IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

CASE NO. 298/2010
REPORTABLE

In the matter between:

CENTRE FOR SOCIAL ACCOUNTABILITY **Applicant**

and

THE SECRETARY OF PARLIAMENT **1st Respondent**

THE SPEAKER OF PARLIAMENT **2nd Respondent**

THE CHIEF WHIP OF THE AFRICAN NATIONAL CONGRESS **3rd Respondent**

JUDGMENT

ALKEMA J

[1] This is an application in terms of section 78(2) read with section 82 of the Promotion of Access to Information Act, 2 of 2000 ("PAIA" or "the Act") against the refusal by the second Respondent to grant the Applicant access to records relating to the alleged abuse of the Parliamentary travel voucher system during 2004 by individual Members of Parliament ("the

records”). The abuse, as expected, attracted wide media attention and soon became known as the “Travelgate” scandal or saga. I will continue to refer to these incidents collectively as the Travelgate saga.

[2] The Applicant is an independent institution affiliated with Rhodes University in Grahamstown. The Public Service Accountability Monitor (“PSAM”) is a programme within the Applicant which has been engaged in social accountability monitoring since 1999. In this judgment any reference to the Applicant includes a reference to PSAM. It gathers information on the management of public resources and the delivery of public services and attempts through various mechanisms to ensure that public officials are held accountable for their conduct as required by the Constitution. It professes to do so in an objective and politically impartial manner.

[3] Through accessing, considering and then publishing the information obtained, the applicant hopes to assist members of parliament, civil society organizations and ordinary citizens to hold duty-bearers accountable for their performance. The Applicant identifies “duty-bearers” as being all those who can be shown to be responsible, whether directly or indirectly, for the management of public resources. This includes not only government officials but members of Parliament and members of constitutionally appointed bodies responsible for exercising effective oversight over the management and use of public resources. It also includes private entities and individuals to whom the management of public resources may be outsourced or who render public functions.

[4] The first respondent is the Secretary to Parliament and the "Information Officer" of the National Assembly of Parliament (Parliament) as defined in, and designated as such, in terms of the Act. He is cited in these proceedings in his official capacity.

[5] The second respondent is the Speaker of Parliament ("the Speaker") appointed through the process prescribed by section 52 of the Constitution.

[6] The third respondent is the Chief Whip of the African National Congress ("ANC") in Parliament, and is the chosen representative of those members of parliament who objected to the release of the records in question. The third respondent is cited by the applicant in this capacity.

[7] The court entertaining an application for access to a public record under section 78 (2) read with section 82 of PAIA is defined in the Act as, *inter alia*, a High Court within whose area of jurisdiction the requester concerned is domiciled or ordinarily resident. Thus, it is common cause that this Court has jurisdiction to hear this application.

[8] The information furnished by Parliament to the Applicant pursuant to the initial request is relatively scant, but more about this later. For present purposes it suffice to say that relevant background to the Travelgate saga can be gleaned from a "Briefing Document/Fact Sheet" issued by Parliament on 24 August 2004; a report of the task team of Parliament considering reports of Price Waterhouse Coopers and the National Director of Public Prosecutions on the subject under discussion dated 18 March 2005; minutes of proceedings of the Parliament Oversight Authority, dated respectively, 22

February 2008, 10 September 2008, 8 April 2008, 23 September 2008 and 19 March 2009; and finally the affidavit by Kobus De Meyer Roelofse, the Investigation Officer in the South African Police Services attached to the Department of Priority Crime in relation to the irregularities in the use of travel vouchers for Members of Parliament by the Bathong Travel Agency. The relevant features of the Travelgate saga contained in the aforesaid documents may be summarised as follows.

[9] Members of Parliament are issued with a booklet containing either business or economy class warrants (depending on status) which may be used for air travel, bus travel or rail travel anywhere in South Africa. Registered spouses and dependants of members, including their parents or parents-in-law, are also entitled to a limited number of warrants. In addition, a member also receives ten warrants for which a member has to pay 20% of the ticket value.

[10] Travel agents are required to submit monthly account statements to Parliament accompanied by the original warrants duly signed and completed, together with invoices and copies of the air ticket issued to the member. It seems that a panel of travel agency firms situated throughout South Africa was appointed as approved agencies to implement the scheme. Since 2002 it came to light that many of these firms, in ostensible collaboration with many of the members, became involved in fraudulent travel transactions whereby they were paid by parliament for air travel in respect of warrants or air tickets which were either not used or were otherwise fraudulently issued. Precisely how the fraudulent transactions

were exercised or enforced is not explained in any document or affidavit before this court.

[11] As at 18 March 2005 (the date of the report prepared by the Task Team of Parliament referred to in para 8 above), seven travel agents and twenty three members and ex-members of parliament had been arrested on criminal charges of fraud. Five members had been convicted of fraud in respect of the abuse of travel vouchers and were sentenced to fines of varying magnitudes and periods of suspended imprisonment. Many of the travel agency firms implicated in the Travelgate saga were liquidated; *inter alia*, ITC Travel (Pty) Ltd, Business and Executive Travel (Pty) Ltd, Star Travel (Pty) Ltd, Ilitha Travel (Pty) Ltd and Bathong Travel (Pty) Ltd. Civil action to recover losses by Parliament were instituted against some other travel agencies.

[12] As will appear later in this judgment, this application relates specifically to the records of Bathong Travel (Pty) Ltd (in liquidation) (hereinafter referred to as Bathong). I will henceforth confine myself to those records, the content of which must be understood against the background described above.

[13] According to *Roelofse*, the Investigating Officer referred to in para 8 above:

> *"… a number of Members of Parliament were convicted of fraud …"*

and entered into plea bargaining with the National Prosecuting Authority.

[14] The liquidators of Bathong instituted action during 2007 against a number (it is not disclosed how many) of members of parliament to recover monies owing by them to the company. In its replying affidavit the applicant alleges that (as at 2008) the liquidators have recovered some R4.79 million from them in relation to Bathong only. The total costs incurred in doing so amounted to some R1.87 million; resulting in a nett recovery of some R2.9 million of which R2.7 million have been paid to creditors. Parliament's "*Briefing Document/Fact Sheet*" referred in to in para 8 above contains the following remark in relation to the Bathong Agency:

> "*Approximately 70 members utilized the services of this agency. There is evidence of complicity by certain members in possible fraudulent acts.*"

The above remark is particularly relevant to the consideration of section 46 of the Act to which I will refer later in this judgment.

