IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 09/51422
PH 342

In the matter between:

M & G MEDIA LIMITED	First Applicant
NICHOLAS ADRIAN MICHAEL DAWES	Second Applicant
ADRIAAN JURGENS BASSON	Third Applicant

and

2010 FIFA WORLD CUP ORGANISING COMMITTEE SOUTH AFRICA LIMITED (ASSOCIATION INCORPORATED UNDER SECTION 21)	First Respondent
DANIEL ALEXANDER JORDAAN, N.O.	Second Respondent

JUDGEMENT

INTRODUCTION

1 This is an application by a company that publishes a newspaper, The Mail & Guardian, its editor Nicholas Adrian Michael Dawes ("***Dawes***") and one of its investigative journalists Adriaan Jurgens Basson ("***Basson***").

2 These applicants apply for access to certain records relating to the procurement or tender processes applied by the company responsible for organising the 2010 soccer World Cup in South Africa.

3 That company is the first respondent is the 2010 FIFA World Cup Organising Committee South Africa Limited (an Association Incorporated Under Section 21) ('LOC').

4 The second respondent is the LOC's chief executive officer, Daniel Alexander Jordaan ("***Jordaan***"). He is cited in his official capacity as the information officer or head of a private body in terms of the Promotion of Access to Information Act 2 of 2000 ("***PAIA***").

5 I refer to the LOC interchangeably as the first respondent, the Organising Committee or simply as the LOC. Although it calls itself a committee, it is a company, one incorporated under section 21 of the Companies Act 61 of 1973 ("***the Companies Act***").

EVENTS GIVING RISE TO THE APPLICATION

6 In the last week of May 2009, Basson, the investigative journalist in the employ of the Mail & Guardian newspaper, wrote to the Chief Communications officer of the LOC and

requested certain information regarding tenders which the LOC had awarded in relation to the Confederations Cup.[1]

7 The Chief Communications Officer responded that the general policy of the LOC is "*not to release the names of companies awarded tenders, we are not in a position to disclose the names of preferred suppliers*".[2]

8 On 3 June 2009, the applicants' attorneys, Webber Wentzel, wrote to the LOC and reiterated the request for access to the documents. They explained that Basson required access to the records to write an article, and thus exercise the right to freedom of expression and the media.[3]

9 The LOC's attorneys, Edward Nathan Sonnenberg, responded by denying that the LOC was a public body, and stating that if the applicants wished to pursue their request for access, they should do so in terms of PAIA.[4]

10 The applicants did not accept the LOC's denial that it is a public body as defined in PAIA. They submitted a "*public body*" request in terms of PAIA for access to the information regarding the LOC's tenders.[5] Basson alone was reflected as the requester.

11 On 23 July 2009, the LOC refused the request on the basis that it was not a public body.[6]

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1 FA p 12 para 17

2 FA p 12 para 18

3 FA p 12 para 20

4 FA p 13 para 22

5 FA p 14 para 23

6 FA p 15 para 24.3

12 Given this refusal, the applicants submitted a "*private body*" request for access to the documents, even though they still maintained that the LOC was a public body.[7]

13 The private body request included reference to the fact that the applicants required access to the records in order to exercise their right to media freedom and to vindicate the right of the public to receive information on matters of public interest.[8]

14 The private body request was refused by the LOC. The LOC asserted that the applicants had failed to establish that they required access to the records in order to exercise or protect their rights.[9] The LOC did not rely on any other grounds of refusal under PAIA for dismissing the request.[10]

15 Having received these two refusals, the applicants launched the present proceedings in terms of section 78 and 82 of PAIA. Section 78 sets out by whom and how such applications are to be brought. Section 82 sets out the powers of the Court if it should grant a section 78 application.

16 On receipt of the present application, the LOC gave detailed consideration to the records sought by the applicants[11] and in its answering affidavit again refused the request for access in totality, but added an additional ground for refusal i.e that disclosure of the records would be likely to harm the commercial interests of the LOC.[12]

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7 FA p 15 para 26

8 FA p 16 para 29

9 FA p 17 para 30.1

10 FA p 17 para 30.2

11 RA p 677 para 10.3

12 AA pp 405 407 paras 115.3 – 115.4 and pp 415 – 418 paras 115.8 – 115.8.5

17 Applicants apply to this Court for an order directing the LOC to give applicant access to the records of the LOC's tenders i.e. the records created in the process of the LOC selecting and contracting with providers of goods and services when organising the Confederations Cup and World Cup soccer tournament in South Africa in 2009 and 2010 respectively.

18 The respondents' opposition is based on (a) a challenge to the *locus standi* of the Mail & Guardian and Dawes as they do not qualify as "*requesters*" under PAIA, (b) an interpretation of PAIA that would mean that its provisions of this act do not apply to the LOC in regard to its tender records; and, (c) if it does apply, certain provisions of PAIA nonetheless afford the LOC protection against having to disclose its records as to do so would damage its commercial interests.

19 To demonstrate that Basson has written articles on the subject of the public interest regarding allegations of corruption relating to public funds, the replying affidavit has copies attached to it of numerous articles which have previously been published on the subject of corruption in relation to, in particular the award of the contracts to provide security services to the LOC.[13]

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[13] RA vol 7 p. 697, 698,

***IN LIMINE* – LOCUS STANDI OF FIRST AND SECOND APPLICANTS**

20 The respondents take the point that the first and second applicants are not "*requesters*" as defined in section 1 of PAIA and hence they lack locus standi to bring this application.

21 Section 78 of PAIA determines who has legal standing to bring an application such as the present one.

22 The section recognises only a "*requester*" and "*third party*" as persons who may bring a section 78 application.

23 A requester is defined under the definitions in section 1 of PAIA as follows:

"*'requester', in relation to-*

(a) a public body, means-

(i) any person … making a request for access to a record of that public body; or

(ii) a person acting on behalf of the person referred to in subparagraph (i);

(b) a private body, means-

(i) any person, …, making a request for access to a record of that private body; or

(ii) a person acting on behalf of the person contemplated in subparagraph (i); "

24 The respondents point to the fact that Basson gave his name as the name of the requester when he completed the prescribed forms to initiate the formal request processes under PAIA, and in response to the question in the form whether he acted on behalf of another the answer given was "*n/a*" (not applicable).

25 The definition quoted above refers to "*a person making a request*". Applicants argue that one cannot disregard the correspondence that preceded the submission of the formal applications. Applicants argue that the respondents were aware, through their attorneys, that it was Basson in his capacity as a journalist employed by the Mail & Guardian, the editor of which is Dawes, who required the information. In other words, Basson was acting on behalf of the newspaper and its editor and on his own behalf. But this is not what Basson indicated. He expressly indicated that he was not acting on behalf of anyone else. The first and second respondents did not complete request forms and no-one did so on their behalf. Applicants argue that there is no doubt, given the correspondence that preceded the formal requests that respondents knew in what capacity Basson was acting.

26 In the regulations regarding the promotion of access to information, published under GN R187 in GG 23119 of 15 February 20026 it is provided, in regulation 6, that :

> "*A request for access to a record as contemplated in section 18(1) of the Act must substantially correspond with Form A of Annexure B.*"

27 Section 18(1) of PAIA provides:

> "*A request for access must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address.* "

28 These forms have an area in which are to be filled in the details of the requester and a separate area for filling in of the details of the person acting on behalf of a requester. But for filling in "*n/a*" (not applicable) Basson left blank the part of the form that should reflect the particulars of the person on whose behalf he was acting.

29 It is not, however, as if the contents of the request forms in any way mislead the respondents or their attorneys as to the true identity of the requesters. They do not allege that they were mislead by Basson's approach to the filling in of the forms. The same attorneys continued to act for the same clients as before. A requester is not defined in the act as the person who fills in the form.

30 In my view, therefore, the respondents not having been mislead in any way, on the contrary, they were at all times aware of who it was that was requesting the records, and as there is no prejudice to the respondents in the manner in which the forms were filled out, even though they were not correctly filled out, this technicality does not serve to deprive the first and second applicants of their *locus standi*. It was the respondents' attorneys who suggested to the applicants' attorneys that the procedures under PAIA be

used, and when the forms prescribed under PAIA were used they did not alter that which had gone before. The defect is a purely technical one. The point *in limine* is accordingly dismissed.

THE RECORDS

31 The records which the applicants sought when they launched the application were the following (the numbering is from the founding affidavit):

"*16.1 details of all requests for proposals, quotations and Information (collectively "**the Tenders**") issued by the First Respondent, including those Tenders that have been awarded, in respect of both the Confederations Cup and the World Cup;*

16.2 copies of all relevant documentation issued by the First Respondent in respect of the Tenders, including advertisements and letters of award;

16.3 all records submitted to the First Respondent by service providers in regard to the Tenders, including tender proposals, quotations and/or information;

16.4 details of all the service providers that have been awarded preferred supplier status by the First Respondent;

16.5 all records relating to hearings and/or interviews held by the First Respondent in regard to the Tenders, including all minutes of meetings, internal memoranda, correspondence and shortlists relating to the Tenders; and

16.6 all records relating to the award of the Tenders, including but not limited to the service providers it was awarded to, the price to be paid and the contracts between the First Respondent and service providers,"

32 The applicants had originally requested records relating to the *security services* tender conducted by the first respondent, but applicants increased the scope of their request to the above indicated extent by the time of launching the application.

33 The scope of the request was then narrowed before the hearing, and the reduced scope of the records sought was confirmed by applicants' counsel at the hearing. Applicants have abandoned their claims to the records described in paragraphs 16.1, 16.3, 16.4 and 16.5.[14]

34 Applicants have thus limited their claims for records to only:

> "16.2 *documentation issued by the First Respondent in respect of the Tenders, including advertisements and letters of award;"*
>
> and
>
> "16.6 *all records relating to the award of the Tenders, including but not limited to the service providers it was awarded to, the price to be paid and the contracts between the First Respondent and service providers*."
>
> *(collectively "**the records**")*

35 In short, the Applicants want to know what tenders were invited, how the tenders were invited, on what terms where the tenders invited and, corresponding by, what tenders were awarded, to whom, at what prices and on what terms. Applicants indicated that they might be prepared to narrow their request for records further if furnished with greater particularity of the LOC's tenders. In response to this invitation the LOC provided information of the sort requested. It did so in a letter which was attached to an affidavit handed up at the commencement of the hearing.

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[14] See also the replying affidavit p. 678, which reflects that this narrowing of the scope of the records was communicated by applicants' attorneys to respondents' attorneys on 21 April 2010.

36 The respondents' attorney's letter sets out the tenders which the LOC called for; some sixty odd, those relating to: eg Office Furniture, VIP and Static Protectors Programme Management System, Manufacturing of Fencing Travel Services Supply, Transportation of Fencing Technical Team Consultancy, Event Transport Management Brokers / Advisors for Event Insurance, Infotainment, Above-The-Line Advertising Services , Stewards and Guards, Legal Services , Fencing Transportation, Canteen, Access Control Equipment, Cleaning, Internal Catering Couriers, IBC Catering, HR Recruiting , Interior and Décor Consulting, Schools Campaign, Volunteer Accommodation, Security Guards for SAFA House, Team Base Camps-Pitches, Charters and Helicopter Event Travelling Services, Radio Communication Systems Signage and Branding, Team Base Camps, Flood Lights Opening, Closing and Award Ceremonies, Event Management and Production Services, Volunteer Accommodation, Luxury and Semi-Luxury Coaches, Legacy Pitches, Freight and Logistics, Event Management Preliminary Draw, Medical Support, Audio-Visual Equipment SAFA House, Event Transport Management, Programme Management System, Backup Power, Two-Way Communication System IT and IT Services for the Four Stadiums for the Confederations Cup, Print, Copy, Fax Preliminary Draw, CATV for the Four Stadiums for the Confederations Cup, Transport Management Preliminary Draw, Broadcast Compounds for the Four Stadiums for the Confederations Cup, Safety and Security Advisory. Media and Broadcast Operations for the Confederations Cup, Car Rental Services Luxury Buses, International Broadcast Centre, Print, Copy, Fax, Scan Partner, PCSF Services For Prelim Draw, Steward Recruitment and Management Services for the Confederations Cup 2009 in Bloemfontein, Radio Supply For Preliminary Draw, Steward Training, Access Control – SAFA House Office Furniture, Transport Planning – Final Draw

37 There was no further narrowing by the applicants of the scope of the documents or records, although the Applicant did indicate at the hearing that they require the records only in electronic form.

38 This application is accordingly concerned with the records in the LOC's possession in relation to the fifty nine tender processes listed above.

THE LOCAL ORGANISING COMMITTEE

39 The LOC is the first respondent in this application. Following the award of the hosting rights to the South African Football Association ("***SAFA***"), that association's rights and obligations were transferred to a separate company, the LOC.

40 SAFA did so in order to ensure that there was a single body dedicated to performing the obligations required to stage and host the 2010 FIFA World Cup, and to separate the administrative activities associated with the 2010 FIFA World Cup from the general operational functions of SAFA.

41 The 2010 FIFA World Cup Organising Committee was incorporated as a section 21 company on 29 August 2005.[15]

42 SAFA assigned its rights and obligations under the Organising Association Agreement to the Organising Committee.[16]

43 As a result of this assignment, whatever SAFA was obliged to do under the Organising Association Agreement became an obligation of the LOC and whatever rights SAFA had under the Organising Association agreement became rights of the LOC.

44 By operation of the assignment, the LOC had stepped into the shoes of SAFA for purposes of the Organising Association Agreement.

45 The Organising Committee is the body ultimately responsible for the operational matters pertaining to the 2010 FIFA World Cup. The role of the Organising Committee includes

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15 Certificate of incorporation page 156

16 Answering affidavit para 7.1.1 page 332

ensuring that the venues, and the operational elements which will go into making the venues work, are planned and delivered on time.[17]

46 There are two types of companies recognised in the Companies Act:

(a) a company having a share capital; or

(b) a company not having a share capital and having the liability of its members limited by the memorandum of association (in this Act termed 'a company limited by guarantee')[18].

47 The LOC is the latter type of company, i.e. a company limited by guarantee. It does not have a share capital but it does have members. The names of the members of the company are to be kept in a register of members[19]. The register of members may be inspected in terms of section 113 of the Companies Act.

48 All companies limited by guarantee are deemed to be public companies for the purposes of the Companies Act[20]. The LOC is a public company. This is not to be confused with a company listed on an exchange. Many public companies are not listed on exchanges.

49 In terms of section 302(4) of the Companies Act a public company is obliged to send a certified copy of its annual financial statements to the Registrar of Companies. Documents lodged with the Registrar of Companies may be inspected in terms of section 9 of the Companies Act.

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17 Answering affidavit para 7.2.1 page 333

18 S 19 of the Companies Act 61 of 1973

19 S 103 of the Companies Act 61 of 1973

20 S 19(3) of the Companies Act 61 of 1973

50 There will thus have to be a degree of public disclosure of the LOC's affairs simply because of the above referred to provisions of the Companies Act.

51 The LOC is not, in form at least, a governmental agency; it is not part of National, Provincial or Local government.

52 The board of directors is usually responsible for the government of the company.

53 The respondents point out that a number of Cabinet Ministers in their official capacities[21] are members of the board of directors of the LOC.[22] The Cabinet Ministers serving on the LOC are the Minister of Human Settlements, Tokyo Sexwale; the Minister of Home Affairs, Nkosazana Dlamini Zuma; the Minister of Justice, Jeff Radebe; the Minister of Sport, Reverend Makhenkesi Stofile; the Minister of Co-Operative Governance and Traditional Affairs, Sicelo Shiceka; the Minister of Mining, Susan Shabangu; the Deputy Minister of Finance, Nhlanhla Nene; and the Deputy Minister of Foreign Affairs, Sue van der Merwe.[23]

54 These eight Cabinet Ministers serve on the LOC as "*cabinet ministers responsible for specific portfolios within government*" [24] That means, as I understand it, that these senior members of government are performing their duties as Cabinet Ministers in serving on the board of directors of the LOC. There would appear to be good reason for dedicating some of the country's most senior leaders to serve on the LOC's board of directors.

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21 AA p 333 para 7.1.2

22 AA p 333 para 7.1.2

23 FA pp 30 - 31 para 49.5.10 - 49.5.13

24 AA p 333 para 7.1.2

55 As will emerge later in this judgement, the South African government has bound the country in many and varied ways to provide to FIFA that which FIFA requires for the World Cup to be staged here. It would seem altogether sensible for those who are responsible for honouring the guarantees and undertakings given by the government to be part of the decision making body that is charged with delivering on those promises.

56 The use of a separate company to carry out the combined obligations of SAFA and government, which company is the LOC, seems sensible in that it enables government to be represented within the organising structure of the World Cup.

57 The second respondent, Jordaan, the deponent to the LOC's answering affidavit, describes the reasons for the involvement of the Cabinet Ministers on the LOC as follows.

> "*8.3 In sum, each of FIFA, the Organising Committee and the three spheres of government have specific roles and responsibilities. However, the co-ordinating function falls within the scope of operation of the Organising Committee. The Organising Committee liaises with FIFA and government to ensure the implementation of FIFA's requirements by government. The Organising Committee itself does not perform the government-specific obligations. Rather, government assumes the responsibility of putting in place the institutional framework for delivery of its obligations. At all times each party remains responsible for its individual obligations. …*
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> *8.4 It is for the reasons given above that cabinet members responsible for specific portfolios within government were invited to participate on the board of the Organising Committee. The appointment to the board of the Organising Committee was by virtue of the position held within government by the relevant minister, and was not linked to a particular cabinet member. The governmental activities associated with, for example, sports and recreation necessitated that the Minister representing such portfolio be appointed to the board of the Organising Committee.*"

58 It strikes me that there are some significant legal difficulties with appointing government ministers to directorships of private companies in order to protect the interests of government, and these may not be wholly irrelevant to this application.

59 It is sufficient to point out that a director of a private company owes a duty first to the company, and that it is inconsistent with his or her responsibilities as a director to serve another in a manner that may conflict with the interests of the company[25]. I cannot see how a cabinet minister can ever make his or her duties as a cabinet minister secondary to those of a private company.

