IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Case no: 23554/2002

Date: 15/4/2005

REPORTABLE

In the matter between:

CCII SYSTEMS (PTY) LIMITED Applicant

and

MGP LEKOTA N.O. Respondent

JUDGMENT

SOUTHWOOD J

[1] This is an application in terms of sections 78 and 82 of the Promotion of Access to Information Act, 2 of 2000 ("the Act") for an order directing the respondent to produce and furnish to the applicant copies of records pertaining to the sub-systems to be installed on Corvettes ordered by the Department of Defence for use by the South African Navy.

[2] The applicant is a company which has its principal place of business at Kenilworth, Cape Town. The applicant carries on business as a designer and manufacturer of software and computer systems for the defence industry. The respondent is the Minister of Defence who is cited in his official capacity.

[3] The applicant tendered for the supply of some of the sub-systems and contends that it was wrongfully excluded as a tenderer for the supply of these sub-systems through significant deviation from lawful tender procedures on the part of the state's representatives, unfair administrative action and unlawful business practices. Accordingly, on 12 August 2002, the applicant instituted proceedings for damages against the respondent, the Armaments Corporation of South Africa Limited ("Armscor") and African Defence Systems (Pty) Ltd ("ADS").

[4] On 15 January 2002 the applicant requested the Department of Defence in terms of the relevant provisions of the Act to furnish to the applicant information which the applicant categorised under 54 headings. The Department of Defence furnished some of the information requested but refused to

furnish the rest. The Department of Defence also refused the applicant's internal appeal in terms of section 75 of the Act. The applicant therefore launched this application.

[5] Before dealing with the parties' contentions it will be convenient to consider the legislative framework in terms of which the application must be considered.

[6] The right of access to information is contained in section 32 of the Constitution which provides -

> 'Access to Information
>
> (1) Everyone has the right of access to -
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> (a) any information held by the state; and
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> (b) any information that is held by another person and
>
> that is required for the exercise or protection of any rights.
>
> (2) National Legislation must be enacted to give effect to this
>
> right, and may provide for reasonable measures to

> alleviate the administrative and financial burden on the state' .

[7] Section 7(2) of the Constitution provides that the state must

respect, protect, promote and fulfil the rights in the Bill of Rights and section 7(3) provides that the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

[8] The preamble to the Act states that its purpose 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
>
> 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'

but that -

> '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'.

[9] Section 9 of the Act deals comprehensively with the objects
of the Act. They are -

'(a) to give effect to the constitutional right of access to -

(i) any information held by the State; and

(ii) any information that is held by another person and
that is required for the exercise or protection of any rights;

(b) to give effect to that right-

(i) subject to justifiable limitations, including, but not
limited to, limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance;

(ii) in a manner which balances that right with any
other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution;

(c) to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice, by including public bodies in the definition of "requester", allowing them, amongst others, to access information from private bodies upon compliance with the four requirements in this Act, including an additional obligation for certain public bodies in certain instances to act in the public interest;

(d) to establish voluntary and mandatory mechanisms or procedures to give effect to that right in a manner which enables persons to obtain access to records of public and private bodies as swiftly, inexpensively and effortlessly as reasonably possible; and

(e) generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone -

(i) to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies;

(ii) to understand the functions and operation of public bodies; and

(iii) to effectively scrutinise, and participate in, decision-making by public bodies that affects their rights.'

[10] Section 2(1) of the Act provides that when interpreting a provision of the Act a court must prefer any reasonable interpretation of the provision that is consistent with these objects over any alternative interpretation that is inconsistent with these objects.

[11] Section 11(1) of the Act states the fundamental principle of the Act. A requester must be given access to a record of a

public body if the requester complies with the relevant procedural requirements and access to that record is not refused on any of the grounds set out in Chapter 4 of Part 2 of the Act. Section 33 provides how an information officer of a public body is to deal with a request for access to a record. If the grounds for refusal contained in sections 34(1), 35(1), 36(1), 37(1)(a), 38(a), 39(1)(a), 40 or 43(1) apply, the information officer must refuse a request for access. If the grounds for refusal contained in sections 37(1)(b), 38(b), 39(1)(b), 41(1)(a) or (b), 42(1) or (3), 43(2), 44(1) or (2) or 45 apply, the information officer may refuse a request for access. With the exception of section 35(1) this is subject to the provisions of section 46 which provides for a mandatory disclosure in the public interest: ie 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.'

[12] Consistent with the objects of the Act the definitions make it plain that the Act is to have a wide reach. For example, 'public body' means -

'(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or

(b) any other functionary or institution when -

(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation'

and 'record' of, in relation to, a public or private body, means

'any recorded information -

(a) regardless of form or medium;

(b) in the possession or under the control of that public or private body respectively; and

(c) whether or not it was created by that public or private body, respectively.'

[13] Section 3 also provides that the Act applies to a record of a public body and a record of a private body regardless of when the record came into existence.

[14] Section 11(2) provides that a requester's right of access contemplated in subsection (1) is, subject to the Act, not affected by -

(a) any reasons the requester gives for requesting access; or

(b) the information officer's belief as to what the requester's reasons are for requesting access.

[15] Section 28 deals with severability. If a request for access is made to a record of a public body containing information

which may or must be refused in terms of any provision of Chapter 4 of Part 2 -

> 'every part of the record which -
>
> (a) does not contain; and
>
> (b) can reasonably be severed from any part that contains, any such information must, despite any other provision of this Act, be disclosed.'

I Currie and J Klaaren, *The Promotion of Access to Information Act Commentary* ('Currie and Klaaren') comment on severability as follows -

> '[6.15] In accordance with the principle that limitations of the right of access to information should be reasonable and proportional to the aims pursued by the limitation, the Act requires holding bodies to sever (ie, delete) from a record any information that is subject to refusal and disclose the remainder of the information. The duty applies to both public and private bodies. It is not competent for bodies to refuse disclosure of a record simply because it

contains information covered by one or more of the grounds for refusal. Bodies are required to determine whether the protected information can reasonably be severed from the remainder of the record and, if so, to disclose the remainder.

[6.16] Though the obligation to sever protected information from disclosable information in a record IS mandatory, it is mandatory only to the extent that the latter may "reasonably" be severed from the former. In essence this standard is one of practicality - can protected information be removed from a particular record so as to leave a meaningful remainder that can be disclosed without revealing the content of what has been deleted? Thus, severance is impractical where the protected and disclosable portions of a record are so intertwined that it is possible to provide access only to a few disconnected snippets of information. Severance will also not be reasonably possible where the resultant disclosure is meaningless or misleading because the information it contains has been taken totally out of context. In addition, severance will be unreasonable if disclosure of what remains provides clues to the contents of the deleted portion.

[6.17] In what form is access to a severed record given?

Obviously, it would defeat the purpose of severance to allow inspection of the original and, in most cases, it will be appropriate to provide access to a copy of the record with the severed material blacked out or otherwise obscured. Records that have been subjected to severance are therefore expressly excepted from the requirement of s 29(3) that access to a record should be provided in the form specified in the requester'

Section 28(2) is of importance. It provides that if a part of a record is refused in terms of section 28(1) the provisions of section 25(3) apply. This means the information officer must state adequate reasons for the refusal, including the provisions of the Act relied upon, but exclude, from such reasons, any reference to the content of the record.

[16] Section 23 deals with records that cannot be found or do not exist-

'(1) If-

(a) all reasonable steps have been taken to find a record requested; and

(b) there are reasonable grounds for believing that the record -

(i) is in the public body's possession but cannot be found; or

(ii) does not exist,

the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.

(2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.

(3) For the purposes of this Act, the notice in terms of subsection (1) is to be regarded as a decision to refuse a request for access to the record.

(4) If, after notice is given in terms of subsection (1), the record in question is found, the requester concerned must be given access to the record unless access is refused on a ground for refusal contemplated in Chapter 4 of this Part.'

Subsection (2) is of particular importance. It clearly directs how the explanation must be furnished. A simple statement that the record cannot be found or does not exist will not suffice and the account given may be scrutinised to determine whether it is satisfactory or not.

[17] Sections 74-77 of the Act give the unsuccessful requester a right of appeal against a decision of the information officer of a public body and, section 78, if the appeal is unsuccessful, a right to apply to the court for appropriate relief in terms of section 82. Section 82 provides that the court hearing the 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.'

[18] Section 81 provides that the proceedings on application in terms of section 78 are civil proceedings (ss (1)); that the rules of evidence applicable in civil proceedings apply to the proceedings in terms of section 78 (ss (2)); and that the burden of establishing that the refusal of a request for access complies with the provisions of the Act rests on the party claiming that it so complies (ss (3)). This will be no easy task. The dilemma will always be between disclosing too little - in which case the burden may not be discharged - and disclosing too much - in which case the protection will be lost - compare ***Diamond Stylus* Co Ltd v Bauden Precision**

Diamonds Ltd and another **[1973] RPC 675** at 676124-36 and 677114-18.

[19] These provisions are designed to ensure that, subject to the specific exclusions provided for in the Act, the requester obtains access to the record in question. It must always be borne in mind that access is the norm and refusal the exception. See ***SA Metal*** & ***Machinery Co (Pty) Ltd v Transnet Limited*** **[2003] 1 All SA 335 (W)** para 7; Currie and Klaaren para 7.5. Ultimately the court must decide whether the public body has established that the relevant exclusions have been properly applied and, if not, grant appropriate relief.

[20] In this case, apart from s 23, the respondent relies on the exclusions contained in s 36(1)(b) and (c), s 37(1)(a) and (b), s 41(1)(a)(i) and (ii), (b) and (2), s 42(2)(c)(i) and s 45(b). Section 23 has already been considered. The other sections will be considered in turn.

[21] Section 36

The relevant part of the section provides -

'Mandatory protection of commercial information of third party -

(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of that body if the record contains -

(a) trade secrets of a third party;

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

(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected -

(i) to put that third party at a disadvantage in contractual or other negotiations; or

(ii) to prejudice that third party in commercial competition.

(2) A record may not be refused in terms of subsection

(1) insofar as it consists of information-

(a) already publicly available;

(b) ...'