[15] The minutes of proceedings of the Parliament Oversight Authority which pertain to the Travelgate saga in general and to Bathong in particular, show a distinctive lack of enthusiasm on the part of parliament to pursue the claims of the liquidators of Bathong against its members. For instance, the minutes of 8 April 2008 record that a meeting was held on 15 November 2007 in the Speaker's Boardroom (presumably by certain members of parliament) and that it was resolved, *inter alia*, that:

> "*The actions issued out as against the various members of Parliament, based on the causes of action relating to the un-invoiced tickets and service by levy fees, were to be immediately withdrawn as against the members of Parliament.*"

[16] The members of parliament labored under the impression, quite erroneously, that the meeting had the legal force and effect of a creditor's meeting contemplated by the Insolvency Act, because the minutes of 8 April 2008 proceed to record that:

> "*In the event of no written understanding to abide by the agreements (a reference to the above agreement by the members to withdraw the claims) by 25 February 2008 the Liquidators conduct and breach of agreement will be reported to the Master of the High Court. An urgent order to request that the two liquidators be immediately removed as the liquidators of Bathong Travel (Pty) Ltd* (will be applied for)."

Because the liquidators in all probability did not consider themselves bound by the agreement reached between the members, they continued to pursue the claims against the members, thereby invoking the further ire of parliament.

[17] Realising that the only effective way of preventing the claims being pursued was a resolution by creditors of Bathong to such effect during a properly constituted creditor's meeting under the Insolvency Act, the members introduced a resolution to withdraw the claims to the agenda for the creditor's meeting scheduled for 29 August 2008. In response, two creditors of Bathong instituted application proceedings against, *inter alia*, the first respondent claiming the removal of those resolutions from the agenda. The litigation, however, was settled between the parties and they agreed to a consent order in terms of which the resolutions were removed from the agenda. The Court order is dated 7 August 2008 and is attached to the Applicant's replying affidavit before this Court. It seems that at that

stage 74 claims out of a total of 106 claims were still pending, and the settlement contained in the consent order paved the way for the liquidators to proceed with the recovery of the outstanding claims. That is until parliament decided to purchase the balance of the outstanding claims from the liquidators.

[18] As early as 21 May 2008 the members of the Parliamentary Oversight Authority meeting recognized the sensitivity of the Travelgate saga. At its meeting on that day the minutes record:

> *"The Speaker indicated that the Secretariat must consider whether Parliament needs a special Public Relations Unit to deal with this matter. The Secretary responded that the Public Communications Services skills base needs to be reviewed as the Travel Voucher matter is very complex."*

[19] On 10 September 2008, approximately one month after the consent order referred to earlier, the members' legal team made a report to the Oversight Authority meeting which report was presented to it by senior counsel. It was recommended that Parliament purchase the claims from the liquidators. The full reasons for the recommendation are probably set out in such report, but it does not form part of the papers before this Court and was not discovered by Parliament to the applicant, presumably on the ground of legal privilege. The minutes of 10 September 2008 contain the following entries: (I quote *verbatim)*

> *"Adv D Ntsebeza made a presentation on the report of the Travel Voucher matter. He indicated that it is important that this matter is*

expedited preferably before the end of the term of the third Parliament. At the end of the report there were recommendations."

Also:

"It was emphasized that either way Parliament as an institution will face a risk, this is especially so because if the claims are not bought members will proceed with litigation and this will affect Parliament. However the biggest risk remains if a third party purchased the claim. This will mean that Parliament may become a party to defend the claim. To avoid this it was suggested Parliament should consider the safer alternative which is to purchase the claims ."

Also:

After deliberations it was then agreed that Parliament should solve this matter by buying the claim as per the recommendation of the report presented by Adv. Ntsebeza. Ms Kaylan indicated that she will need to consult within her own party before she can endorse any proposal.

And finally:

"As a way forward it was agreed that another meeting will be held on 23 September 2008. Ms Kaylan was allowed to consult her party on the recommendation made. Since this matter is very sensitive all the copies of the report will be returned to the lawyers. Members who need copies will receive such copies directly from the lawyers after certain information is removed from the report. In the meantime the lawyers were mandated to table an offer for the settlement of the matter."

[20] The above entries indicate a strong desire, for reasons not known but giving rise to wide speculation, on the part of parliament to prevent those claims from being pursued. It was particularly anxious to protect those claims from public scrutiny in a court of law. The last mentioned entry relating to the report and the removal of information from such report, is obviously a reference to the report presented by the legal team. Again, the relevance of these observations will appear later in this judgment when dealing with the legal issues; in particular the issue of public interest.

[21] At the further meeting held on 23 September 2008 the members' legal team made certain proposals in regard to the terms and conditions under which the claims were to be purchased and the amounts to be paid. The resolution to purchase the claims was adopted and it was recorded:

> *'It was felt this will not only lead to the speedy resolution of the matter, but will not damage the reputation of Parliament as an institution."*

[22] These events clearly demonstrate, in my view, that parliament appreciated the sensitivity of the issue and the public interest which it attracted. This is relevant to a consideration of the public interest override contained in section 46 of the Act, to which I shall later return in this judgment.

[23] On 17 February 2009 a Sale of Claims agreement was concluded between the liquidators of Bathong as seller; and parliament represented by the first respondent as purchaser, of all outstanding claims against certain

members of parliament. The "claims" are defined as follows in the agreement:

> *"…means all the current, pending and contemplated claims against the Members relating to the travel warrants, air travel, car hire, accommodation, air travel levies, service fees including, but not limited to, court action which has been instituted by Bathong against certain Members, as more fully set out in Schedule 1 attached hereto; and all rights of action which Bathong may have against certain Members, as more fully set out in Schedule 2 attached hereto."*

[24] The agreement records that parliament is the major creditor of the liquidated estate of Bathong, holding approximately 80% of the value of the creditors' claims against Bathong. It further reads that as parliament wishes to mitigate its risk and limit its exposure to the incurring of legal costs for the recovery of the claims by the liquidators, parliament agrees to purchase against cession and transfer from Bathong, all the claims as defined. The agreement contains all the other usual terms and conditions normally found in an agreement of this nature.

[25] As the definition of *"claims"* in the agreement indicate, Schedule 1 to the agreement contain the names of those members of parliament against whom the claims relate, and Schedule 2 contain information of the nature, and presumably the quantum of, those claims. A perusal of the Schedules will therefore show precisely what was sold and ceded to parliament, and will describe the *merx* of the sale agreement.

[26] The sale of shares agreement, as I said, was concluded on 17 February 2009. On 16 March 2009 the applicant formally made a request to first respondent in his capacity as information officer to be given access to the following records:

1. A signed copy of the sale of shares agreement dated 17 February 2009; and
2. A copy of the unabridged debtors' book referred to in the agreement. (The particulars of the debtors, i.e. their identities and the amount of each claim purchased, are contained in the Schedules to the agreement – there does not appear to exist a separate debtors' book).

[27] In terms of section 25 (1) of PAIA, the first respondent was obliged to decide whether or not to grant the request, and to notify the applicant of his decision within 30 days which period expired on 15 April 2009. It failed to do so.

[28] If an information officer fails to give the decision within the 30 day period, he is, in terms of section 27 and for the purposes of the Act, deemed to have refused the request. By operation of law, the applicant's request was accordingly refused on 15 April 2009.

[29] On 17 April 2009 the applicant duly lodged an internal appeal against the deemed refusal to second respondent in his capacity as the "*relevant authority*" within the meaning of that expression in section 74 (1), which section deals with the right of internal appeals against a decision of an information officer.