60 Jordaan criticises the applicants for blurring or "*eliding*" in its founding papers the different roles of FIFA, government and the LOC. Given that there are eight cabinet ministers serving on the LOC's board of directors and given that FIFA has extracted onerous commitments of national scale from government, and as the LOC has undertaken to cause government to deliver on these undertakings, perhaps the applicants can be forgiven for not drawing too clear a line between these role players.

61 That the LOC is a temporary edifice created for the short-term (the role of discharging the obligations of SAFA under the Organising Association Agreement), is evident from

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25 FISHERIES DEVELOPMENT CORPORATION OF SA LTD v JORGENSEN AND ANOTHER;FISHERIES DEVELOPMENT CORPORATION OF SA LTD v AWJ INVESTMENTS (PTY) LTD AND OTHERS 1980 (4) SA 156 (W) at 163 :

"*A director is in that capacity not the servant or agent of the shareholder who votes for or otherwise procures his appointment to the board (the position of "nominee", though referred to in the plea, would not seem to have the legal consequences alleged by the defendants). The director's duty is to observe the utmost good faith towards the company, and in discharging that duty he is required to exercise an independent judgment and to take decisions according to the best interests of the company as his principal. He may in fact be representing the interests of the person who nominated him, and he may even be the servant or agent of that person, but, in carrying out his duties and functions as a director, he is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principal. He cannot therefore fetter his vote as a director, save in so far as there may be a contract for the board to vote in that way in the interests of the company, and, as a director, he cannot be subject to the control of any employer or principal other than the company. On the general principles, see R v Milne and Erleigh (7) 1951 (1) SA 791 (A) per CENTLIVRES CJ at 828D*; …"

the contents of the respondents' application for the condonation of the late filing of their answering affidavit[26].

62 The following appears in explanation:

> "*There is no consolidated record of procurement processes conducted by the Organising Committee. The reason for this is that according to Organising Committee policy, the manner of procurement of goods and services, and the Organising Committee officials who have delegated authority to procure goods and services, differs depending on the nature and value of the goods and services to be procured.*
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> *For example, procurement of goods and services with a value exceeding R25 million requires the approval of the board of directors. Procurement of goods and services with a value exceeding R15 million but less than R25 million requires the approval of the finance and procurement committee. Procurement of goods and services with a value of less than R15 million requires the approval of either the CEO, the COO, the Finance Director, or a head of department, depending on the value of the particular acquisition.*
>
> ***The offices from which the Organising Committee operates are not intended to be used in the long-term by the Organising Committee, and the staff are not intended to be retained much beyond the event itself. The information management, storage and record-keeping systems that would be well-established and well-known in a permanent business do not exist at the Organising Committee, and there are no personnel who are dedicated to creating and retaining efficient systems for storage, record keeping and information management****. "* (emphasis provided)

63 It is of some concern that the information management, storage and record keeping are not as would be expected to be found in permanent business. The LOC has been placed, via the Organising Association Agreement discussed below and various other undertakings and actions of government, in a position where it binds the credit of the country; it is using the assets of the country to stage the World Cup and as these assets do not belong to it, I would expect the record keeping to be of the highest order so that it can in due course account to the country for that which it has done with those assets

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[26] pp 640 – 672 esp. p. 655 par. 5.12

whilst entrusted to it's care. The temporary nature of the LOC is another reason why the record keeping procedures and management should be of the highest order.

64 During the argument of this matter I raised with Mr Cockrell, who appeared for the respondents, that it would appear to be an intention behind SAFA's assignment of its rights and obligations under the Organising Association Agreement that once the LOC is dissolved or wound up after the World Cup soccer tournament is over, the assets will be transferred to SAFA in accordance with section 21(2)(b) of the Companies Act. Counsel did not suggest that I was wrong in drawing this inference. The LOC (or those entrusted with its dissolution, whatever form that may take after the World Cup) will thus have to account to SAFA too. Good record keeping would seem to be essential for this purpose too.

65 The scale of the liquid assets involved in the World Cup, to say nothing of the illiquid and human assets is of a national scale. In brief, the government budgeted expenditure relating to the World Cup is set out by respondents as follows: department of public transport infrastructure, over seven years: R20.9 billion; department of sport and recreation, allocated to host cities for the stadiums R11.5 billion; department of communication R1.5 billion for infrastructure. Total government budget: R33.9 billion.[27]

66 The LOC is to receive approximately 0.54% of the government's budgeted expenditure, which on the above total, is approximately R181 million.

67 The LOC's expense budget given to it by FIFA is US423m. At seven rands to the dollar the LOC is going to spend R2 961 000 000.00 (two billion nine hundred and sixty one thousand rand) if it stays within this budget.

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[27] Answering affidavit par. 76.5 – 76.8

68 The LOC will thus spend R2.961 billion sourced from private origins and at least R181 million in “public” funds.

69 The privately sourced funds are made up of private funding from FIFA of US20m and income from ticket sales and entities labelled “*national supporters*”, the meaning of which term is unclear.

70 The respondents state that none of the LOC’s income, other than that disclosed in the answering affidavit, comes from government.[28]

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[28] Answering affidavit para 7.3.1 page 336

THE HOST CITIES AND THE STADIUM AUTHORITIES

71 The respondents' answering affidavit reveals that the Organising Committee does not own the stadiums that will be used for the 2010 FIFA World Cup. Indeed the Organising Committee was not even responsible for choosing the match venues.

72 The host cities formulated their own proposals and included them in a binding offer to the Organising Committee and FIFA. The Organising Committee then considered the relative strengths of each option and decided which match venues would be included among the final list of ten to be submitted to FIFA for its endorsement.[29] In short, FIFA chose the host cities.

73 The Organising Association Agreement obliged SAFA (and, after its incorporation and the assignment of SAFA's obligations, the Organising Committee) to sign stadium agreements with the host cities or stadium authorities.

74 The stadium agreements embodied a commitment by the host city, the stadium owner or the stadium operator to provide a stadium which met FIFA's specifications.[30]

75 In some cases, government has provided funding to the host cities and the stadium authorities. In such cases the national government has made contributions to the host cities to build or renovate their stadiums and to pay for many other aspects of the hosting of the World Cup. This funding has *not* been provided to the Organising Committee. As indicated above, the Organising Committee is a legal entity that exists independently, at

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29 Answering affidavit para 9.1 page 344

30 Answering affidavit para 9.3 page 345

least insofar as it is a separate legal entity, of the host cities and the stadium authorities.[31]

FIFA

76 Fédération Internationale de Football Association ("***FIFA***") is the governing body and the owner of all rights in respect of FIFA World Cup.

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[31] Answering affidavit para 9.6 page 347

77 FIFA is a voluntary association registered in Switzerland.[32] It is, in effect a club. It does not form part of government and it is not created by statute.

78 It is the governing body of the member associations, of which the South African Football Association ("***SAFA***") is one.

79 On a four-yearly basis FIFA grants to a member association the right to host a FIFA World Cup within its territory.[33] FIFA imposes various standards (as regards construction, infrastructure, safety etc) with which the host nation must comply.

80 This is apparently done to ensure that the FIFA World Cup runs smoothly, safely and on time; that the pitches are conducive to football of the highest quality; and that the stadia facilitate the viewing of matches both by a sizeable number of global spectators and a global audience.

81 The imposition by FIFA of various standards and obligations is also done to protect the FIFA World Cup brand, in which FIFA has made a considerable investment.

82 FIFA retains the power to finally approve the Host City and Stadium Use Agreements, in order to ensure that those standards are met.[34]

83 The respondent alleges that FIFA's requirements are of a general nature. FIFA affords the organising committee of the member association fortunate enough to be selected for

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32 Annexure ND36 clause 1 page 250

33 Answering affidavit para 5.1 page 328

34 Answering affidavit para 5.3 page 328

this purpose some latitude in relation to how to comply with its technical requirements and how the FIFA World Cup should be organised and operated within the host nation.[35]

SAFA

84 In South Africa, the South African Football Association ("***SAFA***") is responsible for co-ordinating all football-related activities and is a member association of FIFA.

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[35] Answering affidavit para 5.4 page 328

85 As an African member association, SAFA was entitled to submit a bid for the hosting of the 2010 FIFA World Cup.[36] The bidding process for the 2010 World Cup was limited by FIFA for this World Cup to African nations.

86 SAFA's bid for the 2010 World Cup was supported by various guarantees given by the government of South Africa. The guarantees given by government relate to matters such as health services, transport, safety and security, taxes, exchange control, immigration and so forth.[37]

87 In August 2003, SAFA contractually committed to FIFA that it would deliver the 2010 FIFA World Cup.

88 The contract between SAFA and FIFA was recorded in a document known as the **Organising Association Agreement**.[38] It is discussed separately elsewhere in this judgment.

89 The Organising Association Agreement stipulated the general obligations to be assumed in preparation for the 2010 FIFA World Cup. Amongst the contractual terms agreed to by SAFA was an obligation to establish an organising committee which would undertake the activities required to organise, stage and host the 2010 FIFA World Cup.[39]

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36 Answering affidavit para 6.1 page 329

37 Answering affidavit para 6.2 and 6.3 page 330

38 Annexure DAJ1 page 442ff

39 Answering affidavit para 6.5 page 331

GOVERNMENT

90 Government exists at three levels: National, Provincial and Local. This application concerns primarily the National level of government. It is concerned to a lesser extent with Local Authority government.

91 The respondents point out that the 2010 FIFA World Cup is a commercial venture involving FIFA, SAFA and the Organising Committee. The staging of the event is not the role of government, according to the respondents. Government has many responsibilities relating to the staging of the event. Government has provided a wide range of guarantees relating to FIFA in relation to the staging of the event in regard to: safety and security; transport; telecommunications; customs; taxes; ambush marketing and has

undertaken if necessary to freeze hotel prices. These are matters that will receive greater attention later in this judgement.

92 It is common cause that the 2010 FIFA World Cup is a massive event for South Africa as a country, and that the government wishes it to be a success. It has passed legislation, as have certain of the host cities, specifically for the tournament. These items of legislation are considered separately later in this judgement.

93 The respondents submitted that government needs to ensure that normal state functions are performed in a manner that will reflect to the credit of South Africa, and this submission is no doubt correct. The respondents give the example of the provision of policing as a function of government (not of the Organising Committee), and point out that government will need to provide extra policing and traffic control measures in order to cope with the influx of foreign visitors.

94 There is, in effect, the respondents point out, a symbiotic relationship between the Organising Committee and government. The Organising Committee interacts with government, but does not perform the obligations of government. It is government that has assumed the responsibility of putting in place the institutional framework for delivery of its obligations.[40]

95 I now proceed to summarise and give examples of the guarantees[41] furnished by different National government Ministries to FIFA before and after the conclusion of the Organising Association Agreement.

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[40] Answering affidavit para 8.3 page 343

[41] I adopt the term from the wording used by the parties and do not need, for purposes of this judgement, to enquire into precisely what is meant by the term “guarantee” in this context

96 The government guarantees illustrate the extent to which government committed itself to FIFA to ensure that the 2010 World Cup is a success.

97 I consider it appropriate to reproduce a few examples of these guarantees to convey in visual form the official nature of these undertakings, which were documents of great significance to the country, which the emanated from very senior members of government and set out undertakings dedicating national assets, human, legal, financial and physical to FIFA and its requirements. I do not reproduce each of the guarantees, only a few examples need be reproduced visually, which I consider better convey the importance of the documents.

98 On 16 July 2003 the Minister of Safety and Security addressed a letter to the President of FIFA, a copy of the first page of which reads:

DEPARTMENT: SAFETY AND SECURITY
REPUBLIC OF SOUTH AFRICA
Private Bag X463, Pretoria, 0001. Tel: (012) 393 2500, Fax (012) 393 2820
Thibault Arcade, 231 Pretorius Street, Pretoria
ngakula@dsps.org.za

DEPARTMENT: SAFETY AND SECURITY
REPUBLIC OF SOUTH AFRICA
Private Bag X463, Pretoria, 0001, Tel: (012) 393 2800, Fax (012) 393 2820
Thibault Arcade, 231 Pretorius Street, Pretoria
ngakula@dsps.org.za

Reference: 3/2/4(20/99)

Mr Joseph S. Blatter
The President
FIFA
FIFA House
Hitzigweg 11
P.O. Box 85
CH-8030 Zurich
Switzerland

Dear Mr Blatter

RE - SA 2010 FIFA WORLD CUP BID: GUARANTEE TO FIFA

I am acutely aware of the need for the peaceful and orderly running of the 2010 FIFA World Cup. I have directed the National Commissioner of the South African Police Service to make all the necessary arrangements reasonably possible to provide adequate and reasonable security for all guests of the 2010 FIFA World Cup in South Africa.

The Government guarantees to undertake all security measures necessary to guarantee general safety and personal protection, especially at airports, inside and outside hotels, stadiums, training grounds, the International Broadcasting Centre, Media Centres, any official areas and other areas where accredited persons and/or spectators are present.

The Department also guarantees safety and security to the FIFA delegation, media representatives and all accredited persons before, during and after matches, and while travelling in the country.

We further guarantee that a detailed written security plan will be developed and implemented in conjunction with SAFA, taking into consideration the experience gained at previous major sporting events, as well as national security guidelines.

Police escorts will be available for the use of teams, referees and members of the FIFA delegation. The precise number and types will be finalised at a later stage in accordance with FIFA's instructions.

99 The above guarantee from the Department of Safety and Security letter was supported by a letter of undertaking addressed to the President of FIFA on 21 July 2003 by the then

National Commissioner of Police, who similarly undertook on behalf of the South African Police Service to ensure the safety of those attending the World Cup.

100 On 24 March 2004 the then Minister of Home Affairs in his capacity as such addressed a guarantee to the President of FIFA which contained the following passage :

> "*My department guarantees the provision of priority treatment for the teams and the FIFA delegation as well as for all accredited persons for the 2010 FIFA World Cup through the provision of special immigration procedures"*.

101 On 31 March 2004 the then Minister of Finance bound the Republic of South Africa to provide FIFA and others with the highest level of administrative assistance and support with regard to the handling of any customs clearance and importation issues related to the organisation of the 2010 FIFA World Cup.

102 In terms of this guarantee the Republic of South Africa warranted, guaranteed, covenanted, assured and procured that the organisation, staging and performance of the 2010 FIFA World Cup would not be hindered or delayed by any handling procedures at any time. FIFA was assured by the Republic of South Africa that the competent authorities would grant highest priority treatment and would if required by FIFA, cause the National Treasury and the South African Revenue Service to issue in advance unconditional and binding customs clearance, importation and tax rulings relating to FIFA and FIFA's subsidiaries.

103 This guarantee, which contains a number of other undertakings, was co-signed by the Commissioner, South African Revenue Services. Other guarantee letters in similar terms

were addressed by the Minister of Finance to FIFA and co-signed by the then Governor of the Reserve Bank.

104 A further guarantee from the Ministry of Finance, signed by the then Minister of Finance, effectively cast South Africa as FIFA's insurer for all claims against FIFA, other than those arising from the negligence or fraud of the FIFA representatives and associates. The terms of the indemnity appear from the document itself as reproduced below.

MINISTRY: FINANCE
REPUBLIC OF SOUTH AFRICA
Private Bag X115, Pretoria, 0001. Tel: +27 12 323 8911 Fax: +27 12 323 3262
PO BOX 29, Cape Town, 8000. Tel: +27 21 464 6100 Fax: +27 21 461 2934

I, Trevor A Manuel, in my capacity as Minister of Finance of the Republic of South Africa, and on behalf of the Government, indemnify FIFA and defend and hold it harmless against all proceedings, claims and related costs (including professional advisor fees) which may be incurred or suffered by or threatened by others against FIFA in relation to the organisation and staging of the 2010 FIFA World Cup.

This indemnity shall not apply to any damages, claims or losses caused by the negligent or fraudulent conduct on the part of the members of the FIFA delegation, its employees or associates.

Signed at Pretoria on this 24 day of March 2004

TREVOR A MANUEL, MP
MINISTER OF FINANCE

105 On 18 August 2003 the then Minister of Communications addressed a letter to FIFA guaranteeing that the telecommunications infrastructure would conform with the highest standards and requirement applicable at the time of the staging of the 2010 World Cup and would conform to the specific requirements that FIFA may require from time to time.

106 The then acting Minister of Transport provided the following guarantee on behalf of the Ministry of Transport :

DEPARTMENT: TRANSPORT
REPUBLIC OF SOUTH AFRICA
Private Bag X193, Pretoria, 0001
Forum Building, cor Struben and Bosman Streets, Pretoria

The Department of Transport fully supports South Africa's 2010 FIFA World Cup Bid

I, Jeffrey Thamsanga Radebe in my capacity as Acting Minister of Transport of the Republic of South Africa, hereby undertake that my Department will ensure that the appropriate provisions are made in the respective host cities for the efficient and safe transportation of all categories of visitors associates with the 2010 FIFA World Cup

The Department of Transport hereby gives the necessary assurance that:

Air, road and rail based public transport operators have sufficient capacity to accommodate the event.

The transport infrastructure giving access to the World Cup stadium can accommodate the forecast travel demands (In this regard the relevant local authority will undertake all detailed operational reviews)

Singed at PRETORIA on the 24 MARCH 2004

J. Radebe

Minister JT Radebe, MP

Acting Minister of Transport

107 The then Minister of Environmental Affairs and Tourism gave the following undertakings, which included an undertaking to pass laws to fix the hotel prices for the FIFA delegation at 20% below the January 2010 prices for the FIFA delegation, representatives of FIFA Commercial Affiliates and others.

MINISTRY: ENVIRONMENTAL AFFAIRS AND TOURISM
REPUBLIC OF SOUTH AFRICA
Private Bag X447, Pretoria, 0001, Tel: (27-12) 310 3611, Fax: (27-12) 322 0082
Private Bag X9154, Cape Town, 8000, Tel: (27-21) 465 7240/1/2, Fax: (27-21) 465 3216

GUARANTEE TO FIFA

I, [illegible], in my capacity as Minister of Environmental Affairs and Tourism of the Republic of South Africa, hereby commit my department's support to ensure that all required needs are met to successfully host the 2010 FIFA World Cup. I pledge that my department in the event of the Republic of South Africa being selected to host the 2010 World Cup will take all measures, including passing the necessary laws, to ensure that hotel prices for FIFA Delegation, representatives of FIFA's Commercial Affiliates, the Broadcaster, and accredited Media shall be frozen as of 01 January 2010.