[22] Although the respondent relies on section 36(1)(b) and (c) and not section 36(1)(a) it is essential that a meaning be given to section 36(1)(a) as section 36(1)(b) is defined by expressly excluding 'trade secrets' which are the subject matter of section 36(1)(a). As pointed out by Currie and Klaaren this is essential to give the section 'internal coherence' (para 8.32). The difficulty is that what are usually considered to be trade secrets at common law would encompass the information described in section 36(1)(b). According to the learned authors of *Unlawful competition,* HJO van Heerden and J Neethling, a trade secret may be described as trade, business or industrial information belonging to a person which has a particular economic value and which is not generally available to and therefore known by others. They point out that there is much support for the view that a trade secret, as an incorporeal product of the human mind embodied in a tangible agent, constitutes immaterial property, which serves as the

object of an immaterial property right. The right to a trade secret is freely transferable and it has inherent value. The learned authors also point out that in order to qualify as a trade secret - and therefore as an independent legal object - the information must comply with three requirements. First, the information must not only relate to but also be capable of application in trade or industry. Second, the information must be secret or confidential: ie, objectively determined, it must only be available, and thus known, to a restricted number of people (it 'must be something which is not public property or public knowledge'). Third, objectively viewed, the information must be of economic value to the proprietor or person entitled to the information (223-225 para 1.2.1). Thus described or defined, any type of information which complies with these requirements constitutes a trade secret. See also *Die reg aangaande onregmatige mededinging,* HJO van Heerden and J Neethling at 132-133. Clearly, if this was the meaning to be given to 'trade secrets' in section 36(1)(a), section 36(1)(b) and (c) would be redundant - see Currie and Klaaren para 8.32. Section 36(1)(a) must therefore be given a more limited meaning - compare ***SA Metal*** & ***Machinery*** **Co** ***(Pty) Ltd v Transnet Limited supra*** para 11. Trade secrets can be

restricted to manufacturing methods or processes. Currie and Klaaren (para 8.33) suggest a definition worked out by the federal appellate courts in the United States of America: ie 'a secret, commercially valuable, plan, formula, process or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort' ***Public Citizen Research Group v Food & Drug Administration*** **704F2d 1280 (DC Cir 1983)** at 1289. The World Intellectual Property Organisation publication 'Protection against Unfair Competition' (1994) points out that some countries differentiate between manufacturing (or industrial) secrets and commercial secrets. Manufacturing secrets relate to information of purely technical character, such as production methods, chemical formulae, blueprints or prototypes. This information could constitute a patentable invention but patentability of the information is not essential for the secret to be protectable. Commercial secrets include sales methods, contract forms, business schedules, details of price agreements, consumer profiles, advertising strategies, and lists of suppliers and clients (50 para 97). Distinguishing between manufacturing secrets and commercial secrets,

referring to the former as trade secrets and to the latter as confidential information would ensure the internal coherence of the section. It is also a distinction which has been recognised in South Africa - see *Coolair Ventilator* Co *(SA) (Pty) Ltd v Liebenberg and another* 1967 (1) SA 686 (W) at 689A-C: *Harvey Tiling* Co *(Pty) Ltd v Rodomac (Pty) Ltd* 1977 (1) SA 316 (T) at 322A-D. And it is consistent with section 36(1)(b) which requires that the disclosure of the information would be likely to cause harm to commercial and financial interests of the third party.

[23] Thus interpreted, section 36(1)(b) relates to confidential information of a financial, commercial, scientific or technical nature. In order to be protectable the information must not be publicly available: ie it must be known to only a limited number of people. The second requirement relates to the consequences of disclosure: whether it would be likely to cause harm to the commercial or financial interests of the third party. In every case this will be determined by the facts, bearing in mind that the harm to be caused must be a probability - see *SA Metal* & *Machinery* Co *(Pty) Ltd v Transnet Limited supra* para 12 and 13.

[24] Section 36(1)(c) has three requirements, all of which must be satisfied. The first is that the information must have been supplied in confidence by a third party. The second is that disclosure will result in harm to the third party's commercial interests - either by putting the third party at a disadvantage in contractual or other negotiations or by prejudicing the third party in commercial competition. The third is that the information is not publicly available. In every case evidence will be necessary to show that these requirements are satisfied. With regard to the first requirement, the information which may be protected is not qualified or limited in any way. But it must have been supplied in confidence by the third party. It will be supplied in confidence when this is expressly agreed or it is the necessary implication from the circumstances in which it was supplied - see ***SA Metal & Machinery* Co *(Pty) Ltd v Transnet Limited supra*** para 14:

Currie and Klaaren paras 8.36-8.41.

[25] Section 37

'Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party -

(1) Subject to subsection (2), the information officer of a public body -

(a) must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement; or

(b) may refuse a request for access to a record of the body if the record consists of information that was supplied in confidence by a third party -

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

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

(2) A record may not be refused in terms of subsection

(1) insofar as it consists of information -

(a) already publicly available; or

(b) about the third party concerned that has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned. '

[26] There are three requirements for the mandatory refusal in section 37(1)(a) -

(1) The record concerned must have been furnished pursuant to an agreement that it be kept confidential; and

(2) Disclosure of the record would 'constitute an action for breach of a duty of confidence owed to the third party' in terms of the agreement.

(3) The record must not consist of information already publicly available.

The agreement postulated by the first requirement may be an express or implied term of an agreement or it may be a tacit agreement. An express term requires no elucidation. An implied term is 'an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances': the usual test being whether the term is necessary, in a business sense, to give efficacy to the contract - ***Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration*** **1974 (3) SA 506 (A)** at 532H-533B. A tacit agreement may be inferred from all the relevant facts and circumstances - see ***Standard Bank* of *South Africa Ltd v Ocean Commodities Inc*** **1983 (1) SA 276 (A)** at 292A-C: ***Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd*** **1984 (3) SA 155 (A)** at 1611 and Christie, *The Law* of *Contract,* 4 ed at 94-97.

The second requirement is complicated by the wording. Disclosure of a record cannot be 'an action for breach of a duty of confidence owed to a third party'. Words must be read into the paragraph to give it a sensible meaning. Clearly, the intention is that disclosure of the record would be grounds for

an action for breach of a duty of confidence to a third party in terms of the agreement (ie disclosure of the record would be a breach of a duty of confidence). See Currie & Klaaren para 8.58. To achieve clarity the words 'grounds for' must therefore be read in between the words 'constitute' and 'an' - see ***Klipriviersoog Properties*** *(Edms)* ***Bpk v Gemeenskapsontwikkelingsraad*** **1984** (3) **SA 768** (T): Devenish, *Interpretation* of *Statutes* at 80-81 and the cases there cited.

The third requirement is simply a matter of fact.

[27] There are four requirements for the discretionary refusal in section 37(1)(b)-

(1) The record concerned must consist of information that was supplied in confidence by a third party;

(2) Disclosure of the record could reasonably be expected to prejudice the future supply of similar information or information from the same source;

(3) It is in the public interest that similar information or information from the same source, should continue to be supplied;

(4) The record must not consist of information already publicly available.

The first requirement requires proof that the information was supplied in circumstances calling for it to be kept confidential. Plainly this will depend upon the surrounding facts and circumstances. It will be necessary to show a reasonable expectation of confidentiality arising form the content of the information, its purposes and the conditions under which it was prepared and supplied to the body that holds it - see Currie & Klaaren para 8.6.3.

Proof of the other requirements will also depend on the facts.

[28] Section 41

The relevant parts read as follows -

'Defence, security and international relations of Republic -

(1) The information officer of a public body may refuse

a request for access to a record of the body if the disclosure -

(a) could reasonably be expected to cause prejudice to -

(i) the defence of the Republic;

(ii) the security of the Republic; or

(b) would reveal information -

(i)

(ii) supplied by or on behalf of the Republic to another state or an international organisation in terms of an arrangement or international agreement, contemplated in section 231 of the Constitution, with that state or organisation which requires the information to be held in confidence; or

(iii) required to be held in confidence by an

international agreement or customary international law contemplated In

[29] In terms of ss 41(1)(a) a request for access may be refused if the disclosure of the record could reasonably be expected to cause prejudice to the defence of the Republic or the security of the Republic. There is no attempt to define the record or its contents. However ss (2) refers to various types of information which are included in such a record. The nature of such information will facilitate proof that disclosure of the information could reasonably be expected to cause prejudice to the defence of the Republic or the security of the Republic. Nevertheless, evidence will be necessary to show that the disclosure would have that consequence. See ***CCII Systems (Pty) Ltd v Fakie and others NNO 2003 (2) SA 324 (T)*** para 20. The two subsections cannot be read as if they are a deeming provision: that the information referred to in ss (2) will have the consequence referred to simply because of its nature. (In this regard I respectfully disagree with Currie & Klaaren para 8.90.) The subsection is intended to have wide application. This can be seen from the definition of 'subversive or hostile activities' in section 41(2)(b)(i): '(a) aggression against the public; (b) sabotage or terrorism aimed at the people of the Republic or a strategic asset of the Republic, whether inside or outside the Republic; (c) an

section 231 or 232, respectively, of the Constitution.

(2) A record contemplated in subsection (1), without limiting the generality of that subsection, includes a record containing information -

(a) ...

(b) relating to the quantity, characteristics, capabilities, vulnerabilities or deployment of –

(i) weapons or any other equipment used

for the detection, prevention, suppression or combatting of subversive or hostile activities; or

(ii) anything being designed, developed, produced or considered for use as weapons or such other equipment;

(c) relating to the characteristics, capabilities, vulnerabilities; performance, potential, deployment or functions of –

(i) any military force, unit or personnel; or

activity aimed at changing the constitutional order of the Republic by the use of force or violence; (d) a foreign or hostile intelligence operation'.

The provisions of ss 41(1)(b) are straightforward. In each case evidence would be necessary to show that the relevant subparagraph was applicable.

[30] Section 42

The relevant parts read as follows -

> 'Economic interests and financial welfare of Republic and commercial activities of public bodies-
>
> (1) The information officer of a public body may refuse
>
> a request for access to a record of the body if its disclosure would be likely to materially jeopardise the economic interests or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic.

(2) The information referred to in subsection (1) includes, without limiting the generality of that subsection, information about -

(a) ...

(b) ...

(c) a contemplated -

(i) sale or acquisition of immovable or movable property; or

(ii) ...'

[31] In terms of the subsection a request for access may be refused if disclosure of the record would be likely to materially jeopardise the economic interests or the financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interests of the Republic. There is no attempt to define the record or its content. However ss (2) contains a number of items of information which are included in such a record. The nature of some of the items will facilitate proof that the disclosure

would have the stipulated consequences: but evidence would still be necessary in each case to show that disclosure would be likely to bring about those consequences. The two subsections cannot be read as if they were a deeming provision, that the items referred to in ss (2) will have the stipulated consequences, if disclosed, simply because of their nature. (In this regard I respectfully disagree with Currie & Klaaren para 8.95).

[32] Section 45

The section reads as follows -

> 'Manifestly frivolous or vexatious requests, or substantial and unreasonable diversion of resources.
>
> The information officer of a public body may refuse a request for access to a record of a body if -
>
> (a) the request is manifestly frivolous or vexatious; or

(b) the work involved in processing the request will substantially and unreasonably divert the resources of the public body.'