[30] On 24 April 2009 the first respondent, notwithstanding the deemed refusal of the request and the pending internal appeal, nevertheless furnished the applicant with a signed copy of the sale of shares agreement. However, he failed to attach the Schedules to the agreement which describe the claims and disclose the names of the debtors. Not surprisingly, four days later, on 28 April 2009, the applicant requested first respondent to furnish it with the missing Schedules.

[31] In terms of section 77 (3) of the Act the time period within which to decide the appeal expired on 18 May 2009. However, on that day the second respondent requested the applicant to extend the time period. The applicant agreed to extend the time period to 22 June 2009 to enable the first respondent to furnish it with the missing Schedules, or for the second respondent to decide applicant's internal appeal against the deemed refusal. I pause to point out, in passing, that PAIA neither makes provision for the extension of any time-frames nor for condonation by the Court of non-compliance with the prescribed time periods.

[32] On 26 May 2009 the second respondent advised the applicant that since the Schedules requested contain the names of the third parties (the members of parliament against whom the claims were lodged), third party notices had to be sent by him to such third parties in terms of section 47 read with sections 34 (1) of the Act. The applicant disagreed that section 34 applied. The second respondent, however, notified the third parties on 12 June 2009 of the request, and invited them to make written representations within the 21 day statutory period.

[33] In argument before me, it was common cause that even if section 34 (1) applies, the notices to the third parties were not given timeously by first respondent in terms of section 47 (2). If section 34 (1) does not apply, then the applicant's internal appeal lapsed on 22 June 2009 (the extended date by which second respondent had to give his decision on the applicant's internal appeal). Therefore, and on such assumption, in terms of section 77 (7) the second respondent is deemed to have dismissed the applicant's internal appeal on 22 June 2009.

[34] Mr *Kennedy* SC, assisted by Ms *Rajab-Budlender* and Ms *De Vos*, acting on behalf of the applicant, convincingly argued that even if section 34 (1) does apply and that the late notification to third parties may be condoned by the Court, then sections 47 to 49 of PAIA which provide for the third party notification procedure, clearly empowers the *"information officer"* (namely the first respondent) and not the second respondent, to deal with such procedure. The evidence and correspondence, on the second respondent's own version, clearly demonstrate that it was the second respondent and not first respondent who decided on the third party procedure; he did so after the applicant's request for the record was deemed to be refused and after the applicant had lodged an internal appeal against such deemed refusal; and he was actively involved in the third party procedure. On this basis, Mr *Kennedy* SC submitted, his actions by usurping powers he did not have, are *ultra vires* the act and must be disregarded.

[35] Be that as it may, it seems that subsequent events overtook all previous procedural steps because, on 21 July 2009, the second respondent advised

the applicant that twenty three members (third parties) had objected to the release of the Schedules, but only one of the twenty three had provided "… *adequate reasons for objecting."* Second responded proceeded to inform the applicant:

> *"… Thus, with the exception of the one member, a decision has been taken (by the information officer, i.e. first respondent) to grant access to the record."*

[36] The decision to release the Schedules was taken by first respondent in terms of section 49 (1) and the members (third parties) were informed accordingly. On 12 August 2009 the third respondent, representing the third parties, lodged an internal appeal with second respondent against the decision to release the Schedules. The ground of the appeal was that the Schedules contain personal information about the members and that their rights to privacy would be invaded by the release. The applicant was invited to make representations on why the appeal should be dismissed which it did on 8 September 2009.

[37] On 24 September 2009 the second respondent informed applicant that he had decided to uphold the appeal from the third parties and to overturn the information officer's decision to grant access to the Schedules. It is against this decision that the present application was launched by the applicant.

[38] Mr *Heunis* SC, assisted by Mr *Oliver*, who appeared on behalf of the second respondent, contended that the application may be disposed of on a procedural point without deciding the merits. The point taken by Mr *Heunis*

SC must be evaluated against the above background. In essence, it is that the applicant has no *locus standi* to apply to this Court under the Act for the relief claimed. The argument is based on the provisions of section 78 of PAIA, which is contained in Chapter 2 under the heading APPLICATIONS TO COURT. For the sake of easy reference I quote hereunder the section in full:

> *"**CHAPTER 2***
>
> *APPLICATIONS TO COURT*
>
> ***78. Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies.***
>
> *(1) A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.*
>
> *(2) A requester-*
>
> *(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;*
>
> *(b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75 (2);*
>
> *(c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1-*
>
> *(i) to refuse a request to access; or*

(ii) or taken in terms of section 22, 26 (1) or 29 (3); or

(d) aggrieved by a decision of the head of a private body-

(i) to refuse a request for access; or

(ii) taken in terms of section 54, 57 (1)or 60,

may, by way of an application within 30 days apply to a court for appropriate relief in terms of section 82.

(3) A third party-

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;

(b) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1 to grant a request for access; or

(c) aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body,

may by way of application, within 30 days apply to a court for appropriate relief in terms of section 82."

[39] Section 82 reads as follows:

"82 ***Decision on application –*** *The court hearing an application may grant any order that is just and equitable, including orders-*

(a) confirming, amending or setting aside the decision which is the subject of the application concerned;

(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;

(c) granting an interdict, interim or specific relief, a declaratory order or compensation; or

(d) as to costs"

[40] If I understood Mr *Heunis* SC correctly, his argument proceeded as follows:

Section 78 (2) (a) must be read with section 74 (1) and (2) which deal with internal appeals by a requester and a third party. To para-phrase the relevant part of sections 74 (1) and (2):

> *"74 (1) A requester may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of 'public body' in section 1-*
>
> (a) *to refuse a request for access; or*
>
> (b) *taken in terms of section 22, 26 (1) or 29 (3),*
>
> *in relation to that requester with the relevant authority.*
>
> *(2) A third party may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of 'public body' in section 1 to grant a request for access."*

[41] In terms of s74 (1)(a) therefore, a requester such as the applicant in this case, may only lodge an appeal against a decision to **refuse** a request. (and, under sub-section (2) a third party may only lodge an appeal against a decision to **grant** a request). (my emphasis). It follows, so the argument goes, that the "*internal appeal"* referred to in sub-section 2 of section 78, is intended to be a reference to the requester's own appeal, and not a reference to the appeal of the third party, and the same reasoning applies to a third party's appeal under section 78(3).

[42] The argument then proceeds from the aforesaid premises to the (correct) reminder that the application under consideration was launched against the third party's appeal against the decision to make the Schedules available, and not against the applicant's appeal. The argument then concludes in the victory loop that the requester (applicant) was not "*unsuccessful in an internal appeal"* within the meaning of those words in section 78 (2)(a) and, accordingly, it lacks *locus standi* and it has no right to apply to this court under section 78 (1). Mr *Heunis* SC submitted that, in these circumstances, the applicant must first exhaust its internal appeal procedures as provided under section 78 (1) read with section (74 (1), before its right to an application to court arises under section 78 (2).