My department together with South African Tourism will, in conjunction with SAFA, ensure that the hotel prices for the FIFA Delegation are 20% less than the frozen rate on 01 January 2010.

I guarantee that FIFA Delegation will be charged only for the actual number of hotel room nights used and that no minimum stay requirement will be imposed (except for the final match, where a minimum of three nights may be required)

Signed at [illegible] on the [illegible] day of [illegible] 2003

[illegible]

Minister of Environmental Affairs and Tourism

108 The then Minister of Trade and Industry on behalf of the Republic of South Africa represented, undertook, guaranteed and ensured to pass, to the extent necessary, special laws designed to prevent "*ambush marketing*"[42] of the 2010 FIFA World Cup in South Africa and undertook to provide FIFA with the support of officers or relevant authorities, such as police and customs, to assist in the protection of the marketing rights, broadcast rights, marks and other intellectual property rights. Other commitments were made by this Ministry on behalf of the Country. That guarantee was expressed to be binding on the Country regardless of whether there was a change of government.

109 I have already referred to the guarantees furnished by government and it seems as if that which was required by FIFA in this regard was delivered by the LOC.

110 Guarantees alone were, however not all that was required of government. Once the guarantees had been given, government had to deliver on them. This included passing legislation, providing telecommunication infrastructure, providing transport infrastructure, funding the building of stadiums, providing police and related security personnel, providing tax, customs and immigration services as well as insurance.

111 In summary, governments role has included providing infrastructural, financial, legislative and executive (members of cabinet) support to the LOC.

THE ORGANISING ASSOCIATION AGREEMENT

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[42] A term later to be defined in the agreement between SAFA and FIFA as meaning: "*marketing, promotional, advertising and public relations activities in words, sound or any other form relating to the Championship, which are intended to capitalize on any form of association with the Championship, but which are undertaken by a person or an entity which has not been granted the right to promote an affiliation with the Championship by FIFA"*

112 The Organising Association Agreement was concluded between SAFA and FIFA in August 2003.

113 SAFA's rights and obligations have since been transferred to the LOC by means of an assignment.

114 In terms of the agreement:

> *"FIFA does not recognise any third parties or organisations apart from the Organising Association and the government of the Host Country. Any problems connected with the organisation of the Championship shall therefore be dealt with by the Organising Association.*
>
> *The Organising Association is subject to the control of FIFA, represented by the Organising Committee for the Championship. FIFA has the last and final decision power on all matters relevant to the hosting of the Championship*."

The role of the LOC in relation to government is set out as follows in this agreement:

"*8.* ***GOVERNMENT GUARANTEES AND COLLABORATION***

8.1 The Organising Association shall undertake to obtain the government Guarantees as set forth in Clause 4 of the List of Requirements from the competent government authorities.

8.2 The Organising Association shall undertake all measures necessary to ensure that the government Guarantees are valid, operable and enforceable at all times.

8.3 The Organising Association shall undertake all measures necessary to ensure at all times the highest level of infrastructure and administrative support and the collaboration of the local and national government authorities in connection with the Championship.

8.4 The Organising Association shall undertake to obtain in a timely manner all necessary governmental decrees, licenses, permits, grants, orders, decisions and other acts required for the organisation, staging and hosting of the Championship in accordance with this Agreement.

8.5 The Organising Association shall, as necessary, negotiate with, lobby and/or petition the government on its own behalf, and if directed by FIFA on FIFA's behalf, to ensure the fulfillment of its obligations as set out in this Agreement.

8.6 The Organising Association shall support the FIFA Delegation to the fullest extent in obtaining all necessary governmental decrees, licenses, permits, grants, orders, decisions and other acts.

8.7 The Organising Association shall be reliable [sic] for all government Guarantees and governmental acts, which are not, not in a timely manner or not to the necessary extent obtained. The Organising Association shall indemnify FIFA and defend and hold it harmless against all proceedings, claims and related costs (including professional advisor's fees), which may be incurred or suffered by or threatened by others against FIFA in this relation."

115 It is clear that the LOC was obliged to obtain from government a wide range of commitments for FIFA.

116 The security obligations of the LOC are set out in the agreement as follows:

*23. **SAFETY AND SECURITY***

*23.1 **Responsibility***

23.1.1 The Organising Association, in accordance with the respective governmental guarantees, shall at all times be fully responsible and guarantee for the general security, safety and personal protection, especially of the FIFA Delegation, Media and spectators as well as all people involved in participating in and/or attending the Championship throughout their entire stay in the Host Country.

23.1.2 This shall at all times include the security of those people at airports, inside and outside Controlled Access Sites, hotels, Stadiums, Official Training Sites, the International Broadcast Centre, Media Centres, any official areas and other areas where they are present in the Host Country before, during and after the Championship.

23.1.3 The Organising Association shall ensure the provision of the guarantee(s) of the competent government authorities as required in the List of Requirements and Clause 8.

23.1.4 The Organising Association shall ensure and guarantee that, on all travel from and to a Venue, all necessary security measures shall be taken by appropriate governmental authorities or private security companies.

23.1.5 The Organising Association shall be held liable for any safety and/or security incidents and/or related accidents and shall guarantee

that no responsibility in this respect can be apportioned to FIFA. The Organising Association shall cause the relevant governmental authorities to provide FIFA with identical consummations and guarantees. Consequently, the Organising Association and the relevant government (national, state and local) authorities shall guarantee in a binding form to indemnify, hold harmless and defend FIFA, the FIFA Marketing Partner, the FIFA Broadcast Partner, the Commercial Affiliates and Broadcast Right Holders (including the Host Broadcaster) from and against all liabilities, obligations, damages, losses, claims, demands, recoveries, deficiencies, costs or expenses (including attorney's fees), which such parties may suffer or incur in connection with, resulting from or arising out of any security and/or safety incidents and or accidents in connection with the Championship.

23.2 ***Costs***

23.2.1 All costs associated with the Championship security shall be borne by the Organising Association and/or governmental authorities in the Host Country."

117 It will be noted once again that the LOC is obliged to ensure that the government provide guarantees of safety and security. The obligation to ensure the safety of the FIFA delegation is particularly phrased, and it is the country, not FIFA which carries much of the risk associated with the tournament.

118 The agreement obliges the LOC to engage the government's law enforcement agencies to prevent "*ambush marketing*" [43], i.e. any commercial activity which seeks to benefit from association with the World Cup without FIFA's permission. The clause reads:

"*31.1.4 The Organising Association shall take all necessary measurements to eliminate Ambush Marketing within the Host Country and use its best efforts to prevent Ambush Marketing and assist FIFA to prevent Ambush Marketing and, to this end, the Organising Association shall secure and maintain good relations, the collaboration and clear lines of communication with the competent*

[43]"Ambush Marketing" shall mean marketing, promotional, advertising and public relations activities in words, sound or any other form relating to the Championship, which are intended to capitalize on any form of association with the Championship, but which are undertaken by a person or an entity which has not been granted the right to promote an affiliation with the Championship by FIFA.

> *national and local government authorities including, but not limited to competition authorities, police departments, trading standards and customs authorities and other such parties*."

119 The legal mechanism evident throughout the quoted passages of the agreement is an undertaking by the LOC that it will get government to provide what FIFA requires.

120 Given what it is that FIFA requires, it is hardly surprising that it is government that must provide; the LOC could not provide as no company has authority over the country's legislative mechanisms, competition authorities, police departments, trading standards, customs, fiscal and other such departments. These are components of society which fall under government's authority.

121 FIFA has, in effect, used the LOC to get government to provide much of what FIFA requires.

122 The agreement contains a definition of "*Controlled Access Sites*" meaning: (a) the locations of the Matches and Other Events, such as (without limitation) Stadiums and their fences and the aerial space above the Stadiums, the Stadium Perimeters (b) all other locations, such as without limitation Stadium Press Centres, Accreditation Centres, …,the designated hotels, Hospitality areas and centres for the FIFA Delegation, and other areas to which admission is regulated by the Organising Association's issued accreditation and (c) surrounding and adjacent areas to the locations described hereinabove.

123 These provisions in the agreement are material to this judgement for as shall be seen later, the legislation passed by various legislative authorities such as the bye-laws

passed by the local authorities of Johannesburg and Tshwane, give legislative underpinning to the LOC's obligations to FIFA. Unlike an ordinary private contract only enforceable by the parties to that contract, in this case many of the LOC's contractual obligations, having been captured in substance in legislation, have become enforceable against the public at large.

124 Another consequence of the law-makers of the country creating law to support the LOC's obligations is that the normal remedies provided for a breach of a term of a contract, usually only civil in nature, now have in certain instances the force of criminal sanction. Although this is not unique to the LOC, as the "*protected event*" notice legislation[44] demonstrates, criminal sanctions for breaches of contractual rights are out of the norm. Where a private contract is breached the aggrieved contracting party can approach a civil court for enforcement of the contractual remedies against the other party or parties to the contract who may be in breach. In this case, however, as legislation has been passed encapsulating some of the LOC's contractual obligations to FIFA (such as those relating to ambush marketing and controlled access areas) it is the *entire populace* who is bound, and a contravention may be visited upon transgressors in the form of a criminal sanction, including imprisonment.

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[44] Section 15A of the Merchandise Marks Act of 1941, S. 15A inserted by s. 2 of Act 61 of 2002, which came into operation on 17 January 2003, provides that the Minister of Trade and Industry may by notice in the Gazette designate an event as a "protected event" and contraventions may, in terms of subsection (4), constitute a criminal offence.

THE CONSTITUTION

125 The preamble to the Constitution reads:

"*We, the people of South Africa,*

Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to-

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people…"

126 That the Constitution is the supreme law of the country must inform any judgement of any Court in South Africa.

127 The applicable section of the Constitution is Section 32. It deals with the right to access to information. It reads:

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

128 As regards the final portion of Section 32, I point out that concerns about volumes of documentation are dealt with via regulations that impose certain cost liabilities on those seeking records i.e. they must pay for what they get.

129 Section 32 of the Constitution, upon which PAIA rests, is to be found in that Chapter of the Constitution which is called the Bill of Rights.

130 The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.[45]

131 That the Constitution casts the right to access to information as a fundamental right of the people of South Africa must guide the Court in its approach.

132 It is, however, not by application of section 32 of the Constitution that this case is to be decided, for Parliament has enacted PAIA in compliance with the Constitution to give effect to the right of access to information.

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[45] Section 7 of the Constitution

133 It is against the provisions of PAIA that the applicant's application for access to the information in question must be measured.

THE PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000 ('PAIA')

134 PAIA is the Act that will determine the outcome of this application. It is an act, as the title says, that promotes access to information.

135 I have sketched the Constitutional background above by, inter alia, quoting the preamble to the Constitution.

136 The Constitutional Court has held that the starting point of any inquiry into the meaning of an Act of Parliament which gives effect to a constitutional right, is the constitutional provision to which it gives effect.[46]

137 Once its meaning has been determined, the Act must be taken to bear the same meaning, because it is intended to give effect to the constitutional right and because it will be in breach of the Constitution if it does not do so.

138 I now quote the preamble to PAIA, for like the preamble to the Constitution it provides a precise summary of a number of material considerations that locate the application of

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46 *Minister of Health v New Clicks* 2006 (2) SA 311 (CC) at paras 100, 446 and 451

PAIA in this society, including the historical and legal context of the legislation to be applied.

139 The preamble to PAIA reads:

"*RECOGNISING THAT-*

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

- *section 8 of the Constitution provides for the horizontal application of the rights in the Bill of Rights to juristic persons to the extent required by the nature of the rights and the nature of those juristic persons;*

- *section 32 (1) (a) of the Constitution provides that everyone has the right of access to any information held by the State;*

- *section 32 (1) (b) of the Constitution provides for the horizontal application of the right of access to information held by another person to everyone when that information is required for the exercise or protection of any rights;*

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

AND BEARING IN MIND THAT-

- *the State must respect, protect, promote and fulfil, at least, all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa;*

- *the right of access to any information held by a public or private body may be limited to the extent that the limitations are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as contemplated in section 36 of the Constitution;*

- *reasonable legislative measures may, in terms of section 32 (2) of the Constitution, be provided to alleviate the administrative and financial burden on the State in giving effect to its obligation to promote and fulfil the right of access to information;*

AND IN ORDER TO-

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

- *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,*

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-…." (emphasis provided)

140 PAIA follows the framework of section 32(1) of by drawing a distinction between access to information held by the state, and information held by private bodies. It also extends the duty of disclosure which the Constitution places on the state, by placing that duty on other public bodies.

THE PUBLIC / PRIVATE BODY ISSUE

141 The starting-point of PAIA is the distinction which it draws between a 'public body' and a 'private body'.

142 Organs of state fall within the definition in section 1 of 'public body'. Paragraph (b)(ii) of the definition also includes within that term, any functionary or institution which exercises a public power or performs a public function in terms of any legislation.

143 A 'private body' is defined to exclude a public body.

144 These two mutually exclusive definitions therefore provide the governing framework for PAIA: If information is held by an institution which is a public body, then the provisions of Part 2 of the Act apply; If the institution is a private body, the provisions of Part 3 of the Act regulate access to information held by it.

145 Following the dualistic scheme in section 32(1)(a) and (b) of the Constitution, PAIA provides that if access is sought to a record held by a public body, access must be provided *as a matter of right*, unless a valid ground of refusal is advanced.[47]

146 By contrast, if access is sought to a record held by a private body, the requester must establish that he or she requires access to the record in order to exercise or protect a

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47 Section 11(1) of PAIA

right. Once this has been shown, the requester has a right of access to the records, which may be defeated by a valid ground of refusal.[48]

147 In any given case it is therefore critical to establish whether the records to which access is sought are held by a public or a private body.

148 Section 8 of PAIA provides that a body may be a public body in relation to certain records, and a private body in relation to other records. I find this section to be unhappily worded, for reasons which appear below.

149 What is clear, however, is that the proper enquiry requires an analysis of the activity or function exercised by the body when it produces the record in question.[49]

150 In this case, urge the applicants, the function which the LOC was performing when it issued and awarded the tenders was "*organising, staging and hosting the World Cup*". It was procuring services and goods in order to enable it to carry on that function. If one breaks that function down into sub-functions, it includes matters such as undertaking access control,[50] security functions,[51] designating the venues for games,[52] tending to the infrastructural requirements of the host broadcaster of the tournament,[53] and controlling marketing associated with the tournament.[54] One could also have regard to the list of 59

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48 Section 50(1) of PAIA

49 *Mittalsteel South Africa Ltd (Formerly Iscor Ltd) v Hlatshwayo* 2007 (1) SA 66 (SCA) para 10

50 See Special Measures Act 11 of 2006.

51 See Special Measures Act 11 of 2006.

52 AA pp 333 – 334 para 7.2.1

53 AA p 334 para 7.2.2.2

54 AA p 406 para 115.4

functions set out above, as supplied by the LOC, which no doubt has a very good idea of just what is required to organise stage and host the World Cup.

151 The case law on the meaning of public and private body under PAIA draws heavily on the approaches taken domestically and in other jurisdictions to the question of whether a body is subject to judicial review.

152 In determining whether an institution is a public body in the field of administrative law, courts have often utilised the 'control test' in terms of which an institution will be regarded as a public body where it is controlled by the state. 'Control' can be established in a variety of ways: ownership; regulation of conduct; veto powers; direction.[55]

153 The SCA has held that in the determination of what is a 'public body' under PAIA, while the control test may be appropriate in some circumstances, it may not be the most suitable one in other circumstances.[56]

154 In *Mittalsteel*, the SCA held that the control test is useful in a situation when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead. This would convert a body, which for all other purposes may be regarded as a private entity, into a public body for the time and to the extent that it carries out public functions.[57]

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55 *Mittalsteel* paras 13 - 16

56 *Mittalsteel* para 22

57 *Mittalsteel* para 19

155 Relying on English law, the SCA noted that the English courts use three tests to establish whether a body is sufficiently 'public' to permit its decisions to be subject to judicial review. These are:

(a) whether, but for the existence of the body, the government would itself almost inevitably have intervened to regulate the activity in question;

(b) whether the government has encouraged the activities of the body by providing underpinning for its work or weaving it into the fabric of public regulation or has established it under the authority of government; and

(c) whether the body was exercising extensive or monopolistic powers.[58]

156 At first blush, the LOC would seem to most admirably meet these criteria. But a more detailed consideration of the applicable legislation and legal principles is required, not least because this matter is unlikely to be finally decided by this judgement.

157 As De Smith, Woolf and Jowell have noted in Judicial Review of Administrative Action

> "*A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. This may happen in a wide variety of ways.*"[59]

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58 *Mittalsteel* para 21

59 (1995) 5 ed at 167.

158 The case law therefore establishes that whether an institution qualifies as a 'public body' under PAIA will depend on the nature of the powers and functions it performs. Although the level of state control of these powers and functions may be relevant to the question of classification, it is not decisive.

159 The central issue in this aspect of the matter was whether the LOC is public body or not.

160 As an introduction to a central issue that emerged quite clearly in the oral argument, I set out the litigants' submissions on the nature of the activity or function of the LOC in relation to the records in issue.

161 Mr Budlender, who appeared with Ms Hofmeyr for applicants, urged that the activity or function of the LOC in relation to the records in question is *the staging and hosting of the 2010 World Cup*, which, he argued, is a public activity involving the whole country and these are the records of a public body. Applicants submitted that the soccer World Cup is *"the most significant sporting event in the world"*.[60] The LOC is responsible for "*organising, staging and hosting the World Cup*".[61] It is a public body. If this is correct, it is not necessary to consider the private body request.

162 Mr Cockrell for the respondents urged that the activity or function of the LOC in relation to the records in question was *a private tender process,* which, he argued, is a private activity involving just the tenderers and the LOC and hence these are the records of a private body. If this is correct I must dismiss the public body request and turn my attention to the private body request. A

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60 It is common cause between the parties that this is the case: FA p 20 para 38; AA p 380 para 55.1

61 FA p 27 para 49.5.5; AA p 387 para 74.1

163 As that it is important to decide the matter on the basis brought by the applicants, i.e. if they are wrong about the LOC being a public body under PAIA then they are entitled to the records under the private body provisions of PAIA, I have determined to decide the matter on the same basis. In other words, if I am wrong in my conclusion on the public body aspect of the matter, then the result would still be the same as the private body requirements of PAIA have been met.