[33] Section 45(a): Frivolous or vexatious requests

Section 45(a) and section 11(3) appear to be contradictory. Section 45(a) provides that the Information Officer may refuse a request for access if the request is manifestly frivolous or vexatious. On the other hand, section 11(3) provides that a requester's right of access contemplated in section 11(1) (ie the general principle underlying the Act) is, subject to the Act, not affected by the requester's reasons for requesting access or by the Information Officer's belief to what the requester's reasons are for requesting access. However, there is no internal inconsistency. (Compare Currie & Klaaren para 8.108). The requester's right of access contemplated in ss (1) is a qualified one. The requester will not be entitled to access if access is refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of the Act. Section 45 is such a ground, and, as appears from section 33(2), is a discrete and self-contained ground for refusing access. An

interpretation that avoids interpreting section 45 as a limitation of the constitutional right to access would not be a reasonable interpretation of section 45 that is consistent with the objects of the Act as required by section 2(1). One of the objects of the Act is to give effect to the constitutional right of access subject to justifiable limitations including limitations aimed at effective, efficient and good governance.

[34] The Act provides no guidelines for when a request is frivolous or vexatious. The ordinary meaning of frivolous (SOED) is 'lacking seriousness or sense: silly' which suggests no serious purpose. The ordinary meanings of vexatious (SOED) are '1. causing or tending to cause vexation, annoyance or distress: annoying, troublesome. 2. spec in LAW, of an action: instituted without sufficient grounds or winning purely to cause trouble or annoyance to the defendant'. As pointed out by Currie & Klaaren, when read together, the terms indicate a desire to prevent misuse of the Act, and abuse of the rights granted by the Act for purposes other than the Act seeks to achieve (para 8.109). This is not always easy to determine and will obviously depend upon the facts - see ***Brummer v Gorfil Brothers Investments (Pty) Ltd en***

***andere* 1999 (3) SA 389 (SCA)** at 412I-J; 414I-J and 416B:

***Price Waterhouse Coopers Inc v National Potato Co-operation Ltd* 2004 (6) SA 66** (SCA). But the key is that the request be 'manifestly' frivolous or vexatious: ie it must be obvious or clearly discernible. This will not be easy to prove.

[35] Section 45(b): Substantial and Unreasonable diversion of resources

The use of the word 'substantial' indicates that the diversion must not be simply an inconvenience for the body concerned. The use of the word 'unreasonable' relates to the body whose records are sought. Currie & Klaaren summarised the effect of paragraph (b) as follows (para 8.110) -

> 'Access can be refused "if the work involved in processing the request would substantially and· unreasonably divert the resources of the public body". "Substantially" is clearly intended to require the diversion of resources to be considerable and not merely an inconvenience for the body concerned. "Unreasonably" on the other hand is rather more difficult to interpret. Unreasonable from whose point of view? It may mean that the effort to be expended in processing the request is

> disproportionate to the benefit to be obtained by the requester. But this cannot be right since, as we have seen, the requester's motives are not relevant. Unreasonableness must therefore be judged from the point of view of the body that is the target of the request. The aim of the exclusion is probably to cater for the rare situation of a request that would have the effect of disrupting the operations of a body by requiring undue expenditure of time and use of staff and physical resources on research and collation of information. Unreasonableness in this regard must be interpreted in the light of the purposes of the Act. The Act is intended to promote open government. Obviously, a reasonable degree of positive effort and expenditure by public bodies to achieve this goal can be expected and is part of its ordinary functions. If a request requires more than this effort and expenditure it will be unreasonably diverting.
>
> Public bodies have a duty to assist requesters in the making of requests. A body should therefore not refuse a request without first attempting to assist the requester to amend the application so that it will no longer substantially and unreasonably divert the body's resources.'

[36] To summarise: where access to any record in the possession of a public body is sought, the information officer must determine the following -

(1) whether the record exists and can be found (section 23);

(2) whether, if the record exists and can be found, access to the record, or any part of it, may or must be refused in terms of any provision of Chapter 4 of Part 2 of the Act; and

(3) whether, if access to only part of the record may or must be refused in terms of any provision of Chapter 4 of Part 2 of the Act, that part can reasonably be severed from the rest of the record and access given to that remaining part of the record (section 28).

[37] What is immediately apparent from the analysis of these sections is that in order to justify refusal in terms of anyone of these sections the relevant facts must be placed before the court. It will not suffice to simply repeat the wording of the relevant section.

[38] On 15 January 2002 the applicant delivered to the Department of Defence a request for information in terms of the Act

(RMY2). Thereafter, over a period of almost a year, the Department of Defence made available to the applicant certain of the documents requested. The applicant sought access to 54 categories of document (RMY2 and RMY7). Sometimes the category referred to a single document and sometimes it referred to an unspecified number of documents. In some instances the Information Committee decided that the document or documents did not exist and in support of that decision referred to affidavits by the information officer of Armscor and the relevant project manager. In nine cases (items 1, 16, 28, 31, 32, 42, 43, 47 and 51) the Information Committee decided to give access and in the remaining cases the Information Committee decided to refuse access referring to sections of the Act which could justify such refusal. In most cases the Information Committee did not furnish facts in support of its decision. It merely referred to the section and quoted some of the wording of the section. This was apparently done in an attempt to comply with section 25(3) of the Act which requires that where a request for access is refused the relevant notice to the requester must state adequate reasons for the refusal.

[39] The applicant was not satisfied with the Department of Defence's response to the request and on the 22nd of January 2003 initiated an internal appeal in terms of section 75 of the Act. This appeal was directed against the refusal of the applicant's request for access. The notice of appeal set out the applicant's grounds for the appeal and repeatedly referred to the principle of severability. The decision on the internal appeal reads as follows (RMY6):

> 'INTERNAL APPEAL REGARDING ACCESS TO RECORDS OF PUBLIC BODY (ACT 2 OF 2000)
>
> 1. An internal appeal has been received by the Department of Defence from CCII Systems (Pty) Limited.
>
> 2. In compliance with the provisions of section 75(4) of the above-mentioned Act, the matter was referred to the Relevant Authority for further attention.
>
> 3. Your appeal application regarding the severing of information from a record has been refused.
>
> 4. The Minister of Defence (RA) is of the opinion that the request was dealt with in the correct manner and the

analysis and decisions taken at various levels during the processing of the request, were made in accordance to the provisions of the Promotion of Access to Information Act (Act 2 of 2000).

5.The DOD further wishes to advise that you have a right to refer the matter to the Courts of law if you feel that the spirit of the Act has been compromised.

6.I trust that the above matter has been dealt with satisfactorily' .

[40] In the notice of motion accompanying the application the applicant sought access to records referred to in 32 categories of the original request. During argument it was conceded that the respondent no longer objects to access being granted to the records described in items 20, 21, 24 and 25 of RMY7.

[41] As already mentioned the principle of severability applies to every request for access to a record of a public body which may or must be refused in terms of any provision of Chapter 4 of Part 2 of the Act. Unless the information officer establishes in terms of section 23 that the relevant record cannot be found

or does not exist, he is obliged to consider the severability of the relevant record in terms of section 28. This section requires the public body to give access to the part of the document which is not covered by a statutory ground of objection. If the information officer refuses a request for access to any part of the record then, in terms of section 25(3), he is obliged to state adequate reasons for the refusal, including the provisions of the Act relied upon.

[42] This is of particular significance in this case where the respondent's opposition is characterised by generalised and sweeping objections on the strength of which he seeks to withhold whole documents and groups of documents. The applicant's counsel argued that the court should not permit this mode of opposition. I agree. The public body must demonstrate to the court that it has considered each document with severance in mind. It must identify the part of the document which contains the protected material, give a proper indication of its content and why its disclosure is protected, and permit access to the rest of the document. Unless the respondent discharges the onus of showing that the whole document (or group of documents) is protected, he

has failed to establish what part he is entitled to withhold. Having failed to discharge that onus he would have to give access to the whole document.

[43] This is of particular relevance to the instances where the respondent relied on section 41(1)(a) of the Act (ie disclosure of information which could reasonably be expected to cause prejudice to the defence or security of the Republic). In relation to lengthy contracts, quotations or offers and batches of correspondence such an objection could not apply to the entire document. Clearly technical military specifications of a sensitive nature could be blanked out and the balance of the document made available. The applicant's counsel suggested in relation to such documents where the question of severability had not been properly considered that the court might direct the respondent within a stated period to identify the severed portions and the grounds of objection and give access to the balance.

[44] Section 78 of the Act deals with applications to court for appropriate relief in terms of section 82. In terms of subsection (1) a requester may apply to a court for

appropriate relief under section 82 only after the requester has exhausted the internal appeal procedure. Thereafter, in terms of subsection (2), the requester who has been unsuccessful in the internal appeal, may apply to court for relief in terms of section 82.

[45] This is clearly not a right of appeal. The prescribed form of procedure is an application: ie notice of motion supported by affidavit. (Neither in the papers nor in argument was there reference to rules of procedure made in terms of section 79 of the Act.) Section 81 of the Act clearly implies that the parties are entitled to present evidence in support of their claims. Subsection (1) provides that the proceedings on application are civil proceedings: subsection (2) provides that the rules of evidence applicable in civil proceedings apply and subsection (3) provides that the burden of establishing that the refusal of a request for access complies with the provisions of the Act rests on the party claiming that it so complies. Where an applicant seeks final relief in terms of section 82 and the affidavits reveal disputes of fact the applicant will only be entitled to final relief in the circumstances described in ***Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty)***

***Ltd* 1984 (3) SA 623 (A)** at 634E-635C. If the respondent fails to lead evidence to justify the refusal to grant access the application must succeed. It is trite that the affidavits in application proceedings constitute both the pleadings and the evidence in support of the pleadings. Where a party seeks to make out a cause of action or a defence in application proceedings it must appear from the affidavits what the nature of the cause of action or defence is and what the facts in support of such cause of action or defence are. See ***Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A)** at 793D-F.

[46] The Act does not specify any grounds for the grant of relief in terms of section 82. In view of the fact that the procedure on application is a civil proceeding an applicant for any of the relief set out in section 82 must set out grounds for such relief in the supporting affidavit: ie facts must be averred which would constitute a valid cause of action. Para (a) and (b) contemplate a review of the decisions of the information officer and the appeal authority, setting aside of such decisions and an order that the information officer give access to the records in respect of which access is sought. Although

the decision of the information officer to refuse access to the record is an administrative act it is expressly excluded from the definition of 'administrative action' in the Promotion of Administrative Justice Act, 3 of 2000 (para (hh) of the definition of 'administrative action' in section 1 of that Act) and that Act is accordingly not applicable. Currie and Klaaren para 3.8. Nevertheless the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Accordingly the failure to comply with any of these requirements will be reviewable. A decision to refuse access to records which is not In accordance with the provisions of the Act is therefore unlawful administrative action which can be set aside and corrected on review. Section 33 of the Constitution: Currie and Klaaren paras 9.9 and 9.13. The Act contemplates a general supervisory role for the court with a view to achieving the objects of the Act set out in section 9. This accords closely with the third category of review referred to in ***Johannesburg Consolidated Investments* Co *v* *Johannesburg Town*** *Council* 1903 **TS 111** at 117-

> '... (r)eview in its widest and in what may be called its popular sense. So employed the expression "review" seems to mean "examine" or "take into consideration". And when a court of law is charged with the duty of examining or considering a matter already dealt with by an inferior court, and no restrictions are placed upon it in so doing, it would appear to me that the powers intended to be conferred upon it are unlimited. In other words it may enter upon and decide the matter *de novo.* It possesses not only the powers of the court of review in the legal sense, but it has the functions of a court of appeal with the additional privileges of being able, after setting aside the decision arrived at by the lower tribunal, to deal with the whole matter upon fresh evidence as a court of first instance.'

