

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER 67574/12

In the matter between:

**MANDAG CENTRE FOR INVESTIGATIVE
JOURNALISM**

FIRST APPLICANT

BHARDWAJ, VINAYAK

SECOND APPLICANT

and

MINISTER OF PUBLIC WORKS

FIRST RESPONDENT

INFORMATION OFFICER:

DEPARTMENT OF PUBLIC WORKS

SECOND RESPONDENT

and

AMICUS CURIAE

THE SOUTH AFRICAN HISTORY ARCHIVE TRUST

THE DEMOCRATIC GOVERNANCE AND RIGHTS UNIT

JUDGMENT

TLHAPI J

[1] This is an application brought in terms of section 78(2) read with section 82 of the Promotion of Access to Information Act 2 of 2000 ('PAIA'). The applicant seek an order in the following terms:

- “1. Declaring that the decision by the respondents to refuse the applicants request for access to information(as defined in the Founding Affidavit attached hereto in terms of the Promotion of Access to Information Act 2 of 2000 (“PAIA”) is unlawful and unconstitutional.
2. Reviewing and setting aside the refusal of the applicants' request in terms of section 11, section 78 and section 81 of PAIA.
3. Directing the respondents to supply the applicants with a copy of the requested records within 15 days of granting of this order.
4. Directing the respondents to pay the costs of this application.”

The application was opposed.

[2] There were two further applications for the admission as amicus curiae by the South African History Archive Trust ('SAHA') and the Democratic Governance and Rights Unit ('DGRU'). The parties consented to their admission. I have also read their founding affidavits and am of the view that the issues they have addressed shall

be of assistance to the court.

BACKGROUND TO THE APPLICATION

[3] On 6 July 2012 a request in the manner and form prescribed by PAIA was made for access to information, to records on the expenditure by the Department of Public Works ('the Department') under the first respondent ('the Minister), of at least R248 million spent on the upgrade of the Nkandla Estate of the President of the Republic of South Africa, Mr Jacob Gedleyihlekisa Zuma ('the Nkandla Estate). The request read:

"records in documentary form which:

1. Pertain to the procurement by the State of goods or services to improve, upgrade, alter add to or secure the Nkandla Estate of the President.
2. Relate in whole or in part to the financial implication of the above; and
3. Were created during period May 2009 to present.

These records will include in particular, any documents evidencing:

- a. needs assessments/motivations;
- b. budgetary availability;
- c. bid evaluations and outcomes; and contracts awarded and their values.

For the purpose of this request the Nkandla Estate is defined as: the immovable property and improvements within and including the perimeter of the property at Nkandla owned by or under the control of the President; and

any improvements outside the perimeter of the same property but aimed at facilitating the functioning of the property or the President's security, well-being or performance of his duties.

We note that while the Act under certain circumstances allows information to be withheld, among other reasons for the protection of individuals under (section 38), the Act also imposes a duty (section 28) to sever and provide information which can reasonably be severed and does not contain information which cannot be disclosed.'

[4] The request was refused by the then Acting Director-General, Ms Mandisa Fatyela-Linde by letter dated 13 August 2012, on grounds that information on the Nkandla Estate was protected under the '*National Key Point Act* 102 of 1980 ('the NKP Act'), the '*Protection of Information Act* 84 of 1982 ('the PI Act') , the '*Minimum Information Security Standards*, ('the MISS') and other relevant security prescripts of the State Security Agency'.

[5] The applicants contended that the grounds relied upon for refusal were not grounds in terms of PAIA and, that none of the legislations relied upon prohibited access to the records or prohibited the disclosure of the records sought by them. Furthermore, that the reasons given for the refusal were flawed in that no reference was made to the request for information being decided in terms of PAIA (*section 25 (1)(a)*); that the reasons for refusal did not contain the provisions of PAIA relied upon in such refusal (*section 25(3)(a)*); that the refusal failed to state that the applicant (*the requester*) could lodge an internal appeal (*section 25 (3)(c)*).