THE PUBLIC BODY REQUEST

164 In the discussion that follows it is important to bear in mind that a great deal depends on how narrowly or broadly one construes the activity or function in relation to the records.

165 The definition of public body in PAIA is as follows:[62]

"*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—

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[62] The definition bears obvious similarities to the definition of "organ of state" in section 239 of the Constitution.

> *(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***". (emphasis provided)

166 Much of this lengthy judgement[63] turns on the meaning of the highlighted two lines above.

167 The applicants contend that the Organising Committee falls within paragraph (*b*)(*ii*) of the definition, i.e. that the LOC is a functionary or institution exercising a public power or performing a public function in terms of legislation.

168 A meticulous investigation of what (b)(ii) means and how to apply it to the facts of this case was presented by all counsel, upon whose efforts this judgement is almost entirely based.

169 It is common cause between the parties that the LOC is responsible for "*organising, staging and hosting the World Cup*".[64] This, applicants submit, is inherently a public, and a public interest, function.

170 Applicants point out that the LOC is doing what is in the national interest – not in the private interest of the few people who will play in the matches, or even solely or primarily in the interest of those who will watch the matches (itself a public function). I do not think there can be any doubt about the national interest being promoted by the LOC.

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63 Like Bernard Shaw, I did not have time to write a short one.

64 FA p 27 para 49.5.5;
AA p 387 para 74.1

171 Applicants argue that if this were not the case, the national, provincial and local governments would not be investing vast sums of money in the staging of the World Cup, and the government would not have deputed a substantial number of Cabinet Ministers to serve on the LOC. As highlighted above, the 'sub-functions' which are performed to this end include the following: undertaking access control,[65] security functions,[66] designating the venues for games,[67] tending to the infrastructural requirements of the host broadcaster of the tournament,[68] and controlling marketing associated with the tournament.[69]

172 Applicants submit that these functions are performed in the public interest and are of a public character. They argue that but for the LOC performing these functions, they would certainly be left to the government to carry out. They point out that the LOC is authorised to carry out these functions and to organise, host and stage the World Cup. It operates with extensive powers – a characteristic feature of public power, and it carries out functions which would ordinarily be exercised by government. The very purpose of the LOC is to promote the public and national interest. As set out in more detail below, the operations of the LOC are underpinned by a framework of legislation and it has been woven into the legislative framework of nation and city.

173 All of these features of the LOC's activities point to the conclusion that it is exercising public functions when it organises, hosts and stages the FIFA World Cup. In sum,

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65 See Special Measures Act 11 of 2006.

66 See Special Measures Act 11 of 2006.

67 AA pp 333 – 334 para 7.2.1

68 AA p 334 para 7.2.2.2

69 AA p 406 para 115.4

applicants argue, without the LOC performing these tasks, the most significant sporting event in the world[70] could not be hosted by South Africa.

174 Applicants submit that this interpretation is also in accordance with the injunction in section 39(2) of the Constitution[71] to interpret legislation in a manner which better advances the spirit, purport and objects of the Bill of Rights[72]. Because the right of access to information of public bodies is unqualified, a broader interpretation of public bodies under PAIA would better promote the Constitution's ambition of enhancing transparency and accountability in the public sector. Simply put, adopting an unqualified interpretation of public power will result in more people having access to the records of bodies operating in the public realm. An invitation of so general a nature must be refused. The case must be decided on an application of legislation to the specific body under consideration.

175 The respondents, observe that the applicants' approach is too *general* and that the entire thrust of the founding affidavit focuses on what the Organising Committee does *in general terms*,[73] whereas the proper way to approach the problem is in more particular terms.

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70 FA p 20 para 38; AA p 380 para 55.1

71 "*Interpretation of Bill of Rights*
(1) When interpreting the Bill of Rights, a court, tribunal or forum-
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law; and
(c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

72 *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 (CC) at paras 46, 84 and 107

73 See, for example, founding affidavit para 52.2 page 25 ("The first respondent exercises a public power or performs a public function.")

176 In oral argument the metaphor was used of a high level (general perspective, low detail) or a low level (particular perspective, high detail) approach to be taken by the Court when considering the LOC's activities (functions or powers). If one looks at the activities of the LOC from a high altitude, then its function is probably correctly described as simply organising and staging the World Cup. If the lower altitude view is adopted, then one sees the individual tasks or activities that make up the larger function as separate, discreet, ones.

177 The answer as to which perspective to adopt lies in PAIA, and in particular in section 8. The respondents submit that the relevant question is not whether the Organising Committee exercises a public power or performs a public function in terms of legislation "*in the air*" i.e without regard to the particular activity being performed by the LOC to which the records relate. In other words, argue respondents, the correct approach is not to look at what the overall function or activity of the LOC is, (staging hosting and organising the World Cup 2010) but what *the specific function was when the record was being created or acquired* (conducting a private tender process).

178 The respondents submit that the relevant question is whether the Organising Committee exercises a public power or performs a public function in terms of legislation *when it exercises the functions that form the subject matter of the requested records*.

179 The respondents support this submission by drawing attention to Section 8(1) of PAIA which makes it clear that the same institution may be a "*public body*" when it performs certain functions and a "*private*" body when it performs other functions. It provides as follows:

"*For the purposes of this Act, a public body referred to in paragraph (b) (ii) of the definition of "public body" in section 1, or a private body—*

(a) may be ***either a public body or a private body in relation to a record of that body****; and*

(b) may in one instance be a public body and in another instance be a private body, ***depending on whether that record relates to the exercise of a power or performance of a function as a public body or as a private body****.*"

180 Section 8(1)(b) is unhappily worded. The sub-section appears to simply say that a public body is a public body when it is performing the acts of a public body.

181 I find it more helpful to simply apply (b)(ii) of the definition of public body under Section 1 of PAIA which says that when a body performs a public function or exercises a public power* it is a public body. It leads to the obvious next questions: what does "*performing a public function*" mean, and, what does "*the exercise of a public power*" mean? Neither of these terms are defined in PAIA so the Court must now determine the ordinary meaning of the language used, taking due cognisance of the purpose for which the legislation was enacted, the mischief that it is intended to address and the context of the words in the Act, and indeed the context into which the Act itself fits. If "*the body*" (the LOC) was engaged in either of these activities then it is a public one for purposes of PAIA, provided that the activities were carried out in terms of legislation. I shall come back to the question of what "*in terms of legislation*" means under a separate sub-heading.

THE MEANING OF "*PUBLIC FUNCTION*" "*PUBLIC POWER*"

182 Mr Cockrell relied on Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC) [186] – [194], the minority judgement of Langa CJ, in which Mokgoro and O'Reagan J concurred.

183 This is what the former Chief Justice said regarding the same phrase as used in the Promotion of Administrative Justice Act 3 of 2000:

> "*[186] Determining whether a power or function is 'public' is a notoriously difficult exercise. There is no simple definition or clear test to be applied. Instead, it is a question that has to be answered with regard to all the relevant factors, including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.*"

184 Whilst only a minority judgment it is not without significance and I accordingly dealt with it. That case dealt with The Promotion of Administrative Justice Act, an Act concerned with administrative actions by organs of state. It is a separate Act to the one under consideration in this application. It has a separate function and a different focus. This is how the first part of the definition of 'administrative action' reads in that Act:

> " '*administrative action' means* ***any decision*** *taken, or any failure to take* ***a decision****, by-*
>
> *(a) an organ of state, when-*
>
> *(i) exercising a power 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; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,…*"[74] (emphasis provided)

185 Caution must thus be exercised in taking guidance from cases dealing with PAJA, even though the definitions have some common language. It will be noted that the PAJA

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[74] The definition is extensive, much more extensive than the definition of public body in PAIA. Much of the definition has been omitted from the quotation above.

definition is focussed on **a decision**. This judgement is concerned with the definition of a **public body** under PAIA. PAJA is concerned with decisions taken by the entity in question. PAIA is concerned with the entity itself. The former is obviously of far smaller compass than is the latter.

186 When applying PAJA one asks "*what was nature of the decision*", and the court measures "*the decision*" against the component parts of the definition of an organ of state to decide whether the body that made the decision is an organ of state or not.

187 Nonetheless, one can use the criteria listed by Langa CJ to measure the LOC's tender process, and come to what is at least a provisional conclusion as to the nature of the body when conducting the tenders:

(a) the relationship of coercion or power that the actor has in its capacity as a public institution;

(b) the impact of the decision on the public;

(c) the source of the power; and

(d) whether there is a need for the decision to be exercised in the public interest

188 As I understand the case, the applicants would apply these criteria along the following lines:

(i) The relationship of coercion or power that the LOC has may be seen in general terms with regard to its having undertaken via the Organising Association Agreement to cause government (which is a body of considerable coercive

powers of its own) to: give guarantees, pass legislation; undertake indemnities and generally put a large part of the country's human and other capital at the disposal of the LOC for the duration of the World Cup in the public interest.

(ii) The impact of the World Cup on the public can only be characterised as national, for the reasons given above.

(iii) The source of the power to stage the World Cup is, apart from the funds and support provided by FIFA, government; its guarantees and support. Posed as a *sine qua non* test, it is clear that the LOC could not stage the World Cup and discharge its obligations under the Organising Association Agreement without the government's support and contributions in the various ways detailed in this judgment, particularly the government Guarantees.

(iv) Whether there is a need for the World Cup to be staged in the public interest does not need much consideration. Government has plainly decided that this is so, for it is inconceivable that it would have gone to the lengths that the guarantees demonstrate it has gone to were the hosting and staging of the World Cup not in the public interest.

189 The respondents would submit that the Court should not apply the listed criteria to the "*staging and hosting of the World Cup*", but to "*the conducting of the tenders*" by the LOC conducted, the records in respect of which the Applicants have applied for in this application. They would recommend that the approach should be along the following lines:

(i) The source of the coercion is simply the common law, a private body can call for and conduct tender processes with the limited powers available to a contracting party under the common law of private bodies to contract.

(ii) The impact of the decision as to who to award the tender is minimal, it is a private affair between two ordinary contracting parties, and few contracts can be said to have much impact.

(iii) The source of the power is once again the common law.

(iv) There is no need for the tender process to be conducted in the national interest, it is a private affair involving private funding and private contractual relationships.

190 Continuing the comparison between PAIA and PAJA, the critical enquiry under PAIA is an enquiry into the nature of *an activity* (exercise of a public power, performance of a public function), rather than into the nature of *a decision* (which is the case under PAJA). Decisions may always be included in the concepts of performing a function or the exercising of a power, but the opposite is not true; i.e. the performance of a function is not always a decision, nor is the exercise of a power necessarily a decision. The definition of public body under PAIA depends on concepts of greater scope, greater breadth, than mere decisions.

191 Applicants' propose that the function or power under consideration is: "*Staging the World Cup*" (an obviously public one) whereas the respondents submit that the functions and powers to be considered are those confined to : "*Conducting a tender process*" (more likely to be private in nature).

192 It was skilfully argued by Mr Cockrell for the respondents that for the reasons that follow, the Organising Committee did not function as a public body *when it invited and awarded tenders.* He pointed out that paragraph (*b*)(*ii*) of the definition of "*public body*" incorporates the following requirements:

(i) The *first* requirement is that the body must amount to a "*functionary*" or "*institution*".

(ii) The *second* requirement is that the functionary or institution must exercise a "*public power*" or perform a "public function".

(iii) The *third* requirement is that the functionary or institution must do so "*in terms of legislation*".

193 I deal with each of these in turn.

A "*functionary*" or "*institution*"

194 The respondents submitted that, when it awards tenders or exercises procurement functions, the Organising Committee does not act "*in terms of any legislation*".

195 If this is accepted it follows, say the respondents, that the Organising Committee is not a "*functionary*" or "*institution*" (within the meaning of the definition) when it awards tenders. A "*functionary*" or "*institution*" submit the respondents, is a body that derives its powers from legislation. I do not agree. If this was so it would be unnecessary to include the requirement of acting in terms of legislation at the end of the definition of public body in (b)(ii). To do so would be tautologies. The respondents' argument in this regard would

accept that the legislature intended a tautology to be present in its definition of public body under PAIA, which, I do not accept.

196 I conclude that the phrase "*in terms of legislation*" is not intended to be included in the meaning of functionary or institution, the phrase is added separately elsewhere in the definition.

PUBLIC POWER, PUBLIC FUNCTION

197 The respondents submit that a body exercises a "*public power*" or performs a "*public function*", when:

(i) the person exercises a power that is inherently governmental in character;

(ii) where the state has outsourced to a private person a responsibility that the state would otherwise have had to discharge; and

(iii) where a private body is controlled by the state.

198 The example given by the respondents of the first situation (exercise of a power inherently governmental in character) is where the person *"[carries] out functions of*

government",[75] performs "*what is traditionally a government function*"[76] or engages in "*the affairs of service of the public*".[77]

199 So, for example, pointed out respondents, the power to punish is inherently a governmental function.

200 Mr Budlender, for applicants, also used punishment as an example of an inherently public function. He gave the example of the prison-operating company is brought to mind. Prisons provide good examples of what is a traditional or typical or inherently government function. The courts have held that private bodies exercise a public function *when they exercise powers of punishment by way of disciplinary committees.* This is so even though there be no criminal component – it is simply the power of punishment. For example, to exclude a member of a private body from being a member of that body i.e. expulsion or disbarring.

201 The point was made by Lord Denning in *Breen v AEU* [1971] 2 QB 175 (CA) at 190:"*[Institutions such as the Stock Exchange, the Jockey Club, the Football Association and innumerable trade unions] delegate power to committees. These committees are domestic bodies which control the destinies of thousands. They have quite as much power as the statutory bodies of which I have been speaking. They can make or mar a man by their decisions.*" It is for this reason that the South African courts have consistently held that the conduct of a committee of a voluntary association that

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75 *Greater Johannesburg Transitional Metropolitan Council v Eskom* 2000 1 SA 866 (SCA) para 12

76 *MittalSteel South Africa Ltd v Hlatshwayo* 2007 1 SA 66 (SCA)

77 *Korf v Health Professions Council of South Africa* 2000 1 SA 1171 (T) at 1177I

investigates a complaint against members which may result in disciplinary action, (punishment) falls within the reach of administrative review.[78]

202 The examples given by respondents of the second situation (where the state has outsourced to a private person a responsibility that the state would otherwise have had to discharge) are (i) the prison example – if the state were to outsource to a private company the incarceration of prisoners - and (ii) where a private company is engaged by government to pay state pensions.[79]

203 Olivier JA made the point in *Transnet Ltd v Goodman Brothers (Pty) Ltd* 2001 1 SA 853 (SCA) para 38, when he stated that Transnet was an organ of state since it was "*exercising the public powers and performing the public function … for or on behalf of a government department*" (emphasis added).

204 The third situation posited by Mr Cockrell as a situation where a Court should treat a notionally private body (such as a company) as a public body under PAIA is where a private body is controlled by the state. He gives the example of a company whose sole shareholder is the government and whose entire board of directors is appointed from the ranks of government.

205 In ordinary private and public companies (i.e. where government is not the sole shareholder) the shareholder(s) hold the power to appoint the directors and the directors owe a fiduciary duty to the company. This duty may require the directors to conduct the

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78 *Bekker v Western Province Sports Club* 1972 3 SA 803 (C) at 811B; *Marlin v Durban Turf Club* 1942 AD 112; *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A); *Barnard v Jockey Club of South Africa* 1984 2 SA 35 (W); *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 2 SA 1 (A)

79 *IDASA v ANC* 2005 5 SA 39 (C) para 26

business of the company in a manner that does not advance the interests of one or other shareholder. As a general rule, however, unless there is a conflict of interests between the interests of the company and that of its shareholder, the majority shareholder's interests will direct or control the actions of the company.

206 The Supreme Court of Appeal explained the control situation as follows in *MittalSteel South Africa Ltd v Hlatshwayo* 2007 1 SA 66 (SCA) para 19:

> "*The control test is useful in a situation when it is necessary to determine whether functions, which by their nature might as well be private functions, are performed under the control of the State and are thereby turned into public functions instead. This converts a body like a trading entity, normally a private body, into a public body for the time and to the extent that it carries out public functions*."

207 The respondents submit that, applying any of these tests, the Organising Committee does not exercise a "*public power*" or perform a "*public function*" when it invites and awards tenders as:

(i) The power to invite and award tenders is *not* a power that is inherently governmental in character. It is a power that "*that is not unique to the Crown, but is possessed in common with other legal persons*".[80] Private persons obviously have the power to call for tenders and to enter into contracts.

(ii) The power to invite and award tenders is *not* a power that has been outsourced by the state to the Organising Committee.

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[80] Hogg Constitutional Law of Canada as quoted in *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) para 40

(iii) The power to invite and award tenders is, the respondents contend, *not* a power the exercise of which is controlled by the State. The respondents argue that the State has no control over the Organising Committee.

208 The respondents submit that the applicants have, in an effort to avoid this conclusion, sought to adopt what the respondents characterised as "*an inappropriately nebulous understanding of what is meant by a 'public power' or 'public function'* ".

209 The respondents criticised applicants for suggesting that, if the public has an interest in the way in which a power is exercised, then the exercise of that power amounts to a "*public power*".[81] The Respondents submitted that this test is far too loose to determine what amounts to a "*public power*". The respondents point out that no doubt the public has an interest in the composition of the Bafana Bafana football team, but nobody would suggest that the selectors exercise a "*public power*" when they choose the team. There might, however, not be quite so few people to make this suggestion if the selectors counted amongst their number eight cabinet ministers acting in their official capacities.

210 The respondents submit that the test formulated above in paragraph 204 provides a more rigorous and analytical understanding of what amounts to a "*public power*".

211 The hallmark, submitted the respondents, of a "*public power*" or "*public function*" is that it is *governmental in character*. I understand this to mean that the function or power must either be inherently or traditionally or typically performed by government or controlled by government.