[43] In response, Mr *Kennedy* SC on behalf of the applicant, submitted that since section 34 (1) does not apply to the facts of this case, the entire third party notification procedure under section 47 (1) has no application and the third parties (the members of parliament) should never have been parties to the request procedure and consideration. Their appeal and the decision taken pursuant thereto must, accordingly, be regarded as void and of no legal

force and effect. In any event, he submitted, due to the respondents' non-compliance with the procedural third party notification requirements under section 47 (2), the entire third party procedure falls to be set aside. He submitted that in any event, and for the reasons mentioned earlier in this judgment, the second respondent had no authority to institute the third party procedure. In the final alternative, he submitted that in the event of this court finding that section 34 (1) does in fact not apply in whole or in part, and that all procedural irregularities may be condoned and that the third party procedure followed was valid and legal, then the public override provision contained in section 46 applies as provided for in section 33 (1).

[44] The allegations and counter-allegations relating to the procedural irregularities and the arguments on the legal implications, ramnifications and consequences thereof have opened a Pandora's box of such chaotic proportions that the temptation is almost irresistible to simply put the lid back and rather deal with the merits of the application, regardless of the procedural manipulations and shortcomings. Unfortunately, this is not possible. I am nevertheless constrained to remark that the conduct of the respondents in not observing the procedural requirements of the Act is yet another example of how rapidly the non-compliance with procedural requirements can degenerate into a maze of inextricable and indissoluble legal dead-locks from which there is often no point of return. Such an exercise is time-consuming and an unnecessary legal expense to litigants; in this case the South African taxpayer. With these remarks in mind, I now turn to cross the procedural bridge which, as I will attempt to show, is a bridge too far (to repeat the concluding words of Nugent JA quoting, in turn, (at least by implication) the title of a non-fiction book by the author Cornelius

Ryan, in *President of the RSA v M&G Media Ltd* 2011 (2) SA 1 at 16 (a judgment to which I shall shortly return).

[45] There is much merit in many of Mr *Kennedy* SC's submissions, but in view of the conclusion at which I have arrived, I do not believe it is necessary to deal with his submissions. First, it is necessary to deal with Mr *Heunis* SC's submission in regard to his interpretation of section 78 (2) resulting in the conclusion that the applicant lacks *locus standi* and does not qualify to apply to the court for an order under section 74.

[46] In the consideration of his argument I am prepared to accept in favour of the respondents, but only for purposes of this judgment and without making any finding in this regard, that this court has the power to condone all procedural irregularities and that all procedural requirements were correctly and timeously fulfilled. I am also prepared to accept, again without making any finding but simply for purposes of this judgment, that all third party procedures are valid and not *ultra vires* the powers of the second respondent under the Act. The argument advanced by Mr *Heunis* SC will accordingly be assessed on the aforesaid hypothesis.

[47] The argument, with respect, is disingenuous and inappropriate. Whilst I agree with Mr *Heunis* SC' s interpretation of section 74, the attempt to extend such interpretation to section 78 (2) and (3) ignores the logical consequence that in any opposed appeal, whether judicial or internal, formal or informal, there is always an unsuccessful respondent (requester) for every successful appellant (third party). And to restrict the wording of section 78 (2) (and, by implication, also of sub-section (3)), to only one face of the

coin, is to read words in the section which are simply not there. The words *"… in an internal appeal …"* in both sections 78 (2) and (3) include by necessary implication an internal appeal lodged by either the requester or the third party, and the words *"… requester (or third party")* in both sections include, by necessary implication *"… a requester (or third party) that has been unsuccessful in an internal appeal lodged by an opposing party …"* And it is common cause that the applicant is a requester who was *"unsuccessful in an internal appeal"* lodged by the third parties.

[48] To give the aforesaid words a restrictive meaning as contended for by Mr *Heunis* SC not only offends the plain meaning of those words, but it also offends the spirit and purpose of both the Act and section 32 (1) (a) read with section 39 (2) of the Constitution Act, 1996. In this regard Mr *Heunis* SC was constrained to concede that such interpretation may render sections 78 (2) and (3) of PAIA unconstitutional, which interpretation must, as a rule of interpretation, be avoided if possible.

[49] In these circumstances I hold that the applicant qualifies as a *"requester"* in this application under section 78 (2). Having lodged an internal appeal against the deemed refusal on 15 April 2009 (which appeal was subsequently overtaken by the decision of 21 July 2009 to grant access to the record, including the Schedules), the applicant in my view had exhausted all internal appeal procedures. To suggest, as Mr *Heunis* SC submitted – albeit somewhat faintly – that the applicant was obliged to lodge an appeal against the decision to uphold the appeal of the third parties, is therefore in my respectful view ill-conceived. I therefore believe that the applicant has complied with section 78 (1).

[50] The above finding paves the way to now consider the merits of the application instituted under section 78 (2).

[51] Since this exercise involves the interpretation of various sections of the Act, it is necessary to first remark generally on the structure and purpose of the Act.

[52] The starting point is section 32 (1) of the Constitution, which provides that:

> *"(1) Everyone has the right of access to-*
>
> *(a) any information held by the state; and*
>
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights."*

[53] The distinction between the right to information held by the State, on the one hand, and information held by private institutions, on the other hand, is significant. The former is unqualified; the latter is qualified by information that is required by the requester for the exercise or probation of any rights. Section 32 (2) of the Constitution requires parliament to enact national legislation to give effect to section 32 (1).

[54] The Act, or PAIA, is the legislation born from the constitutional demand contained in section 32 (2). The opening words of the Act in its preamble state its purpose thus:

> *"To give effect to the constitutional right of access to any information held by the State…"*

It recognizes that:

> *"The system of 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 violations;"*

and that

> *Section 32 (1) (a) of the Constitution provides that everyone has the right of access to any information held by the State."*

[55] It concludes that the purpose of the Act is to:

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

and to

> *"actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights."*

[56] The escape from a secretive and closed system of government and the quest for an open, accountable and transparent system of government find expression in *inter alia*, the right of access to *"any"* information held by the State. It is now trite that such right must be interpreted to give effect to the new constitutional order of openness, accountability and transparency. I need only to refer to two *dicta* in support. The first is the well-known passage in *Shabalala and Others v Attorney-General, Transvaal and Another* 1996 (1) SA 725 (CC) at para 26 where Mahomed DP said:

> *"There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution*

is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is 'justifiable in an open and democratic society based on freedom and equality'. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment."