The court may therefore reconsider and reverse a decision taken on the merits. It will do this taking into account the distinction between mandatory and discretionary grounds for refusing access. In the case of mandatory grounds only the determination of the ground can be reviewed and set aside. However, in the case of discretionary grounds, the body must first determine whether the ground applies and then must exercise a discretion in deciding whether or not to refuse access on that ground. When the decision is attacked it must

be shown to have a rational connection with the evidence. if not, it will be set aside - see Currie and Klaaren para 9.13.

[47] The applicant's affidavits are replete with references to section 46 of the Act which provides for mandatory disclosure in the circumstances described.

Despite these references, the applicant's counsel expressly disavowed reliance on these provisions for purposes of the present case. Section 46 therefore requires no further consideration.

[48] Notwithstanding the fact that the initial decision to refuse access to the documents was taken by a committee appointed by the South African Defence Force and Armscor, and not by the Information Officer as contemplated by sections 17-26 and 33-45 of the Act, no point was made of this by the applicant and it requires no further consideration.

[49] A brief summary of the relevant facts (gleaned from chapter 12 of the JIT draft report dated 30 October 2000 - annexure RMY15) will facilitate understanding of the issues: In

September 1997 the government decided to purchase various new weapons systems for the South African Defence Force (SADF). These systems were referred to as Strategic Defence Packages (SDPs). One SDP was four patrol Corvettes for the South African Navy (SAN). Each Corvette consists of a hull, propulsion system and a combat suite. The combat suite consists of every system which provides the vessel with its fighting capability. The acquisition program contemplated combat suites comprised mainly of systems developed and manufactured by companies in the Republic. These systems are referred to as sub-systems. The central element of the combat suite - in effect the brain - is the Combat Management System (CMS). This provides the electronic impulses and data to the other sub-systems to ensure their coordinated operation. The sub-systems of the combat suite are connected to the CMS by a databus, the Information Management System (IMS). Other sub-systems include the System Management System (SMS); the Navigation Distribution Sub-system (NDSS) and the Integrated Platform Management System Simulator (IPMSS). The 1998 cost of the combat suites amounted to R2.6 billion

of which the locally developed and manufactured components accounted for R1.938 billion.

The Department of Defence and Armscor set up two bodies to assist in the process of purchasing the Corvettes (including the combat suites). One was the Joint Project Team (JPT) whose members had the technical knowledge and know-how to assess the tenders for the Corvettes and combat suites. The JPT negotiated with the main contractor for the supply of the Corvettes as well as with the sub-contractors for the provision of the sub-systems. The other body, the Project Control Board (PCB), consisted of South African Navy, Armscor and Department of Defence officials. The PCB was responsible for taking the final decisions relating to the acquisition of the Corvettes, including the combat suites. Accordingly, all decisions taken by the JPT pertaining to the acquisition of the Corvettes and sub-systems for the combat suites were submitted for ratification to the PCB.

In November 1998, a consortium of German companies, the German Frigate Consortium (GFC), was declared the preferred bidder for the supply of the four Corvettes (including

the combat suites) and on 3 December 1999 Armscor concluded a contract with GFC for the supply of the Corvettes. The tender process stipulated that the contractor for the combat suites was to be a South African industry consortium in which Altech Defence Systems (Pty) Ltd, later called African Defence Systems (Pty) Ltd (ADS) was to play a leading role. This included assessing tenders for the supply of the sub-systems comprising the combat suite and advising the JPT on the quality of the tenders. ADS also submitted tenders for the provision of some sub-systems in competition with other contractors whose tenders it was to assess.

Despite the fact that the contractor for the combat suites was to be a South African industry consortium led by ADS, all the shares in ADS were acquired by Thomson International, a French corporation. In April 1998 Thomson International acquired 50% of the shares in ADS and in February 1999 it acquired the remaining 50% of the shares. Both ADS and Thomson International became members of the GFC. ADS was awarded the contract for the supply of the combat suites as well as the supply of some of the sub-systems in some of the suites.

The applicant objected to the award of the contracts for some of the sub-systems and attacked the relevant decisions of the JPT and PCB. The applicant considered that it had been wrongfully excluded from the tendering process in respect of these sub-systems.

A Joint Investigating Team (JIT) consisting of the Auditor-General, the Public Protector and the Director of Public Prosecutions was appointed to investigate the applicant's complaints. On conclusion of its investigation the JIT submitted its report to parliament.

The JIT found that the JPT played a major, if not decisive, role in the nomination of suppliers for the sub-systems and the award of contracts to the sub-contractors for the supply of these sub-systems. It found that because the members of the PCB did not have the technical knowledge and know-how to overrule JPT decisions the PCB merely ratified JPT decisions. In effect, the JPT took the decisions to award the contracts to sub-contractors and the PCB ratified these decisions. The JIT

found that the JPT did not keep minutes of its meetings and that there is no proper audit trail of its proceedings.

[50] Against that background the requests for the various items will be considered. This will be done in the same sequence as in the papers.

[51] Item 9

> 'All correspondence concerning these matters between the Department of Defence and Armscor, including the *Authority to Contract* issued by the Department of Defence to Armscor'

The Information Committee decided that the 'Authority to Contract' is the Armscor Act No. 57 of 1968. In the internal appeal this was confirmed by the Relevant Authority (ie the respondent).

The applicant contended that the item refers to the matters referred to in the last paragraph on the first page of the request (annexure RMY2 and RMY7). The respondent

contended that the item refers to the matters referred to in items 1-6 of the request and that items 2-5 do not exist.

The request must be interpreted as a whole. The phrase 'these matters' is used in a number of items (7, 8, 9, 14-20, 24-25 and 32-34) and was clearly intended to have the same meaning throughout the document. In items 14-20 and 32-34 it could not refer to items 1-6 of the request. It could only refer to the matters referred to in the last paragraph on the first page of the request.

Significantly, the respondent's answer in respect of item 14, shows that the respondent understood the phrase 'these matters' in the manner contended for by the applicant. This has not been explained by the respondent.

The applicant is therefore entitled to access to these documents.

[52] Item 10

'The umbrella agreement for the Corvette'

The Information Committee refused access in terms of section 36(1) (commercial information of a third party) and section 37(1) (confidential information of a third party). The decision stated that the Umbrella Agreement consists of sensitive commercial information (terms and conditions pricing, national industrial participation) and that clause 18 which deals with 'Confidentiality and Publicity of the Corvette agreement' forbids entities to divulge any information contained in the agreement. Neither the Information Committee nor the appeal authority gave adequate reasons for the refusal.

[53] The respondent's answering affidavit, deposed to by Siviwe Njikela, Deputy Director: Legal Support in the Department of Defence, alleges the following factual basis for the refusal:
The agreement -

(1) is between Armscor and the government of the Republic of South Africa and five international contractors and suppliers;

(2) contains the terms and conditions for the design, construction, testing, delivery and payment of four corvettes including the corvette platforms and combat suites together with logistic support, production, services and equipment;

(3) also embodies the terms of Industrial Participation to which the suppliers and contractors are subject and which concerns national policies to secure economic and industrial benefits and support for the further development of South Africa through investments and other economic contribution by entities not resident in South Africa;

(4) further contains various warranties, indemnities and guarantees with the same suppliers and contractors as well as material terms regulating breach, dispute resolution and the like.

[54] The respondent relies upon the following parts of clause 18 of the agreement -

'18 CONFIDENTIALITY AND PUBLICITY

Subject to the provisions in relation to Confidentiality and/or Secrecy in the Supply Terms, NIP Terms and DIP Terms any information obtained by any Party to this Agreement in terms, or arising from the implementation, of this Agreement shall be treated as confidential by the Parties and shall not be divulged or be permitted to be divulged to any person not being a party to this Agreement, without the prior written consent of the other Parties, save that -

18.1 Any information which is required to be furnished by law or by existing contract or by any Stock Exchange on which the shares of any Party to this agreement are listed may be so furnished, provided that the Party seeking to disclose such information shall give 10 (ten) days' prior written notice to the other of its intentions so to disclose;

18.2 ...

18.3 ...

18.4 ...

> 18.5 The South African government shall not be precluded from disclosing any information it deems to be in the public interest, save that it shall not be entitled to disclose any information of a commercial and technical nature and which is confidential without the written agreement of the Seller'.

[55] The respondent contends that the umbrella agreement is protected from disclosure in terms of -

(1) subsection 36(1)(c) of the Act-

> 'The terms and conditions of the Umbrella Agreement contain or reflect information supplied in confidence by the said contractors or suppliers, the disclosure of which could reasonably be expected to bring them at a disadvantage in contractual or other negotiations or prejudice them in commercial competition'.

In this regard the respondent relies on the pricing and the terms and provisions upon which they have agreed to issue guarantees. No other facts are alleged.

(2) subsection 36(1)(b)-

'In the same way and for the same reasons';

(3) subsection 37(1)(a) -

By reason of the provisions of clause 18 which impose a duty of confidence owed by the respondent. No other facts are alleged.

(4) subsection 41(1)(a)(i) and (ii)-

The respondent states that these provisions apply to the Umbrella Agreement 'which concern capital acquisitions on behalf of the Navy in respect of the defence and security of the Republic'. No other facts are alleged.

These subsections were not relied upon for the decision.

(5) subsection 42(2)(c)(i) -

> The respondent states that these provisions cover the contract for the acquisition of the corvettes which is included in the kinds of records envisaged in subsection 42(1). No other facts are alleged.
>
> This subsection was also not relied upon for the decision.

[56] Neither the decision nor the respondent's answering affidavit show that the Information Committee or the respondent considered whether there were any parts of the document which could be severed from the whole and furnished to the applicant.

[57] As already mentioned, the burden of establishing that the refusal of a request for access complies with the provisions of the Act rests on the party claiming that it so complies. Accordingly, the failure of the respondent to adduce facts to bring the umbrella agreement within the ambit of section 36(1), 37(1), 41(1) or 42(2) makes it impossible to find that the whole agreement or any parts of it are indeed covered by these subsections. I agree with the applicant's counsel that

the vague and generalised conclusory statements made by the respondent do not assist the respondent to discharge the onus. This will be illustrated with reference to the sections relied upon.