[6] The applicants launched an internal appeal in terms section 77 of PAIA on 10 September 2012. When no decision was given by due date, that is, within the 30 day period as prescribed by section 77(3) of PAIA, various communications from 18 to 29 October 2012 were engaged between Mr Makgoba and Mr Hlabiwa of the Department and attorneys for the applicants regarding the outcome of the appeal. The applicants were informed that the *'Minister was still awaiting senior counsel's input'* and later *'his approval'*. The appeal reiterated the reason for the request and mentioned the public interest in the *'wide reports that the South African government was planning to spend tens of millions of Rand of tax payers money in upgrading the Nkandla precinct'*. There was later communication to the applicants that the Minister had considered senior counsel's input and had allowed section 77(7) of PAIA to take effect. The Minister was therefore deemed to have dismissed the appeal, which resulted in the launch of this application.

[7] The applicants contended that the public interest in the information requested 'outweighed any interest advanced for refusing access to information and in paragraphs 54 and 55 of the founding affidavit the applicants stated the following:

"54 ...there is manifest and profound public interest in ascertaining, as a matter of increasing urgency, the true extent of public expenditure on the upgrades to the Nkandla Estate of the President, and whether such expenditure has been undertaken in accordance with the applicable provisions of the Constitution and public procurement laws. The disclosure of the records is essential to ensure respect for the founding constitutional values of government openness, responsiveness and accountability, as well as to vindicate the constitutional rights of freedom of expression and access to information.

55Importantly, there is evidence which suggests that a fair, competitive and cost-effective procurement process as required by section 217 of the Constitution and the Public Finance Management Act of 1999 was not followed by the respondents.....notwithstanding any ground of refusal that the respondents may raise, they are required by section 46 of PAIA to disclose the records concerned. This is so because the disclosure of the record will likely reveal evidence of a substantial contravention of, or failure to comply with the law and, the public interest in the disclosure of the record clearly outweighs the harm contemplated in any ground of refusal which the respondents may raise”

According to the applicants the court may in terms of section 80 of PAIA examine any record which was the subject of a refusal of access to information, which record may not be *‘withheld on any grounds’*.

[8] The Director General of the Department, Mr Mziwonke Dlabantu in his answering affidavit confirmed the declaration of the Nkandla residence, like the residences of former Presidents and former Deputy Presidents as a National Key Point, in terms of the NKP Act. According to him, relevant observations to the Nkandla residence were that it was situated in an underdeveloped remote rural area. There was need to invoke special measures to provide essential services including medical services to the President and his family. Besides, the President *‘receives VIP protection and is accompanied by a large security detail at all times’*.

After the inauguration of President Zuma in May 2009 a team of experts representing the Departments of Police Services (‘SAPS’) and Defence (‘SANDF’) and State Security Agency (‘SSA’) reviewed the security circumstances surrounding the President and, identified shortcomings in relation to his residence at Nkandla.

The Department became involved in the upgrade of the Nkandla residence of the President to comply with the recommendations of the security agencies, which included

1. a physical security system;
2. an evacuation mechanism;
3. fire-fighting capabilities; and
4. the operational needs of other national departments including medical facilities and accommodation

[9] In November 2012 a task team was appointed by the Minister to investigate the facts surrounding the security project at the Nkandla residence and its findings were released to the public on 27 January 2013. The task team found that:

1. before his inauguration President Zuma and his family had already 'contracted an architect and contractor to develop plans or improve his private houses at his Nkandla residence, that the constructions were already underway, having progressed close to completion' when he was inaugurated as President;
2. certain amendments had to be effected to accommodate the requirements recommended by the security agents as mentioned above;
3. that 15 service providers including consultants were contracted by the Department to render various services and that proper procurement procedures were not followed in relation to goods and services;

4. that the total cost paid by the Department amounted to R206 420 644.37

[10] Among various reasons given in opposing the application Mr Dlabantu stated at Paragraph 32.2:

“Although the applicants expressly stated that they did not seek access to any information relating to the technical detail of security-sensitive improvements, it is clear that the documents sought are so replete with security-related information that they cannot be disclosed without disclosing security-sensitive information at the same time. Using the headings in the applicant’s request, I set out below why the applicants disavowal of security-sensitive information renders their request internally contradictory.

32.2 1Needs assessments/motivations

The records consist of security assessments by the South African Police Services, the Department of Defence and other security Agencies.....