[57] The second is *Brűmmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at para 62 where Ngcobo CJ held:

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

[58] The provisions of PAIA must not only be interpreted to give effect to the values and principles mentioned in the above *dicta*, but its very structure is designed to give effect thereto. Part 2 Chapter 1 deals with access to records of public bodies. The right is contained in section 11 which reads as follows:

*"**Right of access to records of public bodies:-***

(1) *A requester must be given access to a record of a public body if-*

> *(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and*
>
> *(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."*

[59] Following the constitutional imperative in section 32 (1) of the Constitution, section 11 (1) of PAIA obliges a public body (provided that the procedural requirements relating to the request are complied with) to grant access to the record. This is the point of departure. It may only refuse access under section 11 (2) on a ground covered by Chapter 4 of PAIA. In terms of section 81 (3) (a) of PAIA the onus is on the public body to prove that the refusal is covered by one of the grounds under Chapter 4. The grant of access to State information is thus the rule, and the refusal the exception. This principle is described as follows by Nugent JA in *President of the RSA v M&G Media* (*supra*) at 6 para11:

> *"The 'culture of justification' referred to by Mureinik permeates the Act. No more than a request for information that is held by a public body obliges the information officer to produce it, unless he or she can justify withholding it. And if he or she refuses a request then 'adequate reasons for the refusal' must be stated (with a reference to the provisions of the Act that are relied upon to refuse the request). And in Court proceedings under s 78 (2) proof that a record has been requested and declined is enough to oblige the public body to justify its refusal."*

See also *Minister for Provincial and Local Government of the RSA v Unrecognised Traditional Leaders of the Limpompo Province, Sekhukhuneland* [2005] 1 All SA 559 (SCA) at 565 para 16; Currie and Klaaren *PAIA Commentary* para 2.10.

[60] The ground for refusal by second respondent in this case in upholding the appeal of the third parties, is the reliance on section 33 (1) read with section 34 in Chapter 4 of the Act. The relevant part of section 34 reads as follows:

> *"34* ***Mandatory***
>
> *(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if its disclosure would involve the unreasonable disclosure of personal information about a third party, including a deceased individual."*
>
> (2) *A record may not be refused in terms of subsection (1) insofar as it consists of information-*
>
> *(a)-*
>
> *(b)-*
>
> *(c)-*
>
> *(d)-*
>
> *(e)-*
>
> (f) *about an individual who is or was an official of a public body and which relates to the position or functions of the individual, including, but not limited to-*
>
> *(i)*
>
> *(ii)*

(iii) *the classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual; and*

(iv)-."

[61] Section 33 (1) provides that if the request for access is one contemplated by section 34 (1), then the request *"must"* be refused, *"… unless the provisions of section 46 apply."* Before considering section 46 it must first be established if section 34 (1) applies. Section 34 (1), in essence, seeks to protect the right to privacy under section 14 of the Constitution and, to some extent, the right to dignity under section 10. Section 34 (1) must accordingly be interpreted having regard to the content of the constitutional rights to privacy and dignity bearing in mind the operation of the limitation of rights clause 36. Finally, clause 34 (1) must be interpreted taking into account the definition of *"personal information"* in clause 1. The definition reads as follows:

*"**personal information"** means information about an identifiable individual including but not limited to-*

(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the individual;

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

(c) any identifying number, symbol or other particular assigned to the individual;

(d) the address, fingerprints or blood type of the individual;

(e) *the personal opinions, views of preferences of the individual, except where they are about another individual, or about a proposal for a grant, an award or a prize to be made to another individual;*

(f) *correspondence sent by the individual that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;*

(g) *the views or opinions of another individual about the individual;*

(h) *the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual, but excluding the name of the other individual where it appears with the views or opinions of the other individual; and*

(i) *the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,*

but excludes information about an individual who has been dead for more than 20 years."

[62] Having regard to the fact that PAIA merely gives *"… effect to the constitutional right of access to information held by the State* (and private

bodies*)* …" as demanded by section 32 of the Constitution, no new constitutional rights are created by PAIA. The Act merely fleshes out and elaborates on the existing constitutional rights, and provides a structure for their operation. And to the extent that PAIA (or any other Act of Parliament) goes beyond or limits any of the constitutional rights under the Bill of Rights, it is unconstitutional. The same principle applies to the right of privacy. Neither the definition section of "*personal information*" nor section 34 (1) of PAIA creates any rights of privacy – the content of the right of privacy remains vested in its constitutional setting under section 14 of the Constitution. Therefore, the categories of "*personal information*" listed under the definition of "*personal information*" in section 1 of PAIA are not exhaustive, and neither are the categories under section 34 (2).

[63] What, then, is the meaning of the words "*… the unreasonable disclose of personal information …*" as used in section 34 (1) of PAIA? The starting point, I believe, is the determination of the contents of the constitutional right to privacy.

[64] It is generally recognized that every person has an untouchable inner sphere of personal life where he or she has the sole autonomy to decide how and where to live his/her life, and where his/her decisions do not adversely affect other people. No interference by law is tolerated with conduct within this sphere, either by the state or by other individuals or institutions. At the heart of this right is the freedom of identity of each individual, enclosed in an area of private intimacy. That privacy pertains to the freedom of individuality, is recognized by both the definition section 1 of PAIA which deals with "*personal information*" which may be refused, and by section 34

(2) which deals with information which may not be refused. The definition section defines *"personal information"* as information *"… about an identifiable individual …"*; whereas section 34 (2) categorises the classes of information about *"…an individual …"* which may not be refused.

[65] Applying the principle of freedom of individuality to the facts of the case before the court, Didcott J said in *Case and Another v Minister of Safety and Security and Others*; *Curtis v Minister of Security and Others* 1996 (5) BCLR 609 (CC) at para 91:

> *"What erotic material I may chose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the state."*

See also: *De Reuck v Director of Public Prosecutions (WLD) and Others*, 2003 (12) BCLR 1333 (CC) at paras.51-53. In a different context, Langa DP said in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (10) BCLR 1079 (CC) at para 16:

> *"… when people are in their offices, in their cars or on their mobile telephones, they still retain a right to be left alone by the State unless certain conditions are satisfied."*

See also: *Deutschmann NO and Another; Shelton v Commissioner for the South African Revenue Services* 2000 (6) BCLR 571 (E) (2000 (2) SA 106 (E).

[66] The leading case on the subject seem to remain *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC). Ackermann J, writing for

the majority, acknowledged the foundational role of identity in the concept of privacy. He stated as follows at 483F para 65:

> *"The scope of privacy has been closely related to the concept of identity and it has been stated that 'rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity'."*

[67] However, the learned Judge recognized that in the South African constitutional setting every right is limited, either by section 36 of the Constitution, or by another right. Accordingly, the second stage of the enquiry is to determine the limits when the right to privacy leaves the protection of the inner sanctum of a person and enters the public domain. In this regard he said at 484 C-D para 67:

> *"The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his or her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."*

[68] Referring to the German law on the subject, the learned Judge describes with approval how this process plays out in practice. He says the following at 489 C-E:

> *"A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation."*

[69] A reading of South African judgments on the subject show that the case law has adopted a very pragmatic approach on a case to case basis. Cases are decided on the particular facts, without attempting to define a general principle applicable to all cases. In the result, our case law contain examples of the nature of information considered on the facts of that case to be protected by the right to privacy, rather than any attempt to define the underlying principle of limitation. In the same vein, the definition of *"personal information"* in section 1 of PAIA contain an inconclusive list of the type of information which the legislation has decreed to constitute protectable *"personal information"* and section 34 (2) contain a similar list of personal information which is not regarded as protectable under the right to privacy.