[58] Section 36(1)(b)

The respondent was obliged to show that the disclosure of the umbrella agreement would as a probability cause harm to the third party's commercial or financial interests. See ***SA Metal & Machinery* Co *(Pty) Ltd v Transnet supra*** para12. Conclusory and generalised allegations of harm are not sufficient. Harm must be shown by 'specific factual or evidential material'. See American Jurisprudence 2 ed vol 37A para 163 and cases cited in footnotes 80 and 81. With regard to section 36(1)(b) the respondent relied on the allegations made in respect of section 36(1)(c). These allegations related to pricing and the terms and conditions upon which the third party agreed to issue guarantees. It was not explained why the disclosure of this matter would be likely to cause harm. Prices offered would cease to have commercial value once the contract has been awarded. See

SA Metal & Machinery Co (Pty) Ltd v Transnet supra para 13. The same applies to the terms and conditions upon which guarantees would be issued. The respondent has not established that objective grounds existed for refusal of access in terms of section 36(1)(b).

[59] Section 36(1)(c)

The first requirement is that the contract must be 'information supplied in confidence'. Clause 18 of the contract relied upon by the respondent relates to information obtained by any party 'in terms, or arising from the implementation of this agreement'. The terms of the contract itself are not covered by this provision.

[60] The second requirement is that disclosure of the contract could reasonably be expected to have the prejudicial consequences described in the section. The Canadian Courts have held that the 'reasonable expectation' must be one of probable harm - *Canadian Packers Inc and Minister* of *Agriculture: Romahn Intervenant* (1988) 53 DLR (4th) 246 (FCA) at 255: *Re Saint John Shipbuilding Ltd and Minister*

of *Supply and Services* (1990) 67 DLR (4th) **315 (FCA)** at 316. This interpretation of the subsection is consistent with the approach prescribed by section 2(1) of the Act. The respondent relies on bald and generalised assertions in this regard which merely repeat the wording of the subsection. If it is borne in mind that the third party concerned, the European South African Corvette Consortium, was created for the purpose of entering into the agreement and that the contract was entered into more than four years ago it is highly improbable that the prejudicial consequences referred to in the subsection will follow disclosure. The respondent has failed to establish that refusal of access complies with section 36(1)(c).

[61] Section 37(1)(a)

The respondent relied solely on the confidentiality provisions contained in clause 18 of the contract. As already mentioned these provisions do not render the terms of the contract itself confidential. They only make confidential, information obtained in terms of or arising from the implementation of the agreement. Furthermore, the clause provides that it does not

apply to any information 'which is required to be furnished by law' which obviously would include the Act.

[62] This finding makes it unnecessary to consider the applicant's two alternative arguments: ie that a proper interpretation of section 37(1)(a) of the Act makes it essential for the party refusing access to establish not only a breach of the duty of confidence but also that such breach caused or would cause harm or patrimonial loss without which an action for an interdict or damages would not succeed: and, that in terms of the court's equitable powers under section 82 the court would be entitled to disregard the relevant clause and order disclosure - see the unreported judgment of Daniels J in ***SA Metal & Marketing Company (Pty) Ltd v Transnet Ltd and Another*** TPD case number 32106/02.

The respondent has not established that objective grounds existed for refusal of access in terms of section 37(1)(a) of the Act.

[63] Section 41(1)(a)(i) and (ii)

Neither the Information Committee nor the appeal authority relied on these provisions for refusing access. In his answering affidavit the respondent simply refers to the subsection without alleging any facts which would show that disclosure of the agreement could reasonably be expected to cause prejudice to the defence or the security of the Republic. The respondent merely states that the agreement concerns 'capital acquisitions on behalf of the navy in respect of the defence and security of the Republic'. In particular the respondent made no attempt to bring the agreement within the ambit of section 41(2)(b) of the Act.

[64] The respondent's counsel submitted that national security is a fundamentally important public objective and that an operationally effective military and weaponry is essential for the achievement and maintenance of this objective. It was further submitted that to be effective a degree of secrecy in the realm of the military's capabilities and security is necessary. Accordingly, it was submitted, that an executive's assessment of whether exemption is necessary for the purposes of safeguarding national security should not be readily gainsaid. With reference to the Canadian decision of

***Hoogers v Canada (Minister* of *Communications)* 83 CPR (3d) 380** and ***Logpro Properties* CC *v Bedderson NO and others* 2003 (2) SA 460 (SCA)** at 471A-B it was argued that in national security matters and international relations secrecy is essential and that where national security is involved judicial deference is appropriate to the complexity of the task facing the information committee.

[65] This argument ignores the fact that neither the information committee nor the appeal authority (the Minister of Defence) relied on section 41(1)(a)(i) and (ii) for refusing access to the agreement and that the respondent, when seeking to justify the decision, did not consider it necessary to deal with the security implications dealt with in section 41(2)(b) of the Act. No facts are set out in support of this section in the respondent's answering affidavit. Consequently it would not be appropriate to defer in any way to the expertise of the officials who took the decisions. The respondent has accordingly not established that objective grounds existed for refusal of access in terms of section 41(1)(a)(i) and (ii) of the Act.

[66] Section 42(2)(c)(i)

Neither the Information Committee nor the appeal authority relied on this subsection and the respondent has not averred any facts which would justify a finding that disclosure of the agreement 'would be likely to materially jeopardise the economic interests or financial welfare of the Republic or of the government to manage the economy of the Republic effectively in the best interests of the Republic'. The respondent has therefore not established that objective grounds existed for refusal of access to the agreement in terms of section 42(1) or (2) of the Act.

[67] Item 11

> 'The Supply Agreement for the Corvette Platforms (Part A) and the Corvette Combat Suite (Parts B and C).'

The Information Committee refused access in terms of sections 36(1) and 37(1) of the Act and relied on clause 26 of the Supply Agreement which prohibited the disclosure of any information contained therein. Neither the Information

Committee nor the appeal authority averred any facts which would support the application of the two sections. The reasons given by the Information Committee and the appeal authority are not adequate.

[68] In his answering affidavit the respondent avers that the Supply Agreement is a schedule to the Umbrella Agreement and includes the supply terms for the corvettes applicable to the contractors and suppliers. The respondent states that supply terms includes the financial terms involving price basis calculations, price adjustments, escalations and exchange rate provisions as well as taxes and duties. According to the respondent these terms and the related payment conditions are wide-ranging and commercially and financially sensitive both to the Republic and to the contractors and suppliers. The respondent states that the supply terms embody the technical requirements and quantity and quality insurance provisions as well as the milestone scheduling relating to the acquisition; the terms relating to delivery and hand over at risk. Warranties are given for the Platforms and Combat Suites which are detailed and describe and specify which part of the material are affected and which not, as well as the provisions

relating to user in accordance with technical manuals and like detail provisions. Sections of the supply agreement are devoted to questions of protection of intellectual property rights and there are also provisions relating to damages and the responsibility of the main contractors and various subcontractors and to issues of technology transfer as well as appropriate guarantees. The respondent states that he relies on the same provisions for refusing access as for the Umbrella Agreement.

[69] The respondent quotes clause 26.10 of schedule A to the agreement -

> 'Armscor, the End-User and the Seller will keep confidential all information including Specifications, Plans, Drawings, Lists and other Data, whether furnished to it in writing or by electronic means prior to the date of this Schedule A or after and which is clearly and conspicuously marked as confidential or proprietary. The same shall apply with respect to such information which is not so marked but where Armscor and/or the End User had clear reason to know that such information was to be kept confidential. Such information shall be used only for purposes under this

Schedule A or as may be otherwise agreed in writing by the Parties.'

[70] The respondent does not state that he has considered severability and that no portion of the agreement can be made available to the applicant.

[71] The comments already made in relation to sections 36(1), 37(1), 41(1)(a)(i) and (ii) and section 42(1) and (2) regarding Item 10 are equally applicable to Item 11. Regarding the effect of clause 26.10 of the agreement it is clear that the clause does not apply to the contract itself but to information furnished prior to or subsequent to the date of the schedule and which is clearly and conspicuously marked as confidential or proprietary. The respondent has not alleged any facts to bring the agreement within the ambit of the clause. The respondent has therefore not established that objective grounds existed for refusal of access to the agreement in terms of the Act.

[72] Item 48

All quotations and offers regarding the SMS submitted to the JPT by the GFC as received from ADS.

The Information Committee refused access in terms of sections 36(1) and 37(1) of the Act. Neither the Information Committee nor the appeal authority set out any facts in support of these sections. They did not give adequate reasons for the refusal.

[73] The respondent states that the information requested relates to information supplied by the applicant's competitor relating to a Combat Suite element for which the applicant and a third party were competitors. The 'quotations and offers' contained commercial pricing methods and technical descriptions of the element referred to. GFC and ADS, the contractors or suppliers involved, refused to disclose this information. Having regard to the third party's attitude to disclosure and the relevant sections of the Act, the information officer (ie the committee) correctly declined to grant the request in respect of this item. The respondent contended that the request deals with commercial information of a third party and is therefore refused in terms of section 36(1)(b) and (c) of the Act. It also

deals with the mandatory protection of certain confidential information of a third party and is refused in terms of section 37(1)(a) and (b) of the Act. The respondent also alleged that Armscor's tender regulations do not permit disclosure of this information. The tender regulations are not attached.

[74] The respondent makes a number of general allegations using the wording of section 36(1) and 37(1) but makes no factual allegations. The respondent states that refusal of access is justified in terms of section 36(1), 37(1), 41(1)(a)(i) and (ii) and 42(2)(c)(i) of the Act.

[75] Section 36(1)(b) and (c)

Pricing methods and technical descriptions of the element are now, more than four years after the contract was awarded to ADS, merely of historical interest. But, in any event, without an explanation for these terms the respondent has not set out any facts to show that disclosure of these matters would be likely to cause harm to the commercial or financial interests of ADS or any other party. There is also no evidence to show that, if the quotations and offers were supplied in confidence,

their disclosure would put ADS or any other third party at a disadvantage in contractual or other negotiations or prejudice ADS or any other third party in commercial competition. The respondent has therefore not established that objective grounds existed for refusal of access in terms of section 36(1)(b) and (c) of the Act.

[76] Section 37(1)(a)

There is no allegation that the ADS and any other quotations were submitted pursuant to any contractual confidentiality provisions. Those quotations preceded the conclusion of the Umbrella Agreement and would therefore not fall within the ambit of that agreement's confidentiality clause. With regard to the confidentiality clause in the supply agreement it is not alleged that ADS or any other party falls within the meaning of 'seller' in that provision. Quotations in any event would not constitute information as contemplated by the clause. The clause envisages information relevant to the performance of the agreement and furnished either in anticipation of its conclusion or thereafter. It has also not been alleged that the quotations were marked as stipulated by the clause.