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81 See for example founding affidavit para 53 page 39

212 The respondents submitted that the powers of the Organising Committee to invite and award tenders are not governmental in character, and therefore do not amount to the exercise of a public power or the performance of a public function.

213 The respondents submitted that the relevant question is not whether the Organising Committee exercises a public function or performs a public function *when it organizes the FIFA World Cup*.

214 The respondents submitted that even if the question were posed as applicants would have it posed, i.e., is the LOC performing a public function or exercising a public power when organizing and staging the World Cup, this question would in any event receive a negative answer in light of the following authorities.

215 In *R v Football Association Ltd, ex parte Football League Ltd* [1993] 2 All ER 832 the English Court was concerned with a decision of the Football Association, a voluntary association which is the governing body of football in England. Rose J held that the Football Association was not a body which is susceptible to judicial review:

> '*Despite its virtually monopolistic powers and the importance of its decisions to many members of the public who are not contractually bound to it, [the Football Association] is, in my judgment, a domestic body whose powers arise from and exist in private law only. I find no sign of underpinning directly or indirectly by any organ or agency of the state or any potential government interest…, nor is there any evidence to suggest that if the FA did not exist the state would intervene to create a public body to perform its functions….[F]or my part, to apply to the governing body of football, on the basis that it is a public body, principles honed for the control of the abuse of power by government and its creatures would involve what, in today's fashionable parlance, would be called a quantum leap. It would also, in my view, for what it is worth, be a misapplication of increasingly scarce judicial resources.' (at 848h-849d)*

216 In *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853 (CA) the English Court of Appeal was concerned with the Jockey Club, a body which

controls horse racing in England. The Court of Appeal held that the Jockey Club's decision to disqualify a horse from a race was not subject to judicial review at the behest of the applicant (who was contractually bound to the Jockey Club's rules). Bingham MR explained the point as follows:

> '[*T]he Jockey Club is not in its origin, its history, its constitution or (least of all) its membership a public body…. It has not been woven into any system of governmental control of horse racing…. This has the result that while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental'* (at 866j-867c)

217 Hoffmann LJ expressed the principle more broadly:

> '*All this leaves is the fact that the Jockey Club has powers. But the mere fact of power, even over a substantial area of economic activity, is not enough. In a mixed economy, power may be private as well as public. Private power may affect the public interest and the livelihood of many individuals. But that does not subject it to the rules of public law.*' (at 875e)

218 These principles were endorsed in a South African context in *Cronje v United Cricket Board of South Africa* 2001 4 SA 1361 (T) at 1377-1379. These cases are distinct from those which dealt with private bodies exercising powers of punishment, discussed above.

219 It is obvious that the task of unearthing the correct meaning of "*public power*" and "*public function*" will be significantly advanced if one can say what the word "public" means in the phrases in the context of PAIA.

220 The Encarta dictionary gives the following meanings of

> "*public*" : **1**.**concerning all members of the community** relating to or concerning people as a whole or all members of a community…**4. of the state** relating to or involving government and governmental agencies rather than

> private corporations or industry … **8. belonging to the community** belonging to the community as a whole and administered through its representatives in government e.g. public land [15th Century. Directly or via French from Latin *publicus,* an alteration of *poplicus*…from *populus* 'people'.

221 The exercise of a **public power** would, on the meanings that I have quoted, mean: the exercise of a power that concerns all members of the community; the exercise of a power that relates to or involves government and governmental agencies; and, the exercise of a power belonging to the community as a whole and administered through its representatives in government.

222 The performance of a **public function** would on the same method, mean: the performance of a function that concerns all members of the community; the performance of a function that relates to or involves government and governmental agencies; and, the performance of a function belonging to the community as a whole and administered through its representatives in government.

223 In the light of the facts summarised above, for anyone to suggest that on these papers that the 2010 World Cup in South Africa does not concern all members of the community, does not relate to or involve government or governmental agencies and does not belong to the community as a whole administered through its representatives in government (one thinks of the cabinet ministers serving on the LOC) would be surprising. This is, in essence, the position that the applicants take in these proceedings.

224 The respondents urge, however, that the question must be asked was the LOC performing a public function or exercising a public power *when it decided on the tenders*?

225 Mr Cockrell submitted that since all of the records relate to tenders advertised, adjudicated and awarded by the Organising Committee, the relevant question, it was submitted, is whether the Organising Committee functioned as a public body *when it invited and awarded those tenders*. In other words the way to formulate the issue, according to the respondents, is to ask whether the Organising Committee was functioning as a public body "*when it decided to award the tenders to the successful tenderers*". I have already cautioned against narrowing the critical activity down to the level of a *decision* when applying PAIA.

226 In the *Chirwa* case the learned Chief Justice concluded, in a minority decision, that an individual dismissal of a public employee did not constitute the exercise of a public power or the performance of a public function on the facts of that case but warned[82] that his reasoning would not necessarily old true for all such cases.

227 Applying the different factors listed by the learned Chief Justice to the facts of this case as I have done above, and giving them due weight in context, I am driven to conclude that even on the narrower enquiry posed, on the facts of this case, which is on the other end of the scale from any private dismissal, it would be correct to find that the LOC is performing a public function or exercising a public function when deciding on the tenders in question.

228 Using the respondent's formulation of what the question should be, but replacing the word "*public*" with the dictionary meanings, the question would read something like this: when deciding on the tenders, did the LOC perform a function that concerns all members of the community, a function that relates to or involves government or governmental

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82 At par [191]

agencies and belongs to the community as a whole administered through its representatives in government?

229 In deciding who was to be awarded the tenders it must be remembered that the LOC, like all companies, is controlled by its board of directors. On the LOC's board of directors serve no less than eight cabinet ministers, who serve on the board as representatives of government. I have not been enlightened as to how many members sit on the board of directors of the LOC in total but I have no doubt that the eight cabinet ministers comprise a significant influence on the LOC's decision making processes.

230 When LOC decides who to award any tender to, it does not seem likely to me that it does so in a manner that can realistically be insulated from government. On the contrary, it is inherent in the structure of its highest decision making body that government is represented in numbers. No decision of any consequence for the LOC can be made, either at the level of the board of directors itself, or at the level of CEO or lower, without government being involved, not as a matter of fact but as a matter of law, for a company is in law controlled by its directors. All those who act on the company's behalf derive their powers to do so from powers delegated, expressly or tacitly, from the board of directors.

231 The fact that its board of directors contains a substantial government contingent weighs heavily with me in favour of a conclusion that the activities of the LOC are public those of a public body. in *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd*[83], an access to information case under s 23 of the Interim Constitution had based its decision in large part on the fact that the board of directors was government appointed.

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[83] 2002 (3) SA 30 (T)

232 In the context of this case it is unnecessary to say which is the decisive factor, but as will be appreciated, the mere presence of the eight Cabinet Ministers on the LOC's board is a weighty consideration indeed. It is for good reason that the authorities relied on by the *amicus* emphasise that each case must be decided on its particular facts. I cannot imagine that there are many companies which are not state owned that have so many cabinet ministers serving on their board of directors.

233 As regards the other tests, Conradie JA[84] quotes with approval a the following passage from a foreign academic text:

> "*If the degree of [government] control is significant, the functional test has been held to be of little or no importance.*"

234 The existence of the eight cabinet ministers on the board of the LOC is in itself probably sufficient to meet the test of significant control. Hence, even if I am wrong about the public funding component of the public body, the cabinet ministers presence on the LOC board of directors would suffice to establish, for the reasons given, that the LOC is a public body in regard to its tender records.

235 Conradie JA quoted[85] the following from an English textbook:

> "*A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest*…."

236 Mr Budlender submitted that government was "*embedded*" in the LOC, as it was in the Mittalsteel case where it was found that due to various legislative powers of control

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84 Mittalsteel (supra)

85 At par [20]

vested in government over the appellant it was "*without a doubt, subject to the State's control, perhaps indirect, but firm all the same*."

237 Conradie JA concluded:

> "*[28] The appellant was thus, at the relevant time, and when exercising the functions in respect of which the respondent requested records, a 'public body' for the purpose of s 11 of PAIA. It was not seriously contended that the documents did not come into existence* ***in the course of Iscor's pursuing its activities****. The respondent is thus entitled to access to those records.* " (emphasis provided)

238 It will be noted that in dealing with the documents coming into existence in pursuance of Iscor's activities, the Supreme Court of Appeal did not apply a test that was closely focussed on the individual tasks (such as conducting tenders). It appears to have been satisfied that as long as Iscor was pursuing its activities in a general sense, all that that would ordinarily entail, the it was sufficient for the Court to order the that access to those records be provided under PAIA.

239 I have observed that if officers of government serve on the body itself, the questions are all but answered, but perhaps not conclusively so. This factor aside, in my view, on a proper application of (b)(ii) of the definition of public body in PAIA, a critical indicator of whether a particular scenario should fall within or without the definition of public body is whether or not public funds are being disbursed in the course of the activity of that body.

240 It would thus make no difference if the body were to conduct a tender for its privately funded disbursements, and to conclude a private contract with no tender process preceding it for purposes of disbursing the public funds entrusted to it. The fact that it is in receipt of and is disbursing public funds is sufficient to constitute its activities as public.

241 The activity does not lose its character of being "*public*" just because it is an activity that may also be performed by private bodies. The prisons example used by Mr Budlender demonstrates the point.

242 Mr Budlender, for the applicants, as I have mentioned, gave the example in oral argument of a private security company awarded a government contract to operate a prison. In operating the prison, so the example went, the security company would be exercising a public power or performing a public function in operating the prison – and would thus satisfy this element of the definition of "*public body*" in *b(ii)*. I infer that in such a case the prison records regarding, for example, inmates taken into custody and released would be records that could be inspected under PAIA as the records of a public body.

243 Continuing his example, Mr Budlender pointed out that if the same security company were to contract with an individual householder, the security company would be acting as a private body. I infer that its records in regard to that private contract would in such a case be immune to a public body request under PAIA. Mr Budlender then developed the argument by postulating that the prison-operating company in his example invites catering-businesses to tender to be awarded the contract to supply meals to the prison. Although the tendering process would in this example be a private one designed to result in a private contract, Mr Budlender argued that on a proper application of PAIA, the records relating to the food-supply contract would be the records of a public body and available for inspection as a public body's records under PAIA. In my view the reason why this is obvious is not so much because the tender process for the caterers is wound up in running a prison, but because it is obvious that state funds would be used to pay the caterer, a matter to which I will return.

244 The first scenario is of tender process for catering suppliers conducted by the security company engaged by government to run a prison. The second scenario is tender process conducted by the same security company to procure sub-contractors to provide guarding services to private clients. No government funds are engaged.

245 It will be noted that the two scenarios are well chosen to illustrate the distinguishing features of public versus private bodies, for it is at least arguable that private security guards perform a function similar to the police, a patrolling and protection function that benefits more than just the clients who pay to have private security services provided to them, it serves as a deterrent to criminals for all in the area patrolled by the security company, irrespective of whether all in the area has contracts with it. It is not even so much in the nature of the activity or the public benefit that determines its public character; in the first scenario the funds being spent have been provided by government; whereas in the second scenario the funds have not emanated from government. In this one distinguishing feature I see the clearest difference in principle between the two scenarios. I do not mean to suggest that it is only where state-funding is received by a body that it will be performing a public function or exercising a public power, but the fact that state funding is involved must always be a useful feature of any such enquiry and, I would venture to suggest, will incline a Court to conclude that the function or power in question is public in nature.

246 Mr Cockrell for the respondents drew attention to *IDASA v ANC* 2005 5 SA 39 (C) para 29, wherein the Court determined that the records relating to the private donations made to political parties were not to be disclosed under PAIA, in which the court explained the matter as follows:

> '*It is apparent from these provisions that the definition of "public body" is a fluid one and that the division between the categories of public and private bodies is by no means impermeable. The Act recognises the principle that entities may perform both private and public functions at various times and that they may hold records relating to both aspects of their existence. The records being sought can thus relate to a power exercised or a function performed as a public body, in which event Part 2 of PAIA is applicable, or they can relate to a power exercised or a function performed as a private body, in which event Part 3 of PAIA is applicable. The language of section 8(1) makes it clear that, in respect of any particular record, a body must be either a "public body" or a "private body"; it cannot be both. Whether it is one or the other thus depends on whether the record "relates to" the exercise of a power or performance of a function by that body "as a public body" or "as a private body".*' (emphasis added).

247 Whilst the passage is undoubtedly correct, the reliance on section 8 in the latter part of the quoted portion of the judgement is problematic for the reason given above in relation to that section.

248 Applying Mr Cockrell's approach to the example of the prisons catering contract, the company's records relating to the catering contract would be protected from disclosure under PAIA as the activity or function relating to the record, (the function of private tendering), is a private one. But just because private people or entities can conclude private contracts or carry out private tender processes does not mean that when a company enters into a contract, the act of entering into the contract is private.

249 Tendering processes are not *inherently private*, they can equally be of a public nature. That the LOC might have intended its tenders to be private is of no relevance, the enquiry is not one of intention.

250 Both parties' counsel referred to *MittalSteel South Africa Ltd v Hlatshwayo* 2007 1 SA 66 (SCA). In para 10 the Supreme Court of Appeal held:

> "*A body such as that described in subsection (b)(ii) of the definition of "public body" in section 1 of PAIA, one "exercising a public power or performing a public function in terms of any legislation", has the attributes of a "public body" only when, in terms of section 8 of PAIA, it produces a record in the exercise of that power or the performance of that function. When it does not produce such a "public record", it is a private body in relation to whatever record it does produce*."

251 It is of significance that the respondents accept that the position is different in the case of those tenders that involve the expenditure of money that has been given to the Organising Committee by government for a designated purpose. The respondents state in paragraph 15.6 of their answering affidavit that:

> "*I have indicated in paragraph 7.4.1 above that the Organising Committee has received funding from government for specific purposes, and that those funds have been ring-fenced for the designated purposes. For the purposes of this application,* ***I am prepared to accept for the sake of argument that the Organising Committee may exercise a "public power" or performs a "public function" when it invites and awards tenders involving expenditure of the money referred to in paragraph 7.4.1 above****.* [funds sourced from government] *I point out that the Organising Committee has awarded only one tender that falls into this category being the tender for the opening and closing ceremony awarded to the VWV Consortium. If negotiations with the Department of Minerals and Energy are successful in relation to energy supply, a further tender will fall into this category*."

252 In my view this concession is rightly made by Jordaan on behalf of the LOC. A public power is plainly exercised; a public function is plainly performed, when funds are disbursed from the public purse.

253 Applying the test set out in paragraph 204 above, (the respondents' proposed test) it is clear that the opening and closing functions of large sporting functions are not inherently governmental, nor are they government controlled, yet the respondents recognise that in regard to these ceremonies the LOC is acting as a public body. The reason why this is accepted by the respondents is, as I read their affidavit, because government funds are used to pay for these ceremonies.

254 Public funds are collected by the revenue-collecting agencies of the State eg. the Receiver of Revenue; the Department of Customs and Excise, and, at a local authority level, the local authority's department(s) responsible for collecting rates from property owners.

255 It is a fundamental premise of these transactions (the handing over of taxes of various sorts to the government collection agencies) that the funds collected will be used for a public, not a private, power or function. Taxpayers do not pay taxes on the understanding that government will spend those funds privately. The taxpayer is entitled to accept as a given that the funds collected from the public will be used for the public good, in the public interest[86].

256 The role of public funding sheds light on Mr Budlender's example of the private security company being engaged by government to operate a prison (whose prison-related records would be open to inspection via a public body request under PAIA) and the same security company having private contracts (the records in respect of which would not be open to inspection via a public body request under PAIA).

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[86] Greater Johannesburg Transitional Metropolitan Council v Eskom 2000 (1) SA 866 (SCA) [12]

257 It is, in my view, because government funding would be used by the private security company to run the prison and pay for the catering services to feed the prisoners that its catering contract tender records are so obviously to be regarded as the records of a public body under PAIA. By contrast, when providing the private guarding or security service to its private clients the same security company is being paid by those private clients. If it were to tender for a catering contract to provide food for its guards who protect the private clients there would be little difference between the tender process for the prison and the tender process for the private guards.

258 In my view the origin of the funds expended plays a significant role in guiding a Court to the correct conclusion. A body receiving and disbursing public funds is either exercising a public power or performing a public function, (spending state money) it matters not which. Government funds are the DNA of government, where such funds are to be found, so too is government.

259 If the body receives both state and private funds, then it is acting as a public body at least in respect of the public funds, and to draw too fine a distinction between the public funded activities and the privately funded activities is to place too much trust in the body's account keeping practices; there is no reason why the public should have to limit its rights under PAIA to anything less than a full disclosure of the records, and if that should involve some invasion of private it is a cost that must be paid.

260 To look to the nature of the function or power alone is not a reliable guide on its own, the source of the funding required to perform the function or exercise the power must also direct the Court to the correct conclusion.

261 Even if the private security company had conducted tenders to find sub-contractors to provide guarding services to private clients on its behalf, that would not make the power that it exercised, nor the function that it performed, a public one. It is when it is dealing in public funds that the character of its actions changes from private to public.

262 When public funds pass directly or indirectly into the control of an entity for onward payment to another or others, irrespective of whether the function to be performed or the power to be exercised is inherently, traditionally or typically governmental – outsourced or not - or whether it is subject to government control, it is performing a public function or exercising a public power in receiving and disbursing those funds.

263 This is the only basis on which the respondents' concession that its records in regard to the VWV consortium i.e that that tender was one in which the LOC was acting as a public body, is consistent with the rest of its case. Nothing distinguishes the VWV tender from any of the others conducted by the LOC but for the fact that it was public funding that was being spent by the LOC.

264 In private law an agent has a duty to account to a principal for the expenditure by the agent of the principal's funds. The logic underlying this duty informs the present enquiry. Although there is no contract of agency operative in this case, it is clear that the provider of at least some of the funds is government, and the entity charged with spending them is the LOC.

265 PAIA as an instrument of policy designed to hold public bodies accountable. The respondents point out that the applicants do not seek access to the VWV Consortium / opening and closing ceremonies tender documents specifically. In my view this in no way

should serve to prevent applicants from access to at least these records, i.e those relating to the tender documents in respect of which public funds were disbursed for the opening and closing ceremonies of the FIFA World Cup.