[70] In both the definition section and in section 34 (2), the Act employs the freedom of identity principle referred to earlier. Whereas the nature of the protected information contained in the definition section are arguably examples of the most intimate and personal aspects of an individual, the nature of the unprotected information contained in section 34 (2) are examples where the inviolable core of personal information had been left behind and where the individual had entered into relationships with persons outside this closest intimate sphere. Nevertheless, it remains unsatisfactorily to merely provide examples, both in our legislation and in our case law, of the content and scope of the right to privacy, in the absence of an all-embracing universal principle applicable to all circumstances. It is therefore not surprising that courts and jurists, both in South Africa and abroad, are continuously searching for a general principle which limits the right to privacy.

[71]I believe, with respect, that Ackermann J in *Bernstein and Others* (*supra*) had in fact referred to such a principle. Referring to the United States Constitutional law on the right of privacy (which principle seems to have been followed by the European and Canadian constitutional systems) the learned Judge stated at 488B para 75:

> *"The party seeking suppression of the evidence must establish both that he or she has a subjective expectation of privacy and that the society has recognized that expectation as objectively reasonable. In determining whether the individual has lost his or her legitimate expectation of privacy, the court will consider such factors as whether the item was exposed to the public, abandoned or obtained by consent. It must of course be remembered that the American*

> *constitutional interpretative approach poses only a single inquiry, and does not follow the two-stage approach of Canada and South Africa. Nevertheless it seems to be a sensible approach to say that the scope of a person's privacy extends a fortiori only to those aspects in regard to which a legitimate expectation of privacy can be harboured"*

[72] It is a two part test. The first part is that the objector must establish a *subjective expectation* of privacy. In this regard I venture to suggest that the objector must first establish that the nature of the information is covered by the freedom of identity principle; i.e. that subjectively viewed it is part of the inner sanctum of the private and personal life of the individual. The second part is that, objectively assessed, society must recognize such expectation as reasonable.

[73] In regard to the second part, I assume that what is meant by *"society"* in this context are the legal, moral and ethical expectations of society. It is now accepted that these values are ever-evolving and change in time, space and even cultures. However, it is the duty of the court to objectively interpret such expectations at the time the assessment is made. The expectations must be objectively reasonable; if not, they do not constitute the legal, moral and ethical expectations of society.

[74] If the reasonable expectation test referred to by Ackermann J in *Bernstein* (*supra*) and followed by most other countries is used to determine the scope and content of the right to privacy, then the meaning of the words *"… the unreasonable disclose of personal information…"* as used in section 34 (1) do not constitute any interpretational problems. The first step is to

ask if the information said to be *"personal"* is covered by the principle of freedom of identity. If so, does the individual subjectively harbour a legitimate and reasonable expectation that such information will be protected by the right to privacy? If both questions are answered in the affirmative, then the enquiry proceeds to the second stage by determining whether or not society has a legitimate and reasonable expectation, objectively, that such information is protectable. If so, then the disclosure of the information will be *"unreasonable"* within the meaning of that expression in section 34 (1). This is so because personal information which may be reasonably disclosed is not recognized by society as personal, and no longer enjoys the protection of the right to privacy under section 14 of the Constitution. In this sense, such information falls outside the scope of protectable information, notwithstanding that such information may be personal in nature.

[75] The correct approach to section 34 (1) is therefore, in my respectful view, simply to determine, using the two-stage reasonable expectation test, whether or not the information is protected by the constitutional right to privacy. In the same manner, any type or category of information that is not listed under the definition section or under 34 (2), may be determined to constitute *personal information* protected by the right of privacy, or not so protected.

[76] So, the starting point of an enquiry of this nature must always be to first determine whether the information, which is sought to be protected by the right to privacy, falls within the legal and constitutional realm of privacy. If not, then *cadit quaestio* and the further question as to what stage it loses its

protection does not arise. To answer this question, the nature of the information requested in this case warrants closer scrutiny.

[77] It will be recalled that the information requested, and refused on appeal by the third parties, relate to the furnishing of the two Schedules to the Sale of Shares Agreement. The first Schedule reflect the names of the members of parliament and the second the amount and nature of the claims against them by parliament. The claims are in respect of the unauthorised or irregular issue of travel vouchers. According to the papers before me, respected senior counsel from the Cape Town Bar gave legal opinion that the claims are good in law and enforceable. These are the claims purchased by Parliament from the liquidators of Bathong Travel Pty Ltd (in liquidation). Does the information contained in Schedules relate to the inner sanctum of privacy of a person covered by the principle of freedom of identity? The answer is: No.

[78] The inner sanctum of a person which is shielded from public scrutiny concerns his/her intimate family life, sexual preference, ethnic or social origin, colour, physical or mental health, religion, conscience, belief and culture, and all those other categories mentioned in the definition of *"personal information"* under section 1 of PAIA.

[79] It is information about and concerning the person of an *"identifiable individual"* as stated in both the definition section and in section 34 (2) of the Act. It is, in essence, personal information, protected by the principle of freedom of identity. It specifically excludes information about an individual who is an official of a public body (such as parliament) and which relates to

the function of that individual in such capacity (section 34 (2) (b). It also excludes information concerning the responsibilities of the position held or services performed by an official of a public body in the execution of his duties (section 34 (2) (f) (iii)). On my reading of both the definition section 1 and section 34 (2), the legislative provisions are in harmony with the constitutional concept of privacy entrenched by section 14 of the Constitution. In *Deutschmann NO* (*supra*) the court held that the concept of privacy does not extend to person's business affairs.

[80] The personal life of a member of parliament, his or her personal preferences and beliefs, how he or she choose to live his or her personal life, what they do on vacation in the privacy of their holiday home - even if they travel there on state expense - how they spend their money and how much money they have to spend, all of this is no concern to the state. It is their business; not that of the state. Such information is covered by the principle of freedom of identity. But how they execute their duties as members of parliament; under what circumstances they claim payment in respect of travel vouchers; and whether or not they obey the rules of parliament and act in accordance with the code of conduct which society expects from its members of parliament, all of this is the business of the state. The state has the right to know, and through the state, the members of society who have elected the members of parliament in an open and democratic society. The information sought is in relation to claims in respect of travel vouchers issued to members of parliament in their official capacities as members of a public body. Such information does not concern their private lives and is specifically excluded by section 34 (2) (f) (iii).

[81] I am accordingly of the view that the respondents have neither shown that the information is covered by the principle of freedom of identity, and nor that their subjective expectations of protection are legitimate or reasonable. Secondly, they have failed to show that objectively, society reasonably and legitimately harbours an explanation that such information should be protected by right to privacy. It follows that they have failed to discharge the onus of proving that the information is either *'personal" information'* or that its disclosure would be *"unreasonable"* within the meaning of these expressions in section 34 (1).