Furthermore it has not been alleged that disclosure would cause harm such as to 'constitute an action' within the meaning of section 37(1)(a). The broad reference to Armscor's tender regulations does not discharge the onus resting on the respondent. The relevant provision of the regulations has not even been quoted and it has not been established that refusal of access complies with these sections.

[78] Section 41(1) and 42(2)

Item 52

[79] Item 52

All quotations and offers regarding the NDSS submitted to the JPT as received from ADS.

[77] Section 37(1)(b)

The Information Committee refused access in terms of section 36(1) and 37(1) of the Act. Neither the Information Committee nor the appeal authority furnished any facts to show that the refusal complied with these sections. Neither the Information Committee nor the appeal authority gave adequate reasons for the refusal. In his answering affidavit the respondent established that objective grounds existed for refusal of access in terms of section 37(1)(b) of the Act.

Reliance on this section is not supported by any facts. There are simply no factual allegations to justify the application of this section. It has not even been suggested that the Department of Defence is likely to require further quotations for a SMS or, if it does, that ADS would be reluctant to bid if its quotations given in 1999 were disclosed. The respondent has not established that

10, 11 and 48. The respondent referred pertinently to sections 36(1)(b) and (c) and 37(1)(a) and (b) of the Act but gave no additional facts to show that these sections are applicable. The respondent also referred to the Armscor Tender Regulations which he said do not permit disclosure of the information. As already mentioned these regulations are neither annexed nor quoted.

The respondent has therefore not shown that there were objective grounds for the refusal of the item.

The applicant is therefore entitled to access to this item.

[80] Items 12 and 13

> The Main Equipment List for the Corvette Platform (item 12).
>
> The Main Equipment List for the Corvette Combat Suite (item 13).

The information committee refused access in terms of section 41 of the Act. The decision stated that the item deals with the defence and security of the Republic. No facts were furnished

to show that disclosure could reasonably be expected to cause prejudice to the defence or security of the Republic. It is not alleged that the question of severability was considered. The reasons given for the refusal were not adequate.

The respondent alleges in his answering affidavit that the Main Equipment List of the Corvette Platform which is a part of the Supply Agreement lists the main equipment and sub-systems to be supplied to equip the corvettes and details the exact equipment designations and type of all equipment on board the corvettes including the block numbers of the main weapons. The listings provide a comprehensive overall picture of the corvette as a combat system. The respondent alleges that the same considerations apply in respect of item 13.

The respondent alleges that all the considerations relied upon by the respondent in respect of items 10, 11, 48 and 52 also apply in respect of items 12 and 13.

[81] Richard Young, the managing director of the applicant, who is the main deponent to the applicant's founding and replying

affidavits, states that since 1992 he has enjoyed the Department of Defence's highest security clearance and that all the applicant's staff have a security clearance of at least confidential. He states that notwithstanding the security clearances of the applicant's staff any documents disclosed by the respondent in respect of which section 41 has been invoked, will be perused by only Young and the applicant's legal team. Young says that he has never done anything to prejudice the defence or security of the Republic of South Africa and that he would not do so. He works in the defence industry and is well aware that one indiscretion on his part could jeopardise the applicant's chances of receiving further business opportunities in the industry.

[82] The respondent does not deny any of Young's evidence as to his security clearance and his dealings in the defence industry. The respondent simply makes the point that Young's security clearance does not entitle him to any document generated within the Department and that security clearance entitles a person to have access to information pertaining to a specific duty or function assigned to him by the Department or to information obtained by him in the performance of his

duties. Personnel with such security clearance are not entitled to divulge any such information to any other person except in the performance of their duties.

[83] It is significant that the respondent has not disputed the applicant's allegations relating to the security clearance enjoyed by Mr Young and the applicant's personnel and that there is not even a suggestion that they are not trustworthy and that the Department of Defence has been considering withdrawing their security clearance. There is also no suggestion that information made available to the applicant would be at risk.

[84] The respondent has not established objective grounds for refusing to disclose the lists to the applicant in terms of section 41(1). Furthermore, refusal in terms of section 41(1) is discretionary. It does not appear that the respondent has adequately considered whether disclosure of the items to the applicant would cause the harm referred to in this section. The undisputed facts show that the contrary is true. The applicant is therefore entitled to disclosure of items 12 and 13.

[85] Item 14

> All internal correspondence and memoranda concerning these matters within the Department of Defence.

The information committee refused access in terms of section 45(b) of the Act because the request was vague and unspecified. In view of the committee's interpretation of 'these matters' this reason was adequate.

The respondent's answering affidavit shows that the respondent clearly understood the request and what 'these matters' referred to. The respondent alleged that correspondence within the Department relevant to the acquisition of the South African Navy's Patrol Corvette (SANPC), in particular, to the Information Management System (IMS), the System Management System (SMS), the Navigation Distribution Sub-system (NDSS), elements of the Corvette Combat Suite (CCS) as well as the Integrated Platform Management System Simulator (IPMSS), element of the Corvette Platform (CP), spans many technical subjects integral to the supply of military and communication and

computer data to the Corvettes and constitutes confidential information of a highly sensitive nature militarily, conveyed between the two departments. The respondent also alleges that confidential information obtained from third parties is also involved but in any event, that the information is of such a nature that it could not be disclosed except to the various bodies established to oversee the procurement process for the Strategic Defence Packages.

It is clear from this answer that the respondent clearly understood 'these matters' in the request to refer to the subsystems and corvettes referred to in the last paragraph of the first page of the request - the wording of the affidavit is virtually identical to that paragraph - and that the respondent is prepared to make a number of broad and sweeping statements about the content of documents which he has not seen. It also shows that the respondent has not considered the possibility of severing parts of the record which may not be confidential or of a sensitive nature militarily.

The substantive answer is that referred to in section 45(b): ie that the work involved in processing the request would

substantially and unreasonably divert the resources of the public body. The respondent alleges that there is no single consolidated file which contains all the correspondence requested and that it would be necessary to extract the correspondence and memoranda from a number of files which would have to be identified. This would be a huge task which the respondent contends would have to be performed by senior personnel with proper security clearances and adequate knowledge. It is clear that these general statements are not based on facts established during a search for the documents. This is not referred to.

[86] Apart from these general statements, many of which are conclusions, the respondent has not set out the facts which would justify a finding that searching for the documents requested would be a task of such magnitude that it would substantially and unreasonably divert the resources of the Department of Defence. The respondent has not referred to a sample done by the Department to determine the amount of time and effort it would take to find the documents. It is inconceivable that the Department of Defence does not have an effective filing system and index and cannot identify those

officials who would have kept files containing the relevant documents. The respondent's answering affidavit is silent on these matters. It is significant that the applicant's assertion in its replying affidavit that the Department of Defence maintains a sophisticated registry where documents are properly indexed was not challenged by the respondent in his supplementary answering affidavit. In any event, the Department of Defence is a large government department with a substantial budget and workforce. It is difficult to accept that processing this request would substantially and unreasonably divert its resources. The manner in which the respondent has dealt with this request suggests that the Department of Defence perceives the request as an inconvenience which can be fobbed off. There is nothing in the respondent's affidavit to suggest the Department of Defence has given serious consideration to the request. The respondent has therefore not established an objective basis for refusing the request in terms of section 45(b). Compare ***CCII Systems (Pty) Ltd v Fakie and others NNO*** **2 SA 325 (T)** para 7: ***Re Swiss Aluminium Australia Ltd and Department*** **of** ***Trade*** **10 ALD 96 (AAT).**

[87] There is merit in the applicant's submission that the question of whether there would be a 'substantial and unreasonable' diversion of the Department of Defence's resources must take into account the matter to which the request relates. The transaction is a matter of great public importance and interest and it has received wide publicity. The Government allocated huge sums of money to the transaction (currently estimated at R50 billion) and spent R6 million on the investigation carried out by the JIT. The findings of the JIT point to substantial irregularities in the procurement process. In these circumstances it cannot be unreasonable to require a large government department to allocate personnel with appropriate security clearance to work through the files. However, it is not necessary to decide this issue.

[88] Items 15. 17, 18 and 19

> All correspondence concerning these matters between the Department of Defence and the German Frigate Consortium (GFC) (item 15).

All correspondence concerning these matters between the Department of Defence and the European South African Corvette Consortium (ESACC) (item 17).

All correspondence concerning these matters between the Department of Defence and Thomson-CSF (TCSF) including its subsidiary, Thomson-NCS and Thomson-CSF Detexis (item 18).

All correspondence concerning these matters between the Department of Defence and Altech Defence Systems (Pty) Ltd and its successor in title, African Defence Systems (Pty) Ltd, both entities also abbreviated to the acronym ADS (item 19).

The information committee refused access to item 15 in terms of section 45(b) of the Act because the request was vague and unspecified. In view of the committee's interpretation of 'these matters' this reason was adequate.

In his answering affidavit the respondent relied upon the same considerations relating to item 14. Again no facts are furnished to show that the work involved in processing the request would substantially and unreasonably divert the resources of the Department of Defence.

The respondent also makes the general observation, without invoking any section of the Act, that the correspondence sought is with a third party or supplier and is confidential. It is clear from the answer that the respondent has not seen the correspondence and that no attempt is made to justify refusal of access in terms of section 37 of the Act. The substantive objection to disclosing the correspondence is simply based on section 45(b).

The information committee refused access to item 17 in terms of section 37(1) and stated that section 49(1) also applies. No facts were furnished to show that disclosure would constitute a breach of confidence in terms of section 37(1)(a) or that the correspondence took place in confidence and that disclosure would cause the prejudice referred to in section 37(1)(b). There is no explanation for the statement that section 49(1) applies. This section clearly does not provide a ground for refusal. The reasons for refusal of access were not adequate.

In his answering affidavit the respondent states that the position in regard to this correspondence is the same in

respect of that in item 15. As already shown, this is simply reliance on section 45(b) of the Act.

The information committee refused access to items 18 and 19 in terms of section 36(1) of the Act. No facts were furnished to show whether access was refused in terms of paragraphs (a), (b) or (c) of section 36(1). The reasons for refusal of access were not adequate.

In his answering affidavit the respondent does not rely on section 36(1). He states that the position is the same as that in respect of item 15. As already mentioned, this is simply reliance on section 45(b).

Since no additional facts are alleged to show that the work involved in processing the request would substantially and unreasonably divert the resources of the Department of Defence there is no objective basis for refusing access in terms of section 45(b).

[89] Items 20 and 21

> All general correspondence concerning these matters between the Department of Defence and CCII Systems (Pty) Ltd, from 1 January 1992 until present (item 20).
>
> All correspondence concerning these matters of risk provision and/or performance guarantees for the INS, SMS and NDSS between the Department of Defence and CCII Systems (Pty) Ltd (item 21).