32.2 2Budgetary availability

There was no specific budget allocated for the security upgrades to the Nkandla residence. In this regard, funds were sourced from other prestige projects that were underutilising the funds that had been allocated to them. Accordingly, there are no records reflecting the budget available for this project.

32.2.3Bid evaluations and outcomes

All the documents under this heading deal with the technical detail of what the prospective bidders were proposing to do and the detail of what was agreed upon would be done.....these documents contain security-sensitive information.

32.2.3 Contracts awarded and their values

Each contract awarded contains details of what the successful service provider was required to do.....contains extensive security-related detail which cannot be disclosed without compromising the security arrangements at the Nkandla residence.”

The Department was opposed to the inspection of the records in terms of section 80 of PAIA.

[11] Certain disclosures of the identities of several service providers in Parliament and, the announcement by the Minister of his intention to table the task team’s report necessitated the filing of a supplementary replying affidavit. It was contended by the applicants that the respondents in opposing the application relied squarely on an *‘absolute prohibition on disclosure which they contended flows from the very nature of the requested records i.e security sensitive and non-severable’*. The Minister’s disclosure of the report to public representatives in Parliament contradicted reliance on the absolute prohibition on disclosure.

[12] Subsequently the Minister instructed his special advisor, Mr Phillip Sobi Masilo (‘Mr Masilo’) to revisit the documents in possession of the Department and which fell within the scope of applicants’ request for access to information, in order to

determine whether it was possible to sever security-sensitive information from the documents in compliance with section 28 of PAIA. Having examined 42 (forty-two) separate files and after consulting with the SAPS, SANDF and SSA the Department tendered the following documents:

1. Bid adjudication minutes;
2. Contracts between the Department and various service providers for work on Phase 1 (high security) and Phase 2 (low risk) of the Nkandla security upgrade;
3. Invoices submitted to the Department by contractors;
4. Progress payment advices; variation order motivations;
5. Final accounts; and
6. Internal memoranda of the Department dealing with requests for funds and reallocation of funds.

The documents represented all work done on the Nkandla Estate up to date of the tender, which all amounted to R 210 505 255.90. A list of service providers and a schedule on the tendered documents in each of the forty two files examined was annexed. The State Attorney was tasked with making copies of these documents for the applicants.

It was also mentioned that some of the documents were redacted to a limited extent to remove '*references of security sensitive information and did not include any information on payments to service providers*'. The documents not tendered were listed as all those which carried a security classification and marked '*Top Secret*'.

The said documents related to recommendations on the type of security installations, information on how to secure the perimeter of the residence against intruders; information and sketches and or maps disclosing location and all security related measures.

[13] The applicants filed an affidavit in response, the purpose of which was to outline the issues which remained in dispute and necessitated deliberation at the hearing scheduled for November 2013. The applicants contended that there were deficiencies in the documents disclosed; *‘Several documents could not be located among documents; several disclosed documents were incomplete in that there were missing pages or attachments; in some where meetings were referred to no minutes could be located in the disclosed documents and the disclosed documents were confined to communications among the Department’s middle and lower management, consultants and contractors, and although such records refer to a higher level of communication, deliberation and decision –making i.e so called “top management”-the disclosed documents did not include any records generated at that level’*. A letter to the Department dated 29 July 2013 detailing these deficiencies followed. Mr Masilo responded on 6 August 2013 ‘stating that he had *“listed all of the documents in possession of the Department ...relating to the Nkandla security upgrade”* that some of these documents *“cannot be disclosed due to the sensitive nature of their content”* while others may *“have inadvertently not been made available”* but would be disclosed after analysis by him.