266 It must follow that, subject to other limitations, where government funds are being disbursed by a "*private*" corporate entity (e.g. a company) the right to access to information applies to all records relating to such expenditure. I do not understand the respondents to contend otherwise.

267 Once public funds are involved, it is clear that the tests suggested by the respondents to assist in interpreting what is meant by public body under PAIA are plainly incomplete. Another leg must be added to the test, one that pays due regard to the significance of public funding in determining whether a body is performing a public function or exercising a public power. On their own the three legs to the test in par. 204 are inadequate to the task, and fail to produce a result that is consistent with the respondent's own concession.

268 In formulating an appropriate test (or guide to interpretation of the particular provision of PAIA) to divine what property or set of properties constitutes the exercise of a public power or the performance of a public function, one would have to formulate a test that accommodates the role of state funding when applying the definition of a public body in subsection (b)(ii) of PAIA.

269 I do not propose to formulate such a test. I need only conclude that the respondents' proposed test (par. 204 above) is insufficient as a reliable guide to adopt in approaching the task of interpreting subsection (b)(ii) of the definition of public body in PAIA. Whilst the respondents' proposed test provide valuable tools in informing the process of

interpreting the subsection and applying it to any non-state body and its records, it is, as I think I have demonstrated, not enough to answer all of the respondents' proposed tests in the negative to be able to conclude that the question "*Is this a public body under subsection (b)(ii) of the definition of a public body under PAIA*" should necessarily be answered in the negative.

270 One can make a finding that the power or function exercised or performed is not inherently governmental in character; that the power or function has not been outsourced by the state, and that the power or function is not under the control of the state, but still conclude, as the VWV Consortium example shows, that the power or function is a public one and hence that the functionary or institution that performed the function or exercised the power is indeed a public body as defined in subsection (b)(ii), (leaving aside, once again, the component of the definition that requires that the body exercise the power or perform the function *in terms of legislation*).

271 There is nothing else *but the fact that state funds are involved* that sets the LOC's tender records in respect of the VWV Consortium apart from the LOC's other tender documents. It is hard not to conclude that it is solely because state funds were disbursed via the VWV Consortium tender process (the tender for the opening and closing ceremonies) that the LOC conceded the obligation to provide access to those records. Clearly, state funding is something of an acid test for whether the functionary or institution is a public body.

272 In my view, because this functionary or institution, the LOC, disbursed public funds, even though that functionary may in all other respects be a private one performing an act or acts which are in no other way governmental in character, origin or under governmental

control, (which is not the case here) it surely is performing a public function or exercising a public power. As the funds under its control are from the public purse, it cannot be otherwise.

273 What does this imply for those tenders that the LOC conducted that did not involve state funds? Must the Court accept that the LOC's "*ring fencing*" of the state funds should "*ring fence*" the applicants' rights to access any other tender records of the LOC?

274 Apart from the other grounds of the finding that the LOC is a public body, I think the answer to this question must be in the negative. Mr Cockrell urged me to apply the *Plascon Evans* test[87], which would mean that because the respondents say these funds are ring fenced a court must accept that they are.. The difficulty that I have with this is that I do not know what this means, other than in the colloquial sense, i.e, kept separately. Does this mean that the government funds are kept in a separate bank account? That there are preference shares issued to government in respect of these funds? Does it mean that they government funds are commixed with the LOC's ordinary funds but dealt with on specific instructions to the LOC's bankers and accountants? Does it mean that these funds are kept in an attorneys trust account, with the protections and accounting obligations that are associated with that? I do not see how the *Plascon Evans* test can oblige a Court to accept so vague an averment that the funds are "*ring fenced*" as constituting sufficient proof. A Court would at least expect to be presented with a copy

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87 Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A): dictum at 635-6 "[W]here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact … if the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks … Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

of the records, the bank statements, the accounting entries in the LOC's books of account, the specific accounting policies applicable thereto (not some general invocation of GAAP), to support the substance of this averment. On an evidentiary basis, therefore, I do not have enough before me to merit a finding that the records of the government funded tenders are so distinct and the activities in respect thereof are so separate that those records can practicably be treated differently from the other tender records.

275 Then there is the question of who is the VWV Consortium. A consortium is not a recognised legal entity. It is normally in the context of tenders a number of companies held together by the terms of an agreement drawn specifically for purposes of obtaining the business offered in a tender process. How is the Court to understand that the funds to be paid to such an entity have been "*ring fenced*"? Does the consortium operate a single bank account; does it have a single accounting structure, an obligation to maintain accounts, an obligation to be audited? The problems of accepting the assurance that the funds are ring fenced is compounded by the variable character of a consortium. The Plascon Evans test does not operate to convert a bald averment into conclusive proof, to convert conclusions into evidence.

276 I thus consider the receipt of public funds by the LOC for onward disbursement to third parties (which happens in this case to have apparently occurred via a tender process) to be a strong indicator that in the conduct of its tender processes it is to be regarded as having taken place in "*the performance of a public function or the exercise of a public power*". In my view, a body that receives public funds for onward payment to others is almost certainly exercising a public power or performing a public function in respect of those funds.

277 To draw a line between those tenders which involve the disbursement of public funds and those which involve the LOC's private funds is on the facts of this case impractical. In my view, once a body has accepted the responsibility that comes with receipt of public funds and the duty to disburse those funds to others, it is artificial to limit the reach of a PAIA public body request to only those tender records that relate to those funds unless there is clear evidence, which there is not in this case, that the public funds have been rigorously kept separate and screened off from the other funds handled by that body. Money is a fluid thing; its ebb, flow and evaporation can be achieved in the modern day by the click of a mouse, whether intentional or inadvertent. Where the interest earned on funds received ends, and where the finance charges on moneys borrowed begins, should not be matters that a Court should be prepared to accept on anything but cogent and detailed evidence. Given the nature of the LOC's record keeping it is perhaps not surprising that no better evidence of precisely how the VWV consortium funding was "*ring fenced*" could be produced. Whatever the reason, I consider the evidence presented by the LOC in this regard to be insufficient.

278 It cannot be that just because the funding of the body comes from state coffers (from "*the people*" referred to in the opening line of the preamble to the Constitution) that the recipient of those funds is automatically a public body under PAIA – still leaving aside the acting in terms of legislation requirement. A state employee would not have to account to his or her employee for how he or she spends his or her salary; a company engaged by the state to provide maintenance to public buildings would not have to make its records available under PAIA to show how much it paid its employees, materials suppliers, landlord etc. The position would, however, be different where the maintenance company used sub-contactors. Where the recipient of state funding receives those funds as principal in exchange for goods or services rendered to the state, it would not be

performing a public function or exercising a public power in dealing with those funds. Indeed, the funds would lose their character as public funds the minute that they were paid to the principal. *Non constat* that this is so where the recipient of the state funds receives them, whether known to the state at the time or not, as agent, paymaster, main contractor intending to engage subcontractors or any other form of conduit – type function.

279 The reason for this would seem to be obvious, and it lies in the vital role that state expenditure plays in our constitutional state. I have drawn attention to the preamble to the Constitution and to PAIA above. Ours is a society characterised by a history of institutionalised disadvantaging of the majority of our people. The institutions that were used to perpetrate the crime of apartheid were the institutions of state, and large amounts of state funding were used to prop up the military and security establishments that maintained the status quo that served to advantage so few at the cost of so many. The cost to those disadvantaged was incalculable. It is immeasurable not only because of its vast scale, but because it is a cost that has currencies which do not lend themselves to counting; in the very broadest of terms: dignity, freedom, health, education, and justice. The cost of poverty is another matter altogether. Poverty can be measured, the distance between the breadline and other points on the economic graph is finite, and real currency can be used.

280 There are many instruments of economic policy that our government is using to alleviate poverty.

281 One is the policy of broad based black economic empowerment, a policy expressed in legislation. The policy of encouraging growth of small to medium sized enterprises is

similarly legislated. The State's distribution of its spending power to reach members of previously disadvantaged communities is a complex legislative and social task. The threat of corruption makes it no easier. The remedial distribution of state funds is a constitutional imperative, and it is one that our government is presently trying to discharge by means of the policies embodied in the legislation mentioned at the beginning of this paragraph. Remedial measures our Constitution enjoins all to take. The Constitution casts a particularly heavy burden on the State in this regard. It is to government that South Africans turns to for hope, but more prosaically, for money. And it is to its people that that government turns to for money. And if the people haven't got money to lend or pay to government, government borrows money and promises the lender that the people will pay it back. This practice of binding future generations to pay back the loans and finance charges levied by those who lend money to the government is not unique to our country, but it is a practice that impacts far into the future on the lives of the citizens of the countries whose governments engage in borrowing in this way. Thus, whether government funds distributed in the commercial life of its people are borrowed from the people themselves or from the people of other countries, government funds have a function and a power that can readily be recognised as public. Government may be found wherever government funds go. Where government funds go, so too should follow transparency and accountability of those who handle those funds. It matters not who is entrusted with the task, nor for what the funds are being distributed, whether for social grants, for catering contracts for prisons or for opening ceremonies of the World Cup, where the funds emanate from "*we the people*", the entity dealing in those funds is or should be performing a public function or exercising a public power.

282 A further basis for my finding in this regard is based on Mr Budlender's argument that the LOC is a public body because of the extent to which the LOC's function or power is

interwoven in the legislative fabric. Relying on *Mittalsteel* Mr Budlender urged the Court to consider the "*impact and scale*" of the World Cup on South African society as disclosed in the papers before me. He submitted that in the light of the legislative enactments alone relating to the LOC and the staging and hosting of the World Cup, that to describe the LOC as anything other than a public body could not be achieved "*with a straight face*". He drew attention to a number of legislative enactments that various levels of South African law making machinery, from the National Legislature to the City governments of Johannesburg and Tshwane, have seen fit to pass into law that have as their subject matter the World Cup soccer tournament. These are discussed under the sub-heading "*acting in terms of legislation"* below. I refer particular to the powers and functions of the LOC to, for example, designate previously public areas as restricted or controlled areas, accredit individuals with the right to enter such areas, to exclude non-accredited individuals from such areas, to enjoy the services of peace officers (police) in enforcing the LOC's decisions as to who can or can't enter a controlled area and for the LOC to be protected against a breach thereof by pain of punishment comprising fines of thousands or Rands or even months in prison.

283 The control of access sites were official events (which include the opening and closing ceremonies) taken place is jointly shared by FIFA, the LOC and government. In this regard the Organising Association agreement provides as follows:

> *"12.1.8 The Official Events shall take place in Controlled Access Sites provided by and under the full access* ***and operative control of the Organising Association in collaboration with the competent government authorities and FIFA****."* (my emphasis)

284 I am not persuaded by the respondents' argument that it is the police and other state agencies, not the LOC, that exercise the powers or functions inherent in this body of legislation. In the above example, in the local authority bye-laws, the terms of the legislation make clear that it is the LOC that is directly involved in determining what are the designated or controlled areas and who should be accredited individuals permitted access to such areas. The penal provisons of these bye-laws translate the LOC's determinations into a material part of a criminal offence which exists on the statute book only because of the World Cup, and will cease to exist after the term of the tournament is ended. The legislation is considered in greater detail below.

285 Having found that LOC performs public functions in relation to its tender records, it is now necessary to determine whether it does so in terms of legislation, which is the last portion of the definition of public body in PAIA.

"**In terms of legislation**"

286 The applicants submit that the phrase "*in terms of any legislation*" only qualifies the phrase "*performing a public function*", and does **not** qualify the phrase "*exercising a public power*"[88] i.e. that on the proper interpretation of paragraph (b)(ii) of the definition of '*public body*', the phrase '*exercising a public power*' is not qualified by the phrase '*in terms of legislation*'.

287 Thus where an institution exercises a public power it qualifies, applicants submit, as a '*public body*' whether or not this power is exercised in terms of legislation.

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[88] Founding affidavit para 50 page 38

288 Applicants submit that this interpretation is supported not only by the rules of grammar, in terms of which the qualifying phrase qualifies the noun immediately preceding it, but also cases such as *R v Panel on Take-Overs and Mergers, ex parte Datafin plc* [1987] 1 All ER 564 (CA) ("***Datafin***") and *R v Advertising Standards Authority, ex parte The Insurance Services plc* [1990] COD 42.[89]

289 For reasons given below, the respondents take issue with this, and in this regard I am persuaded by the respondents' interpretation.

290 However, applicants submit that they do not need to pursue this argument here as it is undeniably the case that the LOC performs public functions in terms of legislation and, on this basis alone, the LOC qualifies as a public body under PAIA. For the reasons given, I agree with this latter submission. It does not matter for purposes of this judgement whether the exercise of the public power is in terms of legislation or not. It is sufficient if the applicant shows that the LOC performs a public function in terms of legislation.

291 Whether the organising committee performs a public function or exercises a public power is not decisive. To qualify as a public body it must exercise the public power or perform the public function "*in terms of legislation*" when it invites and awards tenders.

292 The respondents submit that the LOC does not so act. They make this submission for the reasons that follow.

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89 In *Datafin*, the body concerned, a UK institution, the Panel on Take-overs and Mergers did not exercise statutory, prerogative or common law powers. It nonetheless exercised considerable power and performed an important public function in the manner in which large–scale take-overs and mergers of companies took place. The Court of Appeal held that its decisions were subject to judicial review. See, further P Craig 'Public Law and the Control over Private Power' in M Taggart (ed) *The Province of Administrative Law* (1997) p 201 fn 17

293 The drafters of PAIA were alive to the distinction between law and legislation. For example, section 44(1)(a) refers to a decision taken "*in the exercise of a power or performance of a duty conferred or imposed by law*". By contrast, the definition of "*public body*" refers to a functionary or institution "*exercising a public power or performing a public function in terms of any legislation*".

294 The respondents point out that there is no legislation that confers on the Organising Committee the power to procure goods and services or to award tenders. They submit that the Organising Committee derives its procurement powers from the common law, not from legislation. The founding affidavit conspicuously fails to point to any legislation that confers on the Organising Committee the power to procure.

295 The founding affidavit refers to the 2010 FIFA World Cup South Africa Special Measures Act 11 of 2006.[90] The respondents submit that that Act does not confer on the Organising Committee the power to procure or to award tenders.

296 The founding affidavit refers to the 2010 FIFA World Cup and Confederations Cup: South Africa By-law.[91] But those by-laws do not confer on the Organising Committee the power to procure or to award tenders.

297 The founding affidavit refers to FIFA statutes and regulations.[92] But those statutes and regulations manifestly do not amount to "*legislation*" within the meaning of PAIA. They are simply the rules of a voluntary association.[93]

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90 Founding affidavit para 49.5.26 page 36

91 Founding affidavit para 49.5.29 page 37

92 Founding affidavit para 49.5.30 and 49.5.31 page 37

93 Answering affidavit paras 98 and 99 page 396

298 In sum, the position is identical, submit the respondents, to that in *IDASA v ANC* 2005 5 SA 39 (C) where Griesel J held as follows:

> *"[30] Returning to the facts of the present case, the records being sought from the respondents relate exclusively to their fundraising activities. Such activities, insofar as they relate to the private funding of political parties, are not regulated by legislation. The respondents are accordingly entirely at liberty to generate an income from any lawful means, including donations, soliciting contributions from members, the sale of merchandise, the realisation of investments, and the like.*
>
> *[31] Having regard to the guidelines set out above, it cannot be said, in my view, that in receiving private donations, the respondents are (a) exercising any powers or performing any functions in terms of the Constitution; (b) exercising a public power or performing a public function in terms of or any legislation; or (c) exercising any power or performing any function as a public body. They simply exercise common law powers which, subject to the relevant fundraising legislation, are open to any person in South Africa.*
>
> *[32] In the result, I am of the opinion that the matter must be approached on the basis that, for purposes of their donations records, the respondents are not "public bodies", as defined by PAIA, but that they are indeed "private bodies*". (emphasis added)

299 The applicants counter this argument by, *inter alia*, drawing attention to the terms of a notice promulgated by the Minister of Trade and Industry, a piece of legislation referred to for the firs time in the answering affidavit.[94] This latter fact does not prevent the applicant from relying on this legislation in argument.

300 The respondents had properly drawn attention to the **Protected Event Notice** (which had been overlooked by the applicants). The applicants made much of this notice in their replying affidavit.[95]

301 Section 15A of the Merchandise Marks Act of 1941* provides that the Minister of Trade and Industry may by notice in the Gazette designate an event as a "*protected event*". For the period during which an event is protected, no person may use a trade mark in

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94 Answering affidavit para 10 page 347

95 Replying affidavit para 23 page 680

relation to such event in a manner which is calculated to achieve publicity for that trade mark and thereby to derive special promotional benefit from the event, without the prior authority of the organiser of such event.

302 The Minister of Trade and Industry has designated the 2010 FIFA World Cup as a "*protected event*" in terms of section 15A of the Merchandise Mark Act, 1941. He did so in General Notice 683 of 2006, which was published in the government Gazette on 25 May 2006 ("***the Protected Event Notice***").[96] This was published in the government Gazette on 25 May 2006. It reads:

> "*I, Mandisi Mpahlwa, Minister of Trade and Industry, pursuant to the Notice published 17 November 2005, in government Gazette No 28243, Notice No 1259) hereby designate 2010 FIFA World Cup (the World Cup) as a "protected event" in terms of section 15A of the Merchandise Marks Act, 1941 (Act) from the date of publication of this Notice in the government Gazette to six calendar months after the date of commencement of the World Cup. For ease of reference section 15A is attached and the public should pay particular attention to the provisions of subsection 2, 3, 4 and 5 of the section.*
>
> *The "protected event" status is conferred on the World Cup on the understanding that the World Cup is in the public interest and that local Organising Committee (LOC) has created opportunities for South African businesses, in particular those from the previously disadvantaged communities.*
>
> *The "protected event" status is further conferred on the understanding that:*
>
> > *The Procurement Policy of LOC shall apply public section procurement principles such as procedural and substantive fairness, equity, transparency and competitiveness.*
> >
> > *The Procurement Policy of LOC shall apply constitutional procurement principles, the Preferential Procurement Policy Framework Act, 2000, the Department of Trade and Industry (the dti) codes of good practice for Broad Based Black Economic Empowerment (BBBEE) when evaluating suppliers and administrative law principles of fair procedure.*
> >
> > *The LOC must submit an impact assessment of the World cup on communities in South Africa to the Minister six months after termination of the "protected event".*

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[96] Annexure DAJ2 page 613

The date of termination of the "protected event" status is six (6) calendar month s (as envisaged in the Special Measures Act, 2006) after the date of commencement of the World Cup."