The information committee refused access to item 20 in terms of section 45(a) and (b) of the Act because the request was vague and unspecified. It refused access to item 21 in terms of section 45(b) of the Act for the same reason. No facts were furnished to justify the refusal. The reasons for refusal were not adequate. In his answering affidavit the respondent undertook to make available all correspondence between the applicant and the Department of Defence from January 1992.

[90] Items 22 and 23

> The JPT's consolidated Cost and Risk Audits for the Corvette Combat Suite performed for the 1997, 1998 and 1999 years (item 22).

> The JPT's audit files for the Cost and Risk Audits for the Corvette Combat Suite performed for the 1997, 1998 and 1999 years (item 23).

The Information Committee refused access on the strength of affidavits by Sipho Thomo, the information officer of Armscor, and Frits Nortje, the Project Manager Project Citron, that the JPT's Consolidated Costs and Risk Audits and the JPT's Audit File for the Costs and Risk Audits for the Corvette Combat Suites performed for the 1997 and the 1998 years do not exist because no costs or risk audits were carried out in 1997 and 1998. However Nortje said that a cost assessment of the Surface Vessel Combat System Technology Demonstrator was carried out. In its internal appeal the applicant requested these records. In his answering affidavit the respondent stated that JPT did not exist in 1997, 1998 and 1999 and accordingly that JPT did not undertake such audits or generate and maintain such files. The respondent did not deal with the applicant's request for the records of the cost assessment of the Surface Vessel Combat System Technology Demonstrator.

[91] In its replying affidavit the applicant convincingly demonstrated that this answer is, at best for the respondent, disingenuous. The applicant has attached transcripts of evidence given by three senior naval officers who confirm that prior to 2000 JPT investigated and reported on the Corvette Combat Suites. The applicant has also referred to the finding of the JIT that the JPT had direct contact and negotiated with the sub-contractors who received technology retention funding and that annual audit and risk assessments were done of all contractors who received funding in terms of the Technology Retention Program. Mr Young who was personally involved testifies that the naval officers referred to conducted the cost and risk audits during the period 1997 to 1999 to derive the cost of the Corvette Combat Suits for Project Citron. He attaches to his replying affidavit a document dated 30 September 1997 entitled South African Navy Patrol Corvette Combat Suite Costing and Description. The document which is not in dispute bears an approval - it was approved for issue as the Patrol Corvette Combat Suite Element Costing and Description for the purpose of assisting invited contractors to

prepare proposals for the supply of four Patrol Corvette Vessels and Associated Logistical Support for the South African Navy. It was compiled by Nortje, the Project Officer, Project Citron, and signed by (then) Capt. Kamerman, one of the naval officers already referred to. In paragraph 2, under the heading 'The Patrol Corvette Acquisition Project Nature and Scope' it is stated that the South African National Defence Force intends to acquire a Patrol Corvette capability and has launched a project aimed at the acquisition of the following prime mission equipment -

'a. four integrated Vessels each consisting of a Ship Platform

Element and a Combat Suite Element, including their unique logistic support:

(i) The Ship Platform Element is the hulls and machinery from the selected overseas shipyard.

(ii) The Combat Suite Element is the command and

control, communications, navigation, sensor and effector systems specified and selected by the SA Navy, comprising of systems developed and produced by nominated RSA industry, systems from

the SA Navy inventory, and three systems to be acquired from overseas, viz: the primary search radar, anti-ship missile and sonar systems.

b. Six organic Maritime Helicopters including their unique logistic support.

The Vessels with their integrated Maritime Helicopters, will constitute the Patrol Corvette Vessel System to be acquired by the project. The Patrol Corvette Vessel System with its total integrated logistic support and the relevant support elements will constitute the Patrol Corvette User System.'

Paragraph 3 reads as follows -

'Intended Project Management Concept

It is intended that Vessels will be acquired under a single prime contract from a Vessel Contractor, the ship platforms being built overseas and integrated with their combat suites in the facilities of the SA Naval Dockyard, Simon's Town, with the deliverables being complete Vessels post Sea Acceptance Trials, plus logistic support. The Vessel Contractor will be a teaming arrangement between the ship platform supplier and the nominated RSA

> combat suite suppliers with sub-contracts placed on nominated companies for the various sub-systems.'

And paragraph 7 states -

> 'The SA Navy Ceiling Cost for the Combat Suite Element is set at Rm1 470 (one thousand four hundred and seventy million Rand) in predicted April 1998 rands. These costs arise from a recent and comprehensive audit of the Combat Suite with all local suppliers providing detailed budgetary estimates to a common baseline against an approved work breakdown and specification. Costs for the overseas' sourced items of supply are derived from budgetary estimates supplied by the manufacturers to the SA Navy, adjusted to the same costing baseline as the locally sourced systems.'

[92] In the respondent's supplementary answering affidavit the respondent reiterates that the JPT was formed and only became operational during April 2000 after the SDP contracts were signed in December 1999. He then describes the process followed with regard to the acquisition of the Corvettes. He alleges that the Technology Retention Project, called Project Survecs (Surface Vessel Combat Suite) was established and ran between 1995 and 1999 but was totally

unrelated to the corvette (SDP) procurement acquisition project. The respondent maintains that the respondent's initial response was premised on the correct assumption that the applicant was referring to the JPT, but to the extent that the applicant's request has been refined to refer to the costs and risk audits carried out by Project Survecs during 1997 to 1999 the respondent undertakes to disclose the costs and risks audits pertaining to the applicant's IMS demonstrator. The other information is refused in terms of section 36(1)(b) and (c), section 37(1)(a) and (b) and section 41(1)(a) and (b). In this regard, the respondent refers to paragraphs 34.6 and 34.7 of the answering affidavit. These paragraphs simply refer to the same sections and repeat the relevant parts of the sections. The only factual averment is that these documents contain details of commercial pricing methods and technical specifications of the equipment referred to therein. They also contain details of the equipment on board the corvettes, including performance capabilities, weapon numbers and Navy Value Systems of such weapons. These assertions were made with reference to other documents and it does not appear from the deponent's affidavit that he had examined the

relevant audits and audit files to satisfy himself that they contain similar information.

[93] It is not clear why cost and risk audits would contain detailed technical specifications. As far as pricing is concerned the audits would not reflect prices actually quoted or agreed. The audits would simply reflect estimated costs at various times. The information could have no current commercial value. It is clearly obsolete as contracts have long since been awarded to the successful parties.

[94] It is clear from all the evidence that the audits and audit files requested by the applicant do exist. The respondent has not laid a factual basis for finding that disclosure of the documents would cause the harm or prejudice stipulated in the sections and with regard to section 37(1)(a) the respondent has not identified any relevant contractual confidentiality provision. The respondent has therefore failed to establish an objective basis for refusing access in terms of sections 36, 37 and 41.

[95] Item 24

> All correspondence concerning these matters between the office of the Auditor-General and the Department of Defence from 1 January 1998 up to the present date.

The information committee decided that access should be granted. It confirmed that the documents do exist, that it should be declassified and severed accordingly.

Notwithstanding this decision, by the time the applicant launched the application on 22 August 2003 - one year later the applicant had still not received access to the correspondence. By the time the respondent filed his answering affidavit on 22 December 2003 the respondent had still not complied with the decision. The respondent undertook to declassify and sever those documents which the Department has no objection to disclosing to the applicant. There is no evidence that the respondent has honoured the undertaking (August 2004).

In its internal appeal the applicant particularised its request by stating that all drafts of the JIT Joint Report submitted to the Department of Defence together with covering letters and

memoranda were required. In his answering affidavit the respondent stated that the JIT draft report, covering letters and memoranda do not exist.

[96] In its replying affidavit the applicant deals at length with the JIT draft reports. Young says that as he understood the position at least one of the drafts was given to the respondent who then passed it on to the Department of Defence's legal advisor, who in turn passed it on to Mr Shamin Shaikh. As the draft was highly critical of Shaikh's conduct in overseeing the procurement process, he handed it to his lawyer, who then brought up the matter with the Auditor-General, who had prepared the draft of the report. The Auditor-General reported this back to the respondent who then instituted disciplinary action against Shaikh which resulted in him being suspended from the Department of Defence and later being found guilty at internal Department of Defence proceedings. Young also refers to various SAPA press reports which refer to the JIT draft reports and the suspension of the Arms Acquisition Chief Shamin Shaikh. Copies of these reports are annexed and the contradictions are referred to.

In his supplementary answering affidavit the respondent does not dispute these facts but takes the point that the SAPA reports are inadmissible. Nevertheless, he confirms that Shaikh was suspended for disclosing a confidential document to persons outside the Department of Defence. He also confirms that there was a draft report received from the JIT but that the respondent's legal advisor did not believe that the report should be kept. According to the respondent it no longer exists within the Department. This is not confirmed by the legal advisor Mr Rathebe.

In argument the applicant appeared to accept that this unsatisfactory reply established that the Department of Defence was no longer in possession of the draft report. However the applicant pressed for delivery of the covering letter which the respondent did not dispute.

The respondent's counsel conceded that she could not submit that the respondent had complied with its undertaking and she did not make any submissions regarding the covering letter or the question of severance.

The applicant is therefore entitled to an order in respect of item 24 including the covering letter which accompanied the JIT draft report to the Department of Defence.

[97] Item 25

> All correspondence concerning these matters between the Department of Defence and the Office of the Public Protector from 1 January 1998 up to the present date.

The information committee refused access because the documents do not exist. The committee referred to the attached affidavits of Sipho Thomo and Frits Nortje but neither states that this correspondence does not exist.

In his answering affidavit the respondent states that the Department undertakes to furnish all correspondence that exist between the Department of Defence and the Office of the Public Protector as requested by the applicant.

In the applicant's notice of internal appeal the applicant refined its request in respect of item 25. The applicant asked

for notices from the Public Protector requiring attendance at the public phase of the joint investigation and notices of the respondent for authorisation in terms of the Defence Act to testify at this phase.

The respondent's answering affidavit does not comment on these requests.

At the hearing there was no proof that the respondent had complied with the undertaking given or the applicant's requests.

The respondent's counsel conceded that the applicant is entitled to relief in respect of item 25.

[98] Items 26, 33 to 38 and 44

> All records, agendas and minutes of meetings and deliberations of the JPT relating to relevant decisions regarding nomination, selection and award of sub-contracts regarding the Corvette Combat Suite (item 26).

Cost evaluations, in whatever form that these may exist, that were performed by the JPT or received by the JPT concerning these matters (item 33).

Spread sheets, in both printed and digital formats, reflecting details of tenders, proposals, quotations and offers submitted to the JPT by the JFC, CCSA, ESACC, T-CSF and ADS relating to these matters (item 34).

All Proposals, Quotations and Offers relating to the Corvette Combat Suite submitted to the JPT by ADS either directly or via JFC, CCSA or ESACC (item 35).