[14] On 8 August 2013 the applicants sought further clarification to Mr Masilo’s letter:

“

-whether the respondents’ reference to “ documents in possession of the Department

(emphasis added) included any documents in the possession of the Ministry of Public Works;

-whether the reference to documents “related to the Nkandla security upgrade (emphasis added) included all documents related to other (i.e. non-security) aspects of the Nkandla upgrades;

-whether any person had conducted a comprehensive audit of all of the documents held by the Department to determine whether they fell within the applicants’ request, and if not what process was followed;

-whether the respondents could exclude the possibility that relevant documents may have been omitted from the files that were examined by Mr Masilo; and

-whether the respondents contend that those documents referred to in the disclosed documents but absent from Mr Masilo’s list do not exist or cannot be located for any reason, and if so, whether the DG would be prepared to provide an affidavit to that effect in accordance with section 23 of PAIA”

[15] The respondents advised applicants’ attorneys that Mr Masilo and the Department’s KwaZulu-Natal Provincial Office (‘the KZN office’) had conducted a review of the documents in Mr Masilo’s possession and that several documents that had been erroneously omitted would be provided to applicants shortly. A further letter of the 30 August 2013 explained that all documents relating to the Nkandla upgrade which were examined by Mr Masilo were those documents filed at the KZN office which was tasked with managing the project and which were sent to his office at the Ministry in Pretoria. Attached was a colour coded schedule addressing the deficiencies complained about:

1. colour green -- documents tendered but mistakenly omitted (‘omitted documents’)

2. colour yellow – documents which appear to have once existed but now cannot be located ('lost documents')
3. colour red - documents containing security sensitive information which cannot be redacted ('withheld documents')
4. colour blue – documents of which Mr Masilo ' *has been unable, despite his best efforts, to confirm the existence* ' ('undetected documents')

[16] According to the applicants the missing documents referred to documents in a schedule annexed to letter of 29 July 2013 '**SA4**', which was cross referenced to Mr Masilo's list; to documents in '**SA6**' in the disclosed documents which were not tendered and, to documents which Mr Masilo was unable to locate. The applicants contended that the said documents 'must' have existed or been '*beyond doubt (and certainly beyond a balance of probabilities)*' in the possession of the Department. Record of the existence of these documents they contended could be inferred in the first and second disclosures and, in leaked document '**RA6**' annexed to the replying affidavit. A few examples were given among them, '**SA12**' dated 10 January 2011 where it was recorded " *A meeting was held with Deputy Minister Bogopane-Zulu and DDG: ICR, PM & PS on 21 December 2010 in which she confirmed that the Principal indicated that he does not want other contractors on site in Phase 11 opposed to Phase 1 and, where in the second disclosure reference was made to an internal memorandum from the DG to the Minister with the subject 'Requesting assistance in the relocation of neighbouring [sic] families from their old houses to newly build [sic] accommodation.'* In it the Minister is asked " *request the Principal to intervene in expediting the relocation of the families in order that the State may continue with security worksthe families had not relocated, thus posing a risk that the deadlines as given by the Principal ...may not be met*". The applicants

submitted that the missing documents fell within their request and that the respondents were obliged to disclose them or justify fully in terms of PAIA why they could not be disclosed. The applicants persisted in the prayers sought in the Notice of motion.

[17] Mr Masilo, in a further answering affidavit averred that he had been part of the task team appointed by the Minister during October 2012, to investigate allegations of corruption relating to the Nkandla security upgrade which had surfaced in the media. On 12 November 2012 the task team travelled to KZN. According to Mr Masilo he met with the project manager Mr Rindel who was based at the regional office of the Department in KZN. The purpose of the meeting was to collect all documents relating to the Nkandla security project including those in possession of the contractors. Mr Rindel kept working files of each contract/component of the project. The principal agent appointed by the Department (Minenhle Makhanya Architects), the consulting engineers (Ramcom) and, the quantity surveyors (R&G) also kept records on projects in which they were involved. Mr Rindel caused the documents relating to each completed project, except for the records of site meetings and contractors meetings to be filed in the archives of the registry of the KZN office and, no documents were kept at the Head Office of the Department or the Ministry. The documents collected were those referred to as the 42 files consisting of over 12 000 documents. Two sets of copies of the documents were made, one for the task team and the other for the Public Protector who had advised the Minister on 5 November 2012, that she too was investigating the Nkandla security upgrade.