303 It was argued that the Protected Event Notice does not purport to impose on the Organising Committee an obligation to "*apply constitutional procurement principles, the Preferential Policy Framework Act, 2000 [and] the Department of Trade and Industry codes of good practice for Broad-based Black Economic Empowerment"*, merely that there was the Minister's "*understanding*" that this would happen. An understanding is not a phrase that is usually used to convey legal obligation. A more direct obedience inducing form of language is generally used in legislation, words like "*shall*" and "must" are commonly used to convey the coercive quality of legislation.

304 When the Minister here records his understanding that certain procurement statutes will be applied by the LOC, if it does not do so, well, then the Minister was simply mistaken in his understanding; even if he was right, we are still free, says the LOC, to ignore the fact that he had that understanding, because an understanding is something that we can elect to give effect to or not. The LOC in conducting its activities in the shadow cast by the Minister's understanding is not acting in terms of any legislation. Thus even if everything the LOC did was carried out in meticulous observance of the legislation and principles that the Minister understood the LOC would use to conduct its procurement processes, (and there is no suggestion on the papers that the LOC <u>is not</u> actually going about its procurement in exactly the way the Minister understood it would) it would still not be acting "*in terms of legislation*" because the legislatively coercive force is simply not present in the wording used.

305 The respondents submit that the Protected Event Notice does not purport to impose on the Organising Committee an obligation to "*apply constitutional procurement principles, the Preferential Policy Framework Act, 2000 [and] the Department of Trade and Industry codes of good practice for Broad-based Black Economic Empowerment*". The Protected Event Notice does no more than to record the Minister's "*understanding*" that the Organising Committee has assumed a voluntary obligation to comply with the legislation referred to therein ("**the procurement legislation**"). The answering affidavit explains that the Organising Committee indicated to the Minister that it would endeavour to comply with these obligations where possible, even though it is not required to do so in law.[97]

306 This amounts to the voluntary assumption of an obligation that would not otherwise apply. The Organising Committee has undertaken towards the Minister that it will seek to comply with the underlying legislation even though that legislation does not bind it. This does not amount to the imposition of a legislative obligation. The position would be the same if a commercial bank were to state publicly that it will seek to comply with the Preferential Procurement Policy Framework Act 5 of 2000[98] when it procures goods and services. This would not mean that the bank is bound by the Preferential Procurement Policy Framework Act; it would simply mean that the bank has voluntarily assumed an obligation that does not bind it as a matter of law. It would be different if it said it would comply.

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97 Answering affidavit para 10.4 page 350

98 This Act only applies to organs of state.

307 According to the respondents the applicants get it wrong when they state that "*a voluntary obligation is a contradiction in terms*".[99] On the applicants' logic, submit the respondents, there would no law of contract. For more than 2000 years, our common law has distinguished between obligations imposed *ex lege* and obligations imposed *ex consensu*. Any obligation on the part of the Organising Committee to comply with "*public sector procurement principles*" derives from its undertaking towards the Minister; it is not imposed *ex lege*. What the respondents' argument omits to take into account is that if a voluntary obligation is not a contradiction in terms, then it is at least binding *ex contractu*, and the contract in which that voluntary obligation is recorded is in the Protected Event notice, which is legislation. In conducting its tender processes then the LOC is obliged to act in terms of legislation, even though, on its argument, it is only a contract dressed up in legislation. It is still legislation.

308 The respondents submit that the applicants also err when they state that "*the Minister has prescribed that one of the conditions attaching to the declaration of the World Cup as a protected event is that the first respondent act in terms of the Constitution and the Preferential Procurement Policy Framework Act in inviting and awarding tenders*".[100] This is precisely what the Protected Event Notice does *not* say, according to the respondents. It does no more than to record the Minister's "*understanding*" that the Organising Committee will comply with the underlying legislation. I have difficulty reconciling this argument with the respondents' other argument regarding voluntary obligations and the law of contract.

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99 Replying affidavit para 26.1 page 681

100 Replying affidavit para 26.2 page 682

309 Against this background, it is submitted by the respondents that the Organising Committee does not "*act in terms of*" the procurement legislation when it procures goods and services. This is so for two reasons:

306.1 The first reason is that the Organising Committee would only act "in terms of legislation" if it was bound by that legislation *ex lege*. However the underlying legislation does not bind the Organising Committee *ex lege*. The Protected Event Notice records the Minister's understanding that the Organising Committee will apply the underlying legislation *as if* it were bound by that legislation. The fact that the Organising Committee has undertaken to comply with the underlying legislation does not mean that it acts "*in terms of legislation*". In the hypothetical example referred to above, the bank which voluntarily undertakes to comply with the Preferential Procurement Policy Framework Act similarly does not act "*in terms of legislation*" when it procures goods and services.

306.2 The second reason is that the Organising Committee would only exercise a public power or perform a public function "*in terms of legislation*" if the relevant power or function derives from that legislation. However the procurement legislation is not the source of the Organising Committee's power to contract. The procurement legislation provides for substantive restrictions on a power that derives from the common law. The addition of such substantive restrictions does not mean that the Organising Committee is exercising a function "*in terms of legislatio*n". By analogy, the Consumer Protection Act 68 of 2008 imposes various substantive limitations on the contractual powers of private parties, but this does not mean that those parties act "*in terms of legislation*" when they conclude contracts.

310 I am not persuaded Section 15A(1)(b) of the Merchandise Marks Act provides:

> "*The Minister **may not** designate an event as a protected event unless the staging of the event is in the public interest and the Minister is satisfied that the organisers have created sufficient opportunities for small businesses and in particular those of the previously disadvantaged communities.*" (emphasis provided)

311 It seems that the Minister, who would doubtless have been cognisant of this sub-section, was "*satisfied that the organisers have created sufficient opportunities for small businesses and in particular those of the previously disadvantaged communities*" by means of the "*understanding"* which the Organising Committee assumed a voluntary obligation to comply with.

312 However, what the respondents do not appreciate is that the Organising Committee, even if it was only to comply with the legislation mentioned in the Protected Event Notice as a matter of discretion (which seems hardly likely), the Organising Committee, by enjoying the protection of the Protected Event Notice and the Act that it was promulgated in terms of, is acting in terms of that legislation by staging the very event that is the subject of the notice. It is performing a public function of staging the World Cup and doing in a manner that it would not be able to, were it not for the legislation enacted.

313 The respondents have argued that all that the LOC has done (and which is recorded in the "*understanding*" part of the Protected Event Notice) has been to indicate to the Minister that it will endeavour to comply with these obligations where possible, even though it is not required to do so in law. This amounts to the voluntary assumption of an obligation that does not bind the Organising Committee in law; it does not amount to the imposition of a legislative obligation.

314 I very much doubt that the Minister would be happy to learn that he had failed (in his dealings with the LOC prior to the promulgation of the Protected Event Notice) to satisfy himself that the organisers had "*created sufficient opportunities for small businesses and in particular those of the previously disadvantaged communities*", for on the LOC's version the Minister had been "*satisfied*" by unenforceable impressions – his "*understanding*" that the LOC would apply the procurement legislation that has been designed to distribute the wealth of the country to small businesses and the members of previously disadvantaged communities was not enforceable or was at best only contractual. I consider this to be an artificial interpretation of the notice, it is inconceivable that the legislature could have intended to refer to such legislation in so important a context, involving a budget of such proportions, with a view to leaving it open to the LOC to decide within its own discretion whether to comply with the legislation mentioned. In my view the intention of the legislature in promulgating the Protected Event Notice was very clearly to bind the LOC to observe the provisions of the procurement statute; only in that way were the provisions of section 15A(1)(b) met.

315 The LOC also acts, in my view, in terms of legislation when exercising its powers under the bye-laws passed by Johannesburg and Tshwane Local Authorities for purposes of the World Cup. They contain provisions that entitle the LOC to special privileges, including designating what a protected area is and giving the LOC the power to determine who is accredited to enter those protected areas, at least some of which would be ordinary public roads and areas where the populace normally has freedom of movement, and in restricting those rights via legislation enacted specifically to enable it to perform its functions, the LOC is acting in terms of legislation.

316 The Organising Association Agreement contains the following provisions regarding access control:

> ***PART G: ACCESS***
>
> ***24. GENERAL RULES***
>
> ***24.1 Access Rights and Restrictions***
>
> *24.1.1 FIFA shall be the sole holder of the domiciliary and access rights to the Controlled Access Sites and the Organising Association hereby irrevocably transfers all its rights it may have in this respect to FIFA….*
>
> ***24.2 Access Control***
>
> *24.2.1 The Organising Association shall at all times be full responsible for the planning, management and operation of access control to the Controlled Access Sites in collaboration with the competent government authorities…."*
>
> *24.2.2 Access control shall allow and control all people having the respective right to access a specific area during a specific period of time."*

317 In terms of the bye-laws of the Local Authorities referred to, a peace officer may deny an unauthorised person access to an access controlled area. The LOC has the police enforcing the LOC's decisions as to who can enter a particular area that would have been, but for the World Cup, a public roadway or public area. In so doing it is acting in terms of legislation.[101]

318 The respondents contend that the first respondent does not act "*in terms of legislation*" when it invites and awards tenders because there is no legislation that confers on the first respondent the power to procure goods and services or to award tenders.[102] On this basis they conclude that the first respondent is not a public body.

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[101] Reference to bye-laws

[102] AA, record at p 347 – 350, para 10; Respondents' HOA, p 25, para 5

319 The applicants, on the other hand, contend the opposite. They submit that the first respondent performs its functions "*in terms of legislat*ion", and as such should be regarded as a public body.[103]

320 The amicus submits that both the applicants and the respondents have interpreted the phrase "*public function in terms of legislation*" to mean that in order for the first respondent to be a public body, the relevant functions must be authorised by legislation, i.e. the source of its function or functions must be in legislation.

321 The amicus submits that this interpretation and the requirement that the function that is performed must be authorised by legislation is unduly restrictive.

322 The source of the power in terms of which a body exercises power is just one of the factors that must be considered. In *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) it was held in a minority judgment that there is no simple definition or clear test to be applied in determining whether a power or function is public. Rather, it is a question that has to be answered with regard to all the relevant factors, including: *(a)* the relationship of coercion or power that the actor has in its capacity as an institution; *(b)* the impact of the decision on the public; *(c)* the source of the power; and *(d)* whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context.[104]

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103 The applicants point to the fact that the Minister of Trade and Industry has designated the 2010 FIFA World Cup as a protected event in terms of section 15A of the Merchandise Marks Act 17 of 1941; the 2010 FIFA World Cup South Africa Special Measures Act 11 of 2006; and bylaws promulgated by various local governments in support of the contention that the Organising Committee performs its functions in terms of legislation. AA, p 16-18.

104 *Chirwa v Transnet Ltd and Others* 2008 (4) SA 367 (CC) at para [186].

323 The amicus did not wish to make submissions on how, in the context of this case, these factors may be weighed by this Honourable Court. I emphasise that the "source of the power" is not necessarily determinative.

324 The need to look beyond the source of the power being exercised was considered in *Mittalsteel SA Ltd (formerly Iscor Ltd) v Hlatshwayo* 2007 (1) SA 66 (SCA).[105] Contracts are widely used by public authorities as instruments both of policy and of administration.[106]

325 If this approach is followed it is arguable that a body may perform a public function even if the basis on which it does so is not sourced in legislation.

326 If that is so, the words "*in terms of legislation*" should not be given a meaning which requires that the performance of the function is specifically authorised by legislation. The amicus contends that the words "*in terms of legislation*" in the definition of a public body in PAIA are capable of bearing the meaning "in accordance with legislation". It follows that it may well be sufficient that the first respondent performs its procurement functions in accordance with legislation. The amicus submitted that the first respondent was bound to act in accordance with the Preferential Procurement Policy Framework Act, 2000, the Department of Trade and Industry (the dti) codes of good practice for Broad Based Black Economic Empowerment (BBBEE) when evaluating suppliers and administrative law principles of fair procedure.[107]

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105 At paras [20] – [22]

106 In the UK government by contract has been termed a 'new prerogative', Wade & Forsyth Administrative Law 10th ed (2009) at 679.

107 Record, p 615

327 The amicus submits that the Merchandise Marks Act, read together with the government Notice makes it clear that "*protected event*" status was conferred on the first respondent on condition that it complied with government procurement policy and applicable legislation. Put differently, it is a condition of the "*protected event*" status that the first respondent act in accordance with the legislation referred to in the government Notice. The respondents confirm that the LOC undertook to "*endeavour to comply*"[108] with government procurement policy and legislation.

328 I accordingly conclude that the LOC is acting in terms of legislation when the records in respect of its tenders were brought into existence and that it was then acting as a public body as defined in the definition thereof in section 1 (b)(ii) in PAIA.

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[108] AA, record p 350, para 10.4

THE PRIVATE BODY REQUEST

329 Section 50 of PAIA provides that:

> "***50.****(1) A requester must be given access to any record of a private body if —*
>
> *(a) that record is required for the exercise or protection of any rights;*
>
> *(b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and*
>
> *(c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.*"

330 A requester who establishes that a record is required for the exercise or protection of a right is not automatically entitled to be given access to it. The requirements of section 50(1) are cumulative. But the first step is to determine whether the record is in fact required for the exercise or protection of a right. I asked Mr Budlender for the applicants whether the right in question was one that applicants sought to "*exercise*" or merely "*protect*" and the answer was that the applicants seek to exercise the right.

331 In the event that this court holds that the LOC is not a public body, the amicus submitted that the applicants should in any event be given access to the records because they require the records for the exercise and protection of their right to freedom of the media.

332 Section 50(1)(a) of PAIA provides that a requester must be given access to any record of a private body if "*that record is required for the exercise or protection of any rights*". This repeats what is stated in section 32(1)(b) of the Constitution.

333 In order to be granted access to the records of a private body a requester must therefore show two things:

(i) First, he/she must identify a right which he/she seeks to exercise or protect; and

(ii) Secondly, he/she must show that access to the records is required in order to exercise or protect that right.

334 Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC *2001 (3) SA 1013 (SCA)* at para 28 where Streicher JA held "*Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information in terms of s 32, an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required and how that information would assist him in exercising or protecting that right*."

335 Each of these requirements is addressed below.

336 The drafters of both the Constitution and PAIA deemed it appropriate to include the word 'any' before the word 'right' when articulating the right of access to information held by private bodies. This language choice is significant. It points to the drafters' intention to ensure that the broadest possible interpretation be given to what qualifies as a right for the purposes of these sections.

337 The sections could just as easily have been drafted to omit the reference to 'any'. They could have read: *'that record is required for the exercise or protection of a right'*.

338 Just as the Constitutional Court has held that the reference to 'everyone' in sections of the Constitution must be given a broad interpretation,[109] so too, the amicus submits, must the word 'any' in section 32(1)(b) of the Constitution, and with it, section 50(1)(a) of PAIA, be given an expansive interpretation.

339 There can be little doubt that the right to freedom of the media and the corollary right of the public to receive information on matters of public interest, which are entrenched in section 16 of the Constitution, qualify as 'any right'.[110]

340 It is important to emphasise that the right which the applicants seek to exercise is the right to freedom of the media, and not the more general right to freedom of expression which any member of the public may be able to invoke. This is significant. There could be reluctance on the part of a court to accept that *anyone* may simply invoke the right to freedom of expression in order to be given access to the records of a private body. This case is different. It involves the media fulfilling their duty as public watchdog and the information they require in order to discharge this obligation.

341 The Constitutional Court has recognised the particular and vital role which access to information plays in the work of the media. In *Brummer v Minister of Social Development and Others (South African History Archives Trust and South African Human Rights Commission as Amici Curiae)*, Ncgobo J (as he then was) held:

> *'… access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is*

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109 *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) para 41

110 *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) SA 469 (SCA) paras 7 and 8

> *crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. As the present case illustrates, Mr Brümmer, a journalist, requires information in order to report accurately on the story that he is writing. The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.'*[111]

Refer to letter from the respondents' attorneys NGD8.

342 The vital role of the media to facilitate and foster the public's right to receive and impart information and ideas has repeatedly been recognised by local and foreign courts.

(i) For example, in *Khumalo v Holomisa* the Constitutional Court described the right as follows:

> *'The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate ... The media thus rely on freedom of expression*

[111] *Brummer v Minister of Social Development and Others (South African History Archives Trust and South African Human Rights Commission as Amici Curiae)*, 2009 (6) SA 323 (CC) para 63 (footnotes omitted; emphasis added)

and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.

Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require. As Joffe J said in government of the Republic of South Africa v Sunday Times Newspapers and Another 1995 (2) SA 221 (T) at 227I to 228A:

> *"It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest mal- and inept administration. It must advance communication between the governed and those who govern."*

In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16."[112].

(ii) The Supreme Court of Appeal has similarly highlighted the significance of freedom of the media:

> *'[W]e must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion …. The press and the rest of the media provide the means by which useful, and sometimes vital, information about the daily affairs of the nation is conveyed to its citizens.'*[113]

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[112] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) paras 22 to 24. Also see *SABC v NDPP* 2007 (1) SA 523 (CC) paras 24, 28 and 122 (emphasis added)

[113] at 1209 (emphasis added)

(iii) The role of media freedom in a democracy has also been recognised in foreign jurisdictions. For example, in *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd,*[114] the House held that:

> *'In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society … The majority cannot participate in the public life of their society … if they are not alerted to and informed about matters which call or may call for consideration in action. It is very largely through the media … that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring.'*[115]

(iv) In a case dealing with the confidentiality of sources handed down just a few weeks ago by the Canadian Supreme Court, McLachlin CJ held that:

> *'The role of investigative journalism has expanded over the years to help fill what has been described as a democratic deficit in the transparency and accountability of our public institutions. The need to shine the light of public scrutiny on the dark corners of some private institutions as well is illustrated by [the list of corporate delinquencies which 'secret sources' have exposed].'*[116]

(v) The European Court of Human Rights has recognised that obstacles created to hinder access to information of public interest might discourage the media and other public interest organisations from pursuing their vital role as public watchdogs:[117]

> *'The Court considers that obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs" and their ability to provide accurate and reliable information may be adversely*

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114 [2000] 2 All ER 913 (HL) at 992.