All records, agendas, minutes and attendance lists of meetings between the JPT and ADS, T-CSF, JFC, CCSA and/or ESACC relating to the Corvette Combat Suite (item 36).

The Best and Final Offer (BAFO) submitted by the JFC, CCSA or ESACC on the 24th of May 1999 for the Corvette (item 37).

All competitive tenders, quotations and offers relating to the Corvette Combat Suite that were submitted to the JPT by the ADS, T-CSF, JFC, CCSA or ESACC (item 38).

> All Quotations and Offers regarding the Combat Suite databus submitted to the JPT by the JFC, CCSA or ESACC as received from ADS, T-CSF, Thomson-NCS or T-CSF Detexis (item 44).

The information committee refused access in respect of each item in virtually identical terms in terms of section 36(1), section 37(1) and section 41(1). The committee did not dispute the existence of the items and in some instances (items 33 and 34) verified the existence of spreadsheets. No facts were furnished to justify refusal in terms of the sections referred to. The reasons for refusal were not adequate.

In the respondent's answering affidavit the respondent refers to the fact that the JPT was formed in April 2000, that the JPT was mandated to negotiate with contractors about the price and specification of products but did not deal directly with sub-

contractors regarding sub-contracts, nominations, selection/adjudication and awards of sub-contracts, spreadsheets detailing tenders, proposals, quotations and offers. According to the respondent the cabinet selected the main suppliers such as JFC, ESACC, Thomson-CSF and ADS, long before JPT was established. The main suppliers

were required to obtain quotations from the sub-contractors. The JFC administered the tendering process in respect of sub-contractors for the corvettes. The JFC submitted details of the tenders to JPT on spreadsheets. JPT prepared technical and cost briefings for International Offers Negotiating Team (IONT). The respondent states that the JPT only received the information referred to in items 35, 37, 38 and 44 in the form of spreadsheets. It did not generate any of the documents referred to in the items. The respondent contends that there are no agendas or minutes of meetings referred to in items 27 and 36. Finally, the respondent contends that all the items are protected under section 36(1)(b) and (c), section 37(1)(a) and (b) and section 41(1)(a) and (b). He states in very broad terms that these documents contain details of commercial pricing methods and technical specifications of the equipment referred to therein. They also contained details of the equipment on board the corvettes including performance capabilities, weapon numbers and Navy Value Systems of such weapons.

[99] It is clear that spreadsheets summarising quotations would not disclose pricing methods but only prices. At this stage these

prices are of purely historic interest. It is unlikely that the spreadsheets would contain detailed technical specifications but even if they did this would not per se be sufficient to avoid disclosure. In such a case the issue would be whether the disclosure would cause the harm stipulated in the sections. So little is said about the briefing documents that it is not possible to conclude that the respondent discharged the onus of bringing himself within the ambit of any of the sections mentioned. Regarding the confidentiality clauses the provisions have not been shown to be applicable.

[100] The respondent has failed to make the necessary factual allegations to bring these documents within the ambit of sections 36, 37 and 41. The question of whether disclosure would cause the harm or prejudice stipulated has not been addressed at all.

[101] Items 27 and 29

> All records, agendas and minutes of meetings and deliberations of the JPT relating to relevant decisions regarding nominations, selection and award of sub-contracts regarding the Corvette

Integrated Platform Management System Simulator (IPMSS) (item 27).

All records, agendas and minutes of meetings and deliberations of the PCB relating to relevant decisions regarding nominations, selection and award of sub-contracts regarding the Corvette IPMSS (item 29).

The information committee refused access to these items on the grounds that they do not exist. The committee relied on the affidavits of Sipho Thomo and Frits Nortje.

In its internal appeal, the applicant identified two documents to which it sought access but the respondent did not respond to this request.

In the respondent's answering affidavit the respondent states that he has not been able to find one of the documents but that the other is annexed to the papers as annexure RMY12.
The applicant does not persist in its request for these items.

[102] Item 31

> The agenda, minutes, briefing papers and attendance list as well as all presentations made to the meeting whether in printed or digital form, of the meeting of the PCB of 19 August 1999.

The information committee refused access. The committee stated that no PCB meeting took place and accordingly there are no minutes. However the committee stated that briefing papers were prepared for the 19th of August 1999, that these papers still exist and would be declassified and severed.

In the respondent's answering affidavit the respondent alleges that a briefing session was held on 19 August 1999 in preparation for a PCB meeting to be held on 24 August 1999. The respondent undertook on behalf of the Department to provide the applicant with the briefing papers prepared for the briefing on 19 August 1999 in preparation for the meeting on 24 August 1999, subject to the excision of matters not liable for disclosure.

In its replying affidavit the applicant points out that the statement that there was no meeting is contradicted by the

evidence of Rear Admiral Kamerman and annexes a transcript of this evidence. This evidence is not disputed by the respondent in his supplementary answering affidavit.

[103] It is clear that there was a meeting on 19 August 1999. The fact that the respondent chooses to call it a briefing session does not alter the fact. The respondent has not complied with his undertaking to furnish the briefing papers prepared for the briefing on 19 August 1999. The respondent has also not alleged a basis for withholding any part of the document. In argument the respondent's counsel simply referred to the undertaking to provide the applicant with the briefing papers and did not contend that any grounds existed for refusing access. The applicant is therefore entitled to the whole document.

[104] Item 39

The final version of the SA Navy's Patrol Corvette Combat Suite User Requirement Specifications (URS) including all appendices and annexures.

The information committee refused access to the item in terms of section 41(1) and (2) of the Act. It confirmed that the documents existed.

In its internal appeal the applicant limited its request to appendices I and J to the URS: appendix I being 'list of candidate suppliers' and appendix J being 'element costing'.

In his answering affidavit the respondent deals with the URS as a whole and invokes section 36(1)(b) and (c), section 37(1)(a) and section 41(1)(a)(i) and (ii). However the respondent does not deal with the two appendices.

Neither a 'list of candidate suppliers' nor an 'element costing' would contain the information alleged by the respondent. This is pertinently alleged by the applicant in its replying affidavit and not disputed by the respondent in his supplementary answering affidavit.

The applicant is therefore entitled to access to these items.

[105] Item 40

> The version of the Corvette Combat Suite Systems Specification (SSS) used as a contracting base line, including all appendices and annexures.

The information committee refused access in terms of section 41 (1) and (2) of the Act. No facts were given to support this decision. The reasons for refusal were not adequate.

In his answering affidavit the respondent states that the System Specification document is an annexure to the Supply Terms. It details functional applications of the performance of the Corvette System. The respondent alleges that the document is protected in terms of section 41(1)(a) and (b) and repeats the wording of this section. No facts are set out to justify a finding that disclosure could reasonably be expected to cause prejudice to the defence or security of the Republic or that it would reveal information described in section 41(1)(b). The respondent has not dealt with the security clearances held by the applicant's staff or the fact that the applicant has for more than four years had in its possession various versions of the system specification.

There is no objective basis for refusing access in terms of the Act and the applicant is entitled to access to the items.

[106] Item 42

> All reports that were written on the INS and Diacerto busses, including the both 'long' and 'short' versions of the 'report on the Diacerto busses proposed by the SAN of Project Citron'.

The information committee decided that access should be granted. It confirmed that the documents exist and that they would be declassified and severed.

In the respondent's answering affidavit the respondent states that the only difference between the short and long versions of the report is that the long version contains two concluding paragraphs.

It is not in dispute that the respondent has only furnished the short version of the report. The respondent's reference to the

joint report for the two paragraphs is not an answer to the request and the whole document must be furnished.

The applicant is entitled to access to this item.

[107] I have given serious consideration to making a qualified order in respect of some of the items - in effect giving the respondent another opportunity to consider the question of severance. This was suggested as a possibility by the applicant's counsel and echoed by the respondent's counsel who referred to the fact that the Act is new and there is not much guidance in the few judgments that have been given by the courts. I have decided not to make such an order. As already mentioned the internal appeal referred to the question of severability. This was rejected without reasons by the Relevant Authority. This application also addressed the issue. Once again the respondent did not deal with it. The Department of Defence clearly has a legal department and free access to legal advice from private practitioners. On analysis the structure of the Act is logical and easy to follow. There is no dispute that the various exclusions must be given their ordinary meaning. It is quite clear that in every case

where access to a record may be refused the question of severance must be considered. The Act spells out what the person refusing access is obliged to do. Furthermore the respondent's affidavits do not suggest strong grounds for refusing access to parts of the documents. And finally, giving the respondent a further opportunity to consider severability would cause another delay which is contrary to the object of the Act - to enable persons to obtain access to records of public bodies as swiftly, inexpensively and effortlessly as possible. In these circumstances there is no justification for giving the Department of Defence another opportunity to consider this issue.

[108] Costs

The applicant seeks costs of the application including the costs of two counsel.

Both parties were represented by two counsel. The employment of two counsel was clearly justified by the complexity and importance of the issues and by the fact that the Act has not been the subject of many reported judgments.

It was necessary for the applicant to come to court to get appropriate relief - the respondent undertook to furnish some items but failed to do so and only conceded at the hearing that he no longer contested the grant of relief in respect of other items - but persisted in his objection to the grant of relief in respect of the remaining items. The applicant has achieved substantial success in the application and is clearly entitled to the costs of the application, including the costs consequent upon the employment of two counsel.

[109] Order

The following order is made:

(1) The decisions refusing access to the items listed in Annexure RMY7 to the applicant's founding affidavit, as 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 31, 33, 34, 35, 36, 37, 38, 39, 40, 42, 44, 48 and 52 are set aside.

(2) The respondent is directed to produce to the applicant within two months of this order copies of the records

CASE NO: 23554/2003

HEARD ON: 1 September 2004

FOR THE APPLICANT: ADV. O.J. ROGERS SC AND ADV. L.A. VAN DER WESTHUIZEN

INSTRUCTED BY: Mr. Brazington of Findlay & Niemeyer Inc.

FOR THE RESPONDENT: ADV. K.D. MOROKA AND P.G. MALINDI

INSTRUCTED BY: State Attorney

DATE OF JUDGMENT: 15 April 2005

referred to in Annexure RMY7 to the applicant's founding affidavit under items 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24 (including the covering letter which accompanied the Joint Investigation Team draft report to the Department of Defence), 25 (including notices by the Public Protector requiring attendance at the public phase of the joint investigation and notices from the Minister of Defence for authorisation in terms of the Defence Act to testify at the public phase of the joint investigation), 26, 31 (only the briefing papers prepared for the meeting (or briefing session) held by the PCB on 19 August 1999), 33, 34, 35, 36, 37, 38, 39, 40, 42 (the long version only), 44, 48 and 52.

(3) The respondent is ordered to pay the costs of this application, including the costs consequent upon the employment of two counsel.

B.R. **SOUTHWOOD**
JUDGE OF THE HIGH COURT