[18] Mr Masilo submitted that the tendered documents in excess of 12000, copies of which were provided to the applicants were reported upon in publications of the Mail and Guardian newspaper of 5 and 12 July 2012. Furthermore, that the

applicants had not taken issue with any of the security sensitive documents that were withheld. Another search was conducted for the missing documents and a further disclosure of site meetings of June 2011 and January 2012 was annexed. Mr Masilo submitted that despite best efforts on the part of the respondents the documents in colour coded yellow and blue in the second disclosure cannot be located. He contended that the applicants' attack on the missing documents related to a limited number of documents and had gone beyond the order sought in the notice of motion and that the applicants had crossed "*the line between a legitimate request in terms of PAIA and abuse of the Act*".

AMICUS CURIAE

SAHA

[19] SAHA is a Non-Governmental Organisation which collects, preserves and catalogues materials of historic, contemporary, political, social economic and of cultural significance and promotes the accessibility of these materials to the general public. 'In 2001 it launched the Freedom of Information Programme dedicated to using PAIA in order to test the boundaries of freedom of information in South Africa ...and to create awareness of compliance with and use of PAIA'. Since 2001 it has launched over 1800 requests for information from predominantly government departments. Arising out of the refusals for access to information it has launched numerous applications in the High Court and as amicus curiae in one Constitutional Court matter. SAHA's interest arises out of the impact the outcome of this application will have on applications contemplated by it. The purpose is also to provide statistics on research conducted by it on requests for information and, to assist the court in appreciating the developing trend, the pervasive culture of secrecy which impacts on

the 'implementation of PAIA and the enjoyment of the Constitutional right of access to information.

[20] According to SAHA limitations on the right of access to information was demonstrated in the 'culture of secrecy pervading public bodies; in the nature and the extent of the reliance by the State on apartheid era legislation' such as the 'NKP' Act and 'PI' Act and, in 'the misapplication of PAIA's security exemptions to withhold information'.

PAIA requests were routinely met with initial refusal without adequate reasons; with refusing access to all requested documents without complying with the obligation to sever material that may be disclosed' (section 28 of PAIA) and without considering the public interest override in section 46 of PAIA. Refusals were withdrawn when litigation is instituted'.

[21] In illustrating statistics on the trends displayed in the 'culture of secrecy were the 159 requests in 2012 administered by SAHA to various public and private bodies and of these 102 were outright refused or no response was received and this equated to 64% refusal rate. 'Out of 11 PAIA requests to the Office of the Presidency 10 were refused' equating to over 90% refusal rate. Two practical examples, the PAIA requests of David Forbes, a filmmaker, on the amnesty hearings into the murders of the 'Cradock 4' and the entire amnesty application by Eugene de Kock to the Truth and Reconciliation Commission ('TRC').

[22] Where apartheid era legislation was relied upon, out of the 1297 requests to public bodies between 2001 and 2011, 79 requests received refusals and out of these 16 requests were initially refused in 'full or in part on grounds relating to

national security and, this represented 20% of refusal rate in that period. SAHA appealed in seven of the 16 requests and in some, documents were released in out of court settlements, while judgment in one was outstanding. Practical examples were, the '34 boxes case' relating to SAHA's various requests during 2001 of state records of the 'TRC' held by the National Archives and various requests between 2001 and 2004 directly to the 'TRC' archive.

[23] SAHA submitted that in terms of the PI Act and the NKP Act, PAIA applied to the exclusion of both statutes in as far as they were 'materially inconsistent with an object or specific provision of PAIA; that these statutes were to be approached with caution in that they were laws 'made to entrench the apartheid security state prior to the adoption of the Constitution; that to the extent that the statutes were applicable, its provisions be interpreted in terms of section 39(2) of the Constitution; and that the provisions of these statutes imposing civil or criminal liability have the potential of limiting the right to access to information as provided in section 32 of the Constitution.

DGRU

[24] The DGRU is a specialist research unit based in the Department of Public Law, at the University of Cape Town. Its primary research focus is on the relationship between governance and human rights, transparency and the right of access to information and it supports law and policy reform. It seeks to assist the court on the interpretation of the legislation restrictions based on national security that is, the NKP Act, the PI Act and other related security legislation, in relation to PAIA and in a manner consistent with the Constitution and South Africa's obligation under international law.

DGRU has collaborated with established advocacy organisations in South Africa and abroad. Its interest in this matter relates to its work on access to information, accountability and transparency and, to the development of the law relating to the interpretation of sections 38 and 41 of PAIA. It supports a narrow interpretation of national security as a ground for refusing access to information, which is a position supported also in foreign case law and by various international organizations.