[82] The argument that some of the members may be innocent of fraudulent conduct and that the disclosure of their identities may reflect negatively on their reputation and integrity, is equally disingenuous and without substance. The information requested does not relate to criminal investigations or proceedings. It relates to civil claims for money wrongly expended. It concerns the terms of the sale agreement and describes the *merx* sold and delivered. It is sought in an application under section 78 of the Act and the provisions of Rule 6 of the High Court Rules apply. (It is thus not even a review or an appeal from the decision of an information officer or the second respondent). See *President of the RSA* (*supra*) at 6 para 12.

[83] In terms of section 81 (1) and (2) of PAIA these proceedings are civil proceedings and the rules of evidence applicable in civil proceedings apply. The criminal presumption of innocence and the right to remain silent under section 35 of the Constitution do not apply.

[84] It is accordingly not the applicant's case that some members are guilty of criminal conduct and other members may be innocent. These are allegations contained in the investigation report emanating from the respondents themselves and not from the applicant. As far as the applicant is concerned, proof that a record has been requested from the State and was declined is enough to oblige the respondents to justify its refusal. For the reasons mentioned, they have failed to justify the refusal (section 81 (3) (a) and *President of the RSA* (*supra*) page 6 para 11). The respondents have in my view failed to discharge the onus of proving justification of the refusal and, subject to my remarks below, I believe the application should be granted.

[85] For the sake of completion, I should add that even if I am wrong in the above regard, and even if it is held that the information sought to be protected by the respondents are in the nature of *"personal information,"* and accordingly that section 34 (1) applies, then the public interest override in section 46 is in my view applicable in terms of section 33 (a).

[86] Section 46 reads as follows:

> *"**Mandatory disclosure in public interest**. – Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37 (1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or 3, 43 (1) or (2), 44 (1) or (2) or 45, if-*
>
> (a) *the disclosure of the record would reveal evidence of-*

(i) a substantial contravention of, or failure to comply with, the law; or

(ii) *an imminent and serious public safety or environmental risk; and*

(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."

[87] Since it is common cause that subsection (a) (ii) does not apply to the facts of this case, the two requirements of section 46 for present purposes are:

1) the disclosure of the Schedules would reveal evidence of a substantial contravention of, or failure to comply with, the law; and
2) it is in the public interest that the disclosure of the Schedules clearly outweigh the harm (breach of the right to privacy).

[88] I deal first with the requirement that the disclosure would (not may) reveal evidence of a substantial contravention or failure.

[89] As Klaaren and Penfold in *Constitutional Law of South Africa* (second ed.) edited by Woolman, Roux and Bishop, at 62-24(*supra*) point out, of some concern is the emphatic (and, may I add, the stringent and restrictive) language used in the section. The adverbs and adjectives used (*substantial contravention … or failure to comply; imminent and serious*; *public safety or environmental risk;* and *clearly outweighs*) could all have the effect that the public interest override will seldom apply.

[90] I may add to the above examples the requirement that disclosure *'would'* reveal evidence of contraventions or failure to comply with the law. Bearing in mind that a requester of information invariably has no, or very little, information at his or her disposal concerning the information requested (since such information resides with the State), it may very well be impossible to prove that disclosure *'would'* reveal legal contraventions. The restrictive language used may have the effect of undermining the constitutional right of access to information and may call into question the constitutionality of the entire structure of the PAIA or, at least, of the section.

[91] I nevertheless believe that on the particular facts of this case the section may be saved from unconstitutionality by reading it in accordance with the Constitution.

[92] In order to give effect to the constitutional right of access to information held by the State, qualified only by the limitation clause 36 of the Constitution and other rights, the restrictive wording used by section 46 of the AIA must be read subject to section 81 of the PAIA. Section 81 stipulates that the rules of evidence applicable in civil proceedings apply to the proceedings on application in terms of section 78. This is an application under section 78 and the civil onus for the discharging of the burden of proof referred to in section 81 (2) is proof on a balance of probability. It follows that the applicant in this case must prove on a balance of probability that the disclosure of the Schedules would reveal evidence of a substantial contravention of, or failure with, the law.

[93] As I explained at the outset of this judgment, the Respondents' own investigations, and also that of Roelofse, the Investigating Officer, revealed *"complicity by certain members in possible fraudulent acts."* It is also common cause that many members had already pleaded guilty and been convicted of fraud in relation to the misuse of travel vouchers. In my respectful view, the commission of fraud in respect of the state issued travel vouchers by members of parliament, and the failure to observe the code of conduct required from members of parliament, on a balance of probability constitute a substantial contravention of, or failure to comply with, the law. I do not believe that the emphatic language and adjectives used by the legislature detracts in any way from the test of the onus on balance of probability as provided for in section 81 (2) of PAIA. See also the remarks of Howie P writing on behalf of an unanimous Court of Appeal in *Transnet Ltd and Another v SA Metal Machinery Co. (Pty) Ltd* 2006 (4) BCLR 473 (SCA) p483-484 para 30. In my view, therefore, the words *'substantial'* and *'would'* in section 46 (a) do not require any heavier onus than the accepted standards of civil procedure. In any event, I have some difficulty in understanding how a contravention or failure can change in character by either a minor or substantial breach. It remains a contravention or failure.

[94] In these circumstances a requester is called upon to show on a balance of probably that the disclosure would constitute the required contravention or failure – not that the disclosure would, as a fact, constitute such contravention or failure. I believe that on the facts of this case such onus had been discharged.

[95] I now turn to consider whether the disclosure of such contravention, in the public interest, clearly outweighs the harm relied upon by the respondents.

[96] For the reasons alluded to earlier in this judgment, the constitutional concept of, *inter alia*, the right to privacy was not created by PAIA and must therefore retain its constitutional meaning, i.e. the meaning assigned to it under section 14 of the Constitution. It is now settled that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. See *Minister of Safety and Security v Sekhoto* 2011 2 All SA 157 (SCA) at 165 para 15. I believe this is the proper approach to a reading of section 46.

[97] The section provides for a *"public interest"* override of all the grounds for non-disclosure included in the Act (save for section 35(1) which relates to records of the South African Revenue Service). I will confine myself to the override of section 34(1) which relates to *"personal information"* protected by the right to privacy.

[98] For the reasons which follow, I am of the respectful view that section 46 is merely a re-statement of the constitutional law in regard to the circumstances under which personal information shed the right to protection under section 14 of the Constitution and, in the interest of the right of access to information, must be disclosed.

[99] As I said earlier, the bounds of the protection are exceeded when, on the second stage of the principle of legitimate expectation of privacy, society no

longer recognizes the expectation of privacy to be reasonable. This happens when, as explained by Ackermann J in *Bernstein and Other* (*supra*) at 484 para 67, the individual moves into *"… communal relations and activities such as business and social interaction …"* Does the public interest override in section 46 (b) mean anything else? I do not think so.

