be granted if the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law, or an imminent and serious public safety or

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[12] *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province* 2005 (2) SA 110 (SCA) at paragraph 18.

environmental risk; and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

36 OUTA believes, on the basis of information that was given to it by whistle blowers, that the award of the tender to Grayson was irregular, and that those irregularities may amount to fraud, corruption, or maladministration.[13] It therefore holds a genuine belief that there has been a substantial contravention of, or a failure to comply with, the law. The records requested would provide evidence to this effect.

37 The public interest in exposing any fraud, corruption or maladministration would outweigh the harm contemplated in section 36, 37 or section 44 of PAIA. The harm that may be suffered by the respondents (if any) is minimal relative to the abuse of public funds.

38 OUTA's request for information accordingly should have been granted.

CONCLUSION

39 It is accordingly submitted that OUTA's application should be granted and that this Court should order SETA to provide OUTA with all of the information requested, as per its notice of motion.

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[13] FA para 9 at page 6 of the record.

40 SETA should also be held liable for the costs of this application. OUTA was forced to approach this Court because SETA refused to grant its request for information, and because SETA dismissed OUTA's internal appeal. It also put up an answering affidavit in this matter in which it resisted OUTA's application. This was done after the matter was enrolled on the unopposed roll of this Court for 18 November 2019.

41 SETA appears to attempt to distance itself from its liability by indicating that it would abide by this Court's order, and by averring that it needed clarity as to how to manage the competing rights of OUTA and Grayson.

42 In *De Lange* this Court was confronted by a similar tactic by Eskom, which also purportedly abided the order of the court. In ordering Eskom to pay the costs, it held as follows:[14]

> "It is common cause that Eskom has to date refused to disclose information held by itself. The fact that it was egged on by the second and third respondents to do so is, in my view, immaterial. … Eskom cannot escape a costs order against it in the peculiar circumstances of this case."

[14] Note 9 above at paragraph 158.

43 This criticism applies with equal force to SETA in this application. It should accordingly be ordered to pay the costs of this application.

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O Ben-zeev
Chambers, Sandton
2 April 2020