[25] The respondents made certain disclosures, what remains to be determined are the following issues:

1. whether the disclosures made were deficient;
2. whether the respondents took all reasonable steps to find the documents requested by the applicants;
3. whether there are further 'top level documents in existence; or
4. whether there were reasonable grounds for believing that certain records do not exist;
5. whether there are grounds for referral to oral evidence;

A 'note of hearing' was filed on behalf of the applicants prior to the hearing. I do not intend to dwell on criticism on behalf of the respondent that it seemed, that the 'note' had changed the focus on the case the respondents had to meet, that is, of the 'missing documents' as depicted in the papers and heads of argument that exchanged hands. As I see it, the 'note' charted the route the request of the applicants took from 12 July 2012, the change of stance taken by the respondents

throughout, the piecemeal disclosures and, the new facts that came to light in the additional affidavits exchanged, which may have relevance to the original request . The 'note' is not meant to have me disregard what has been presented in both parties heads of argument. It served to make me alive to a need for a holistic approach in dealing with the issues and, the possibility of me expanding on the prayers in the notice of motion, by referring the matter to oral evidence.

[26] Our Constitution marked an important break with the past. Its preamble provides for the laying of the foundation of a '*democratic and open society*'.

The foundation of state value is laid down in the Constitution, which provides for '*accountability, transparency and openness*', s 1(d); s 41(1)(c). Public administration in every sphere of government is subject to these values and principles, s 57(1)(b), s 59(1)(b), s 70(1)(b), s 118(1)(b), s 160(7), s195; "*Open and transparent government and a free flow of information concerning the affairs of the state is the lifeblood of democracy*", *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC) para 46 foot note 45. Organs of state security and other security agencies are also subject to these values and principles. While the initial reason for non-disclosure was that the documents sought were replete with security sensitive information, the applicants have themselves indicated that they were not interested in such information. The respondents subsequently made disclosure and it was then revealed that the grounds relied upon were not justified because only a limited number of the documents were security related. It was correctly submitted by the DGRU that reliance on security grounds to deny access to information would have the result of undermining constitutional safeguards. It is my view that our courts are called upon to be vigilant in determining the legitimacy of the blanket refusals based on security grounds, and that they are required to interpret

security related legislation in a manner that will protect the right of access to information as provided for in the Constitution. In this matter, the subsequent disclosures have limited my pronouncement on refusals based on national security grounds, because the respondents no longer rely on them.

[27] For purposes of determining this application it is important to reiterate why PAIA was promulgated. Section 32 of the Constitution provides for a right to access to Information:

- “(1) *Everyone has a right to have access to*
- (a) any information held by the State; and*
 - (b) any information held by another person that is required for the exercise or protection of any right.*
- (2) *National legislation must be enacted to give effect to this right...*

The preamble of PAIA reads:

“*RECOGNISING THAT-*

**the system for government in South Africa before 27 April 1994, amongst others resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violation;..*

**national legislation must be enacted to give effect to this right in section 32 of the Constitution;.*

AND BEARING IN MIND THAT-

**the State must respect, promote and fulfil, at least, all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa;*
**the right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom as contemplated in section 36 of the Constitution*

AND IN ORDER TO-

**foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information”*

[28] First, whether or not the respondent made a disclosure satisfying the provisions of PAIA must in my view be assessed against the original request and secondly against what was finally disclosed. The request pertained to ‘*all records in documentary form*’, generated from May 2009, the documents were described and this request was further qualified, ‘*We emphasise that our interest is not in the technical detail of security sensitive improvements, but in the financial implications of procurement by the State in respect of Nkandla Estate*”.

The subsequent disclosures and the belief by applicant that the search was confined to the project managers documents (the Rindle documents) and not to a genuine disclosure of all documents even, those at the Department’s head office, should also be considered in light of the responses in the affidavits for the

respondent.