[100] It is difficult to conceive of a situation where the legitimate expectation of society, based on its legal, moral and ethical convictions, cannot be in the public interest. The converse is equally true: it cannot be in the public interest unless the information embraces the legitimate expectations of society. The *'public interest'* which triggers the override in section 46 (b) should therefore, in my respectful view, be interpreted to accord with the test of society's legitimate expectation as to when and under what circumstances private information protected by the right to privacy loses its constitutional protection under section 14 of the Constitution. The *'public interest'* test is also used in the English Law. See, for instance, the judgment on appeal in *Corporate Officer of the House of Commons v Information Commissioner and Others* [2009] 3 All ER 403. The appeal was concerned with the right of access to information under the equivalent English legislation.

[101] The facts were these: Certain members of Parliament in the House of Commons were entitled to an allowance known as *"additional costs allowance (ACA)."* The applicants requested information relating to the ACA paid to 14 members of Parliament. The request was granted by the Information Commissioner. The third parties appealed to the Information Tribunal on the grounds of an alleged breach of their privacy. The

Information Tribunal dismissed the appeal and the aggrieved parties took the decision on further appeal to the Divisional Court. The Divisional Court, presided over by their Lordships Judge P, Latham LJ and Blake J, dismissed the appeal.

[102] Dealing with the requirement of public interest, Judge P, writing on behalf of the Full Court, stated at 408 para 15:

> *"We have no doubt that the public interest is at stake. We are not here dealing with idle gossip, or public curiosity about what in truth are trivialities. The expenditure of public money through the payment of MPs' salaries and allowances is a matter of* ***direct and reasonable interest*** *to taxpayers. They are obliged to pay their taxes at whatever level and on whatever basis the legislature may decide, in part at least to fund the legislative process. Their interest is reinforced by the absence of coherent system for the exercise of control over and the lack of a clear understanding of the arrangements which governs the payment of the ACA. Although the relevant rules are made by the House itself, questions whether the payments have in fact been made within the rules, and even when made within them, whether the rules are appropriate in contemporary society, have a wide resonance throughout the body politic. In the end they bear on public confidence in the operation of our democratic system at its very pinnacle, the House of Commons itself.* ***The nature of the legitimate public interest engaged by these applications is obvious****."* (the emphasis is mine).

[103] So, the legitimate expectations of society are given effect to, and are expressed in, the *'public interest'* as contemplated in section 46. In this sense neither the legitimate expectations of society nor the public interest are concerned with trivial group interests, idle gossip or immaterial issues of public interests. As was stated by Hefer JA in *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212 (albeit in different context): The 'public interest' is 'material in which the public has an interest,' as opposed to material which is interesting to the public'. The *'public interest'* contemplated by section 46 therefore, as does the legitimate expectation test, embrace all those interests necessary for a structured and orderly society. I therefore hold that the 'public interest' test contemplated by section 46 is to be assessed in accordance with the principle of legitimate expectation in the context of *Bernstein* (*supra*).

[104] As I pointed out at the outset of this judgment, Parliament was acutely aware of the public interest in the matter, and even considered the appointment of a public relations officer to deal specifically with the travelgate saga. It went to some lengths to prevent the publication of the information contained in the Schedules in order to protect it against adverse public opinion - even purchasing the claims. This is all borne out by the minutes of the Oversight Authority meetings referred to earlier. But public opinion is not the same as public interest. Public interest is at stake when the structure of institutional democracy is threatened by a culture of *"secretive and unresponsive"* government.

[105] Therefore, and having regard to the particular facts and circumstances of each case, the court must weigh the public interest in protecting the right

to privacy against the public interest to disclose the information. This exercise will involve the distance travelled by the individual from his or her inner sanctum of private life to public interaction and engagement with society in general.

[106] I have little doubt that, for the reasons already referred to, members of parliament who engage in their parliamentarian functions and privileges have moved away from the inner sanctions of their private lives, and their engagement in these activities place their conduct in the realm of material in which the public has an interest. Any conduct by members of parliament which on balance of probability would disclose unlawful or irregular conduct in the exercise of their parliamentary duties, constitute a threat to South Africa's institutional democratic order and warrant disclosure in the public interest under section 46. I am therefore also, and in any event, of the respectful view that even if section 34 (1) does not apply to the facts of this case, then the public interest override provided in section 46 finds application.

[107] It follows from all of the aforesaid that, in my respectful view, the expressions *'unreasonable disclosure'* in section 34 (1) and *"public interest"* in section 46 are all expressions of the same constitutional principle; namely the second stage of the legitimate expectation principle which requires, objectively, society to reasonably and legitimately expect the information to be protectable. This is so because if a different meaning and content is given to the same constitutional right in different sections of the same Act, then the constitutionality of those sections may very well be questioned.

[108] Klaaren and Penfold in *Constitutional Law*(*supra*) at 62-24 suggests with reference to the words *'clearly outweigh'* that the *"public interest"* contemplated by section 46 is a particular serious type of public interest – an interest which is of serious concern or benefit to the public. With respect, I cannot agree. If the bar is raised only in section 46 from the constitutional level of the doctrine of legitimate expectation of society, then section 46 has the effect of both enlarging the right to privacy, and limiting at the same time the constitutional content and scope of the right to access to information. This may very well call into question the constitutionality of section 46, and it falls foul of the interpretational obligation to interpret a legislative provision in accordance with the spirit and purport of the Constitution where such interpretation is reasonably possible. For the reasons mentioned earlier, the public interest requirement defines or limits the inner sanctum of the personal life of an individual, and is assessed in accordance with the legitimate expectation principle. In my respectful view the word *'clearly'* means no more than *'clear evidence'* whilst retaining the civil standard of onus on a balance of probability.

[108] For all the above reasons, and acting within my powers under section 82 of the PAIA referred to above, I make the following order:

1) The decision of the second Respondent upholding the appeal by the third parties is hereby set aside;
2) The first and second Respondents are hereby ordered, within 10 days of the service of this order upon them, to furnish to the applicant the Schedules 1 and 2 attached to the Sale of Claims Agreement dated 17 February 2009 between the liquidators of

Bathong as seller, and the National Assembly of Parliament of South Africa represented by the first Respondent as purchaser.

3) To the extent that the debtors' book of Bathong Travel (Pty) Ltd (in liquidation) is not contained in the aforesaid Schedules, the first and second respondents are ordered within 10 days of the service of this order upon them, to furnish to the applicant with a copy of such debtors book.

4) The Respondents are ordered jointly and severally, the one paying the other to be absolved, to pay the costs of this application, such costs to include the employment of two counsel.

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ALKEMA J

Heard	:	21 October 2010
Delivered	:	28 July 2011
Counsel for Applicant	:	Mr Kennedy SC with Ms Rajab-Budlender & Ms De Vos
Instructed by	:	Whitesides Attorneys
Counsel for 2nd Respondent	:	Mr Heunis SC with Mr Oliver
Instructed by	:	N N Dullabh & Co. Attorneys