[29] It was submitted for the respondents that the disclosure of the 12 000 documents on 21 June 2013 enabled the applicants to discharge their role as members of the media to the public. Argument was presented on the disclosures by making references to the content thereof and to the reports in the Mail and Guardian on the reports so disclosed : *'Nkandla, number 1 emerges clear winner; What did Zuma know about the Nkandla Project'* and other related reports annexed to the papers. Sight should not be lost of the fact that while the applicants are said to have extensively reported on the documents disclosed they still raised queries emanating from those disclosures, and as at August 2013 they still requested the DG to depose to an affidavit in terms of section 23(1) of PAIA.

After inspecting the disclosures the applicants submitted that the missing documents related to all *'records of meetings, communications, deliberations and decisions at the level of 'top management' which referred to the Minister, the Deputy Minister, the DG and the DDG including their communications with the Principal (President Zuma).'*"

[30] There is no doubt that the implementation of the Nkandla project ordinarily shall have generated a volume of interrelated documents, falling within the ambit of the original request. In my view, this included decisions by *'top management'* relating to *'procurement for goods and services', 'financial implications' 'budgetary availability'* referred to in the request, that is, except for information relating to *'security sensitive improvements'*.. The Department's response in the answering affidavit under the heading *'budgetary availability'* and *'contracts awarded and values'* mentioned above is, in my view, not acceptable, especially coming from the

Director General, who is the accounting officer in terms of the law. Where budgetary details are concerned, he states that there were *“no records reflecting the budget available for this project”*.

[31] It was correctly submitted for the applicant that the response was in direct conflict with several laws, to mention but a few being, the Constitutional provisions relating to funds appropriated by an Act of Parliament for the withdrawal of money for expenditure from National Treasury, s 213(2)(a); the obligation by an accounting officer to report unauthorized expenditure to Treasury s 38(1) of the PMFA; the obligation by an accounting officer not to commit a department to any liability *“for which money has not been appropriated, s 38(2)”* of the PFMA and s 39(1) which requires the accounting officer to ensure that expenditure of the department *“is in accordance with the vote of the department and the main divisions within the vote”*, and an accounting officer’s duty to keep full and proper records of the expenditure of the Department and the duty to properly account to treasury in terms of the PFMA, s 40(1)(a) (*keeping of proper records*), s 40(4)(a) (*account towards anticipated expenditure for the forthcoming financial year*) and 40(4)(b) and (c) (*rendering monthly returns of the Departments expenditure*);, the obligation to reduce to writing any directive from executive authority, having financial implications to an accounting officer, s 64 of the PFMA; the Department’s responsibility when it contracts for goods and services to do so *“in accordance with a system which is fair, equitable, transparent, competitive and cost effective”*, s 217(10) of the Constitution, echoed in s 38(1)(a)(iii) and (iv) of the PMFA; The Department is mandated in terms of section 46 of PAIA to disclose records in the public interest where evidence would reveal ‘a substantial contravention of, or failure to comply with the law.’ (my underlining)

It was submitted that even if these excuses regarding the missing documents

were true, the Department would still have to be transparent regarding the content of the missing documents and that the disclosure of such documents still fell within the ambit of the original request. I agree with this submission.

[32] It was argued for the respondent that it was not reasonable to expect Mr Masilo, Mr Rindel or the DG to explain each and every document in the 42 files. The applicants raised no complaint against Mr Masilo and Mr Rindel regarding the KZN files. According to Mr Masilo, Mr Rindel's team was not part of meetings with the 'Minister, Deputy Minister and/or DG or DDG'. The complaint was that there was no disclosure of "*top management*" / "*top level*" meetings or decisions. The applicants argued that it was these documents that had been referred to in the tendered documents that had not been disclosed and that no affidavit by the DG complying with section 23(1) of PAIA was provided. For example, the document that was leaked to the applicants and referred to in these papers and in the media was not among the documents that were disclosed by the Department. This, in my view, would be more reason to believe that there are documents in existence which have not been disclosed. There were no disclosures from Head Office, Pretoria and no search was conducted for the missing documents at such office.

[33] Section 23(1) of PAIA, provides for the process to be followed in the event that the requested record cannot be found or does not exist: "*if all reasonable steps have been taken to find a record*" the "*information officer of the a public body must by way of affidavit or affirmation, notify the requestermust give a full account of all steps taken to find the record in question or to determine whether the record exists ...including all communications with every person who conducted the search on behalf of the information officer.*" (my underlining)

It cannot be concluded that the DG by confirming Mr Masilo's affidavit of disclosure, has complied with his obligations under the provisions of section 23(1) of PAIA.

[34] It was argued for the respondents that it was reasonable to conduct a search for all the documents and of the missing documents pertaining to the Nkandla upgrade at the only offices where they were stored, that is, the KZN regional office of the Department and, in Mr Rindel's office and that reasonable steps had been taken to place sufficient evidence before the court. In my view, the submission that the original request was limited thereby confining the search to the KZN office is not correct.

The request preceded the appointment of the task team by the Minister and the investigation by the Public Protector. The Minister's appointment of the task team to investigate the Nkandla project cannot be interpreted to mean that he confined the investigation to the project manager and the regional office only. My understanding is that when the Nkandla project was initiated at the instance of the SAPS, the SANDF and, other security related organs of government, it is the Department which was tasked with the implementation of the project. The Department allocated funds and had overall control over the project. Mr Rindel was responsible for the execution and supervision over the contractors and service providers of the project at Nkandla. Unless these documents fell within the ambit of documents which should not be disclosed due to security reasons, all documents pertaining to the Nkandla project from May 2009, having relevance to the particular issues identified in the request must be disclosed.

[35] The idea or suggestion of the possibility of no record of documents in writing

or no records being kept pertaining to *'top management'* decisions being available, especially those records like in this matter that have or might have financial implications to the Nkandla project, is a serious indictment against those in public office who deal with the business of government, and, this should not go unchallenged. Failure to keep record or a tendency to lose documents, or to hide them or to deal with government business under a cloud of secrecy where it is not justified or, like in this matter to confine disclosure to the project managers documents, in situations where a government department is taken to task or where the shoe might pinch certain officials in government, constitutes a dereliction of one of the most important obligations on a government, which is to keep proper records. Such conduct on the part of government does not advance the values espoused in our Constitution, that of a democratic, transparent and accountable government. It is in the public interest to keep record in order to give credence to the business of government itself and to those who govern. Record is kept to monitor those vested with the duty to govern; record is kept to ensure that tax payers money is properly accounted for; record is kept to advance access to information as protected by the Constitution. Records are kept so that such records are preserved for posterity in keeping with our national heritage. The National Archives Act, Act 43 of 1996 and the regulatory scheme under the said Act and policy developed around the Act, places an obligation on all government employees from the top to the bottom to create proper records, whether these concern casual, ordinary or classified information, when conducting government business.

[36] The applicants have requested that the matter be referred to oral evidence. There is also the request that the records not disclosed be examined in terms of section 80 of PAIA, that is, in order to assess whether they are the subject of

disclosure or not. I am of the view that at this stage, it would not serve any purpose to either examine the records or refer to oral evidence because the respondents have in my view not completed the exercise of disclosure in terms of the original request. As I see it, a referral to oral evidence in order to subject individuals to cross examination would possibly at this stage not yield the result. In my view, clear indication of the issues to be interrogated must at least be outlined. Unless the disclosures extend to Head Office and the DG first reports as he is required to do in terms of section 23(1) of PAIA, there is possibility that the court by referring the matter to oral evidence might be embarking on a wild goose chase. I take this dim view because of the dilly dallying conduct displayed by the respondents in dealing with this request for access to information.

[37] In the circumstances I give the following order:

1. The respondents are ordered to furnish the applicants with such information outlined in their request in terms of PAIA by including documents filed at the Department's Head Office in Pretoria within 30 days of this order;
2. In as far as the missing documents are concerned, the Director General of the Department of Public Works is ordered to comply with section 23(1) of PAIA within 30 days of this order;
3. The respondents are ordered to pay costs of this application including costs of two counsel.

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	05 NOVEMBER 2013
JUDGMENT RESERVED ON	:	06 NOVEMBER 2013
ATTORNEYS FOR THE 1 ST APPLICANT	:	WEBBER WENZEL ATT.
ATTORNEYS FOR THE 2 ND APPLICANT	:	WEBBER WENZEL ATT.
ATTORNEYS FOR THE RESPONDENTS	:	THE STATE ATT.