115 Emphasis added

116 *R. v. National Post* 2010 SCC 16 para 55

117 *Társaság a Szabadságjogokért v. Hungary* (Application no. 37374/05), 14 April 2009, para 38-39

> *affected (see, mutatis mutandis, Goodwin v. the United Kingdom, judgment of 27 March 1996, Reports 1996-II, p. 500, § 39).*
>
> *The foregoing considerations lead the Court to conclude that the interference with the applicant's freedom of expression in the present case cannot be regarded as having been necessary in a democratic society. It follows that there has been a violation of Article 10 of the Convention."*[118]

343 The applicants submit that the media stand in a unique relationship to the right of access to information. Because information is the tool of their trade, it will often be necessary for the media to gain access to information in order to perform their democratic function of reporting on matters of public interest. That they should do so accurately is essential. That they should therefore have access to reliable sources of information, like the records of the body itself, is vital.

344 For this reason the law ought to recognise the special position of journalists in this context. This would not be unusual in our law. In the context of defamation, and for the very same reasons which it has advanced, our law has been developed to recognise a special defence for journalists. Whereas non-media defendants are restricted to the defence of truth and public interest, the media are afforded the latitude of the defence of reasonableness. The media may therefore defeat a claim for defamation notwithstanding the fact that the defamatory statement may have been false, provided they can show that publication in the circumstances was reasonable.

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[118] Emphasis added

345 In *National Media Ltd and Others v Bogoshi*,[119] the Supreme Court of Appeal developed the common law to hold that

> *'the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.'*[120]

346 In *Khumalo v Holomisa*,[121] the Constitutional Court recognised that this defence is available to the media.

> *'This fourth defence for rebutting unlawfulness, therefore, allows media defendants to establish that the publication of a defamatory statement, albeit false, was nevertheless reasonable in all the circumstances.'*[122]

347 The Constitutional Court has also considered the parameters of 'the media', albeit in the two minority judgments in *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)*.[123] O'Regan J held that the media should include *'professional and commercial purveyors of information'*,[124] and Langa CJ commented that the media constituted *'professionals involved in the distribution of information for commercial gain'*.[125]

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119 1998 (4) SA 1195 (SCA) 1212G – H.

120 Emphasis added

121 *Khumalo v Holomisa* 2002 (5) SA 401 (CC)

122 At para 19

123 2007 (5) SA 250 (CC) (1)

124 at para 181

125 at para 98; see also para 94.

348 The applicants submit that these persons, who disseminate information professionally and broadly, benefit from the rights and bear the obligations that are associated with 'the media'.[126]

349 It is common cause that the applicants are well-established members of the media.[127] As such, they have expressly invoked the right to freedom of the media as the basis upon which they seek access to the records.[128] There can be no doubt that this right qualifies as 'any right' for the purposes of section 50(1)(a) of PAIA.

350 The Supreme Court of Appeal has held that *'required'* in section 50(1)(a) of PAIA means '*reasonably required'*, and that the question whether a person is entitled to a particular record must be determined on the facts of each case.[129]

351 In *Unitas v Van Wyk*, Brand JA held:

> *'The threshold requirement of "assistance" has thus been established. If the requester cannot show that the information will be of assistance for the stated purpose, access to that information will be denied. Self-evidently, however, mere compliance with the threshold requirement of "assistance" will not be enough. The acceptance of any notion to the contrary will, after all, be in conflict with the postulate that mere usefulness to the requester will not suffice.*'[130]

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126 There is authority in both the Canadian Supreme Court that the reasonableness defence should not be limited to traditional media houses: see *Grant v Torstar Corp* 2009 SCC 61. It is not necessary, in this case, to reach the question of whether in our law this special approach applies also to electronic and other non-traditional media.

127 FA pp 8-9 para 9 and para 11, AA p 365 paras 23 – 24

128 FA p 16 para 29

129 *Unitas Hospital v Van Wyk* 2006(4) SA 436 (SCA) at para 6 (per Brand JA), at para 45 (per Cameron JA), at para 56 (per Conradie JA)

130 *Unitas Hospital v Van Wyk* at para 17

352 In *Clutchco (Pty) Ltd v Davis*,[131] where the rights of shareholders in a private company having no public significance were concerned, Comrie AJA interpreted the phrase '*required for the exercise or protection of any rights'* to mean reasonably required, provided that that it is understood to connote a substantial advantage or an element of need.

353 Thus a record will be 'required' where there has been a demonstration of some connection between the requested information and the exercise or protection of the implicated right.[132]

354 As Currie and de Waal point out, it should be borne in mind that a requester is seeking access to information that is not currently possessed. As a result, a requester will not usually know its contents and accordingly cannot be expected to demonstrate a link between the record and rights with any degree of detail or precision.[133]

355 PAIA therefore requires requesters to demonstrate a need to know the information – a connection between the information requested and the protection and enforcement of rights. But the degree of connection should not be set too high or the principal purpose of PAIA will be frustrated. The words *'required for the protection and exercise of rights'* must therefore be interpreted so as to enable access to such information as will *enhance and promote* the exercise and protection of rights.[134]

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131 *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) at para 13

132 Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 5.11 at p. 68

133 Currie and De Waal *The Bill of Rights Handbook* (3ed) (2005) 697.

134 *Van Wyk* per Cameron JA para 31

356 More may be required from some private bodies than others. In his minority judgment in *van Wyk*, Cameron JA held that one must consider the extent to which it is appropriate, in the case of any private body, to further the express statutory object of promoting 'transparency, accountability and effective governance' in private bodies. According to Cameron JA, *'this statutory purpose suggests that it is appropriate to differentiate between different kinds of private bodies. Some will be very private, like the small family enterprise in Clutchco. Effective governance and accountability, while important, will be of less public significance. Other entities, like the listed public companies that dominate the country's economic production and distribution, though not "public bodies" under PAIA, should be treated as more amenable to the statutory purpose of promoting transparency, accountability and effective governance.'*[135]

357 What is therefore required by the media from a private company which has the sole responsibility for organising, staging and hosting the most significant sporting event in the world may be different from what is required by the media from, for example, a small corner fish and chips shop.

358 Although the identification of these 'public private bodies' took place in a minority judgment in *van Wyk*, I am of the view that there is ample support for this approach in another, linked area of the law.

359 The law already recognises that the protection of privacy diminishes, the more public the nature of the activity. The protection of privacy is most intense in its protection of *'the inner sanctum of a person, such as his/her family life, sexual preferences and home*

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135 *Van Wyk* para 40

environment'.[136] From this core, the protection of privacy diminishes as it extends outwards in '*what can be seen as a series of concentric circles ... to the outer rings that would yield more readily to the rights of other citizens and the public interest'*.[137]

360 I have above highlighted the public character of the LOC activities. When these features are considered alongside the undisputable fact that the only manner in which the applicants are able to obtain the information required to investigate tenders in relation to the Confederations Cup and the World Cup, and to publish matters of public interest in connection with such tenders, is by obtaining access to the records held by the first respondent,[138] it is clear that access to the records is 'required' in the relevant sense for the purposes of section 50(1)(a) of PAIA.

361 The applicants submit that they are not able to enquire into and determine whether corruption, graft and/or incompetence have marred the LOC's tender processes, because they have not had access to the records required to investigate the issue. As members of the media, the applicants have an obligation to *'ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators'*.[139] Access to the records requested is therefore required in order for the applicants to exercise their right to media freedom.

362 If this court determines either that the LOC is a public body, or that it is a private body to whose records the applicants require access, then the onus shifts to the LOC to satisfy

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136 *Bernstein v Bester* 1996 (2) SA 751 (CC) para 67

137 *Magajane v Chairperson, Northwest Gambling Board* 2006 (5) SA 250 (CC) para 42

138 RA p 686 para 36

139 *government of South Africa v Sunday Times Newspaper and Another* 1995 (2) SA 221 (T)

this court that access ought to be denied on the grounds of refusal invoked.[140] The onus is addressed in the next section of this judgement.

363 The respondents and the amicus point out that access to a record may, despite being required for the exercise or protection of a right, still be refused in terms of any ground for refusal contemplated in sections 63 to 69 of PAIA.

364 The statutory grounds upon which a record of a private body must or may be refused are many and varied. They provide for the reasonable protection of privacy, commercial confidentiality, trade secrets, research information, and the like. The amicus pointed out that the record in issue is not "*thrown open*" the moment the requester establishes that it is required for the exercise of protection of any rights.

365 For this reason, the words "*required for the exercise or protection of any rights*" should not, the amicus submits, be interpreted or applied restrictively. There is no basis for a concern that privacy, commercial confidentiality, trade secrets and the like would be in jeopardy if section 50(1)(a) is given a meaning, or is applied in a manner, that sets a relatively low threshold.[141]

366 It is also important to bear in mind that whether a record is "*required for the exercise or protection of any rights*" is a matter to be determined on the facts of each case. Every

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140 Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 7.3 at p 100

141 Moreover, section 2(1) of PAIA contains a clear directive that "*When interpreting a provision of this Act, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects.*" The objects of PAIA, contained in section 9 of the statute, include "*... to promote transparency, accountability and effective governance of all public and private bodies*". Notably, transparency and accountability are not values which only public bodies are expected to observe.

application must be decided on its own merits. This appears clearly from the decision of Brand JA in *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at para 6:[142]

> "*Generally speaking, the question whether a particular record is 'required' for the exercise or protection of a particular right is inextricably bound up with the facts of that matter*."[143]

And para 18:

> "*I respectfully share the reluctance of Comrie AJA to venture a formulation of a positive, generally applicable definition of what 'require' means. The reason is obvious. Potential applications of s 50 are countless. Any redefinition of the term 'require' with the purpose of restricting its flexible meaning will do more harm than good. To repeat the sentiment that I expressed earlier: The question whether the information sought in a particular case can be said to be 'required' for the purpose of protecting or exercising the right concerned, can be answered only with reference to the facts of that case, having regard to the broad parameters laid down in the judgments of our courts, albeit, for the most part, in a negative* form."

367 The question to be answered in this case is whether the records requested by the applicants are reasonably required for the *exercise* of the constitutional right to freedom of expression in section 16(1) of the Constitution.

368 Section 16(1)(a) of the Constitution expressly includes the guarantee of freedom of the press and other media, in recognition of the important role played by the electronic and print media in facilitating the free exchange of information, opinions and ideas necessary to sustain a democratic society.

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142 All of the other judgments support this approach; see Cameron JA at para 30: "*Like the statute, the standard is accommodating, flexible and, in its application, necessarily fact-bound.*" And the judgment of Conradie JA at para 56.

143 See also, Claase v Information Officer, South African Airways (Pty) Ltd 2007 (5) SA 469 (SCA) at para 6.

369 In terms of Section 16(1)(b), the freedom to receive or impart information or ideas is also protected. Underpinning both of these is a recognition of the public's right to know.

370 The vital role of the media in a constitutional democracy has now been emphasised in many cases,[144] eg *National Media Ltd v Bogoshi* 1998 (4) SA 1195 (SCA) at 1209.)

371 The principles are largely accepted by the respondents.[145] All parties referred in oral argument to *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) at para [6], which emphasises that the constitutional promise of a free press, protected by section 16(1)(a) of the Constitution, is not one that is made for the protection of the special interests of the press.

372 The constitutional promise of access to information is made to serve the interest that all citizens have in the free flow of information, which is possible only if there is a free press.

373 It must, however, be accepted that a general appeal to the fact that the print and electronic media play a role of undeniable importance in our society may be insufficient for the purposes of section 50(1)(a) of PAIA. This Honourable Court must find that the records are required for the exercise or protection of the section 16(1) right *in this case*.

374 In this case – and I emphasise that other cases may raise very different considerations – I find that the critical enquiry is whether the public has a 'right to know' the information that the applicants may glean from the records in issue.

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144 Applicants' Submissions, para 60.

145 Respondents' Submissions, para 86.

375 That the public is the source of at least a significant sum of the funds that the first respondent is spending is a principle that must have a bearing on the enquiry. I would think that by funding government the public acquires a right to know what is being done with its moneys. I refer to the discussion of this principle above where I deal with the concession made by the respondents in respect of the VWV consortium.

376 In paragraph 88 of their submissions, the respondents raise the issue of whether the section 16(1) right imposes a correlative duty on private entities. With great respect, this is to ask the wrong question. The key question is whether, in this case, the first respondent has an obligation or duty to provide information, which the public has a correlative right to know.

377 I find that the first respondent does indeed have such a duty. The duty flows, at the very least, from the first respondent's acceptance of public funding and its voluntary assumption of various obligations in relation its Procurement Policy. These are set out in the Protected Event Notice.[146] They include that: "*The Procurement Policy of LOC shall apply public sector procurement principles such as procedural and substantive fairness, equity, transparency and competitiveness*."

378 The first respondent also assumed an obligation to comply with "*constitutional procurement principles*", which as section 217(1) of Constitution indicates, include the principles of "*transparency*" and "*cost-effectiveness*". The Constitutional principle of "*transparency*", as it applies to the "public sector", is given meaning in section 195(1)(g) of the Constitution, which provides that "*Transparency must be fostered by providing the public with timely, accessible and accurate information."*

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146 AA, record pages 348 to 350, paras 10.3 and 10.4.

379 In her discussion of government procurement and transparency, Phoebe Bolton[147] points out that in the government procurement context, a transparent system can be said to refer to a system that is "*open*" and "*public*".

380 This means, *inter alia*, that when an organ of state 'contracts', whether with a private entity or another organ of state, this should not be done behind closed doors. Procurement information should be generally available; there should be publication of general procurement rules and practices; government contracts should be advertised; and contractors should be able to access information on government contract awards.

381 Bolton gives as the underlying rationale for transparency in a procurement system as to ensure that interested or affected parties, like the media, the legislature, potential contractors and the public, as taxpayers, are free to scrutinise the procedures followed.

382 This, to a large extent, ensures public confidence in government procurement procedures and promotes openness and accountability on the part of the state organs. Transparent procurement procedures encourage good decision making and, to a large extent, serve to combat corrupt procurement practices. The learned author observes that it is a well-known phenomenon that corruption thrives in the dark.

383 Having assumed an obligation of transparency in relation to its procurement, coupled with the fact it is the recipient of substantial amounts of public money, the first respondent has a duty that is correlative to the public's "*right to know*".

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147 The Law of government Procurement in South Africa

384 Also of significance is the fact that it was on the basis of the assumption of that duty (amongst others) that the Protected Event Notice was issued by the Minister of Trade and Industry. I have referred above to Section 15A(b) of the Merchandise Marks Act. Moreover, the Protected Event Notice was also issued on the understanding that "*the World Cup is in the public interest and that the Local Organising Committee (LOC) has created opportunities for South African businesses, in particular those from the previously disadvantaged communities.*"

385 I find that it is not relevant, for the purposes of this enquiry, for this Honourable Court to decide whether the duty of transparency in relation to the first respondent's procurement was imposed *ex lege*, as a condition of the designation of the 2010 FIFA World Cup as a protected event under section 15A of the Merchandise Marks Act, or whether it was merely voluntarily assumed by the first respondent. An obligation that is voluntarily assumed is no less of an obligation upon the first respondent, in this instance in favour of the public. Nor is it relevant that the public monies received by the first respondent may have been ring-fenced for specific purposes. At the very least, the public has a 'right to know' that this is in fact so.

386 Even in relation to monies received from FIFA, because the Protected Event Notice was issued on the basis that the event is in the public interest and the Minister's "*understanding*" that the first respondent has created opportunities for small businesses and previously disadvantaged communities, the public has a 'right to know' whether this is indeed true when the first respondent engaged in procurement with FIFA's money.

387 Needless to say, it is precisely the role of the applicants, to convey *this information* to the public so that it can be fully scrutinized. This is what constitutes the exercise of the right to freedom of expression in terms of section 16(1) of the Constitution in this case.

388 Applicants submit that, in this case, there can be little doubt that access to the records sought by the applicants is "*required*" for the exercise of the right. In ***Brummer*** (supra) it was emphasised that "*access to information carries with it the responsibility to report accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public."*

389 I accordingly find that even if I am wrong about the LOC in regard to its public body status, the applicants have satisfied the requirements of PAIA in regard to the LOC being a private body which, on the facts of this case, is, subject to the discussion of the statutory obstacles below, entitled to access to the records in question.

STATUTORY GROUNDS FOR REFUSAL

390 The Court having found that the Organising Committee is a "*public body*" when it awards tenders, the Organising Committee relies on section 42(3)(b) of PAIA for refusing access to the relevant records. Section 42(3)(b) of PAIA provides that the information officer of a public body may refuse a request for access to a record if the record "*contains financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the State or a public body*". I shall consider the arguments with reference to the particular categories of records requested by the applicants.

THE DOCUMENTS SOUGHT IN PARA 16.2 OF THE FOUNDING AFFIDAVIT

391 In the main, the paragraph 16.2 and 16.6 records include all the documentation relevant to the issue and award of tenders by the LOC.

392 The LOC contends that amongst these records there are communications between the LOC and individual bidders, as well as the contracts concluded between the LOC and successful bidders, which constitute commercial information relating to the business and

operations of the LOC, the disclosure of which is likely to cause harm to the commercial interests of the LOC.[148]

393 The respondents have indicated that they rely on this provision in order to refuse access to the records described in paragraph 16.2 of the founding affidavit to the extent that those records name a tenderer as being successful. They explain this as follows:[149]

(i) Amongst these records are communications addressed by the Organising Committee to individual bidders, which indicate that a bidder has either been awarded a contract pursuant to a tender process, or has been designated as preferred bidder pursuant to a tender process.

(ii) Clause 29 of the Organising Association Agreement regulates so-called "*Marketing Rights*" in respect of the 2010 FIFA World Cup™. The business model of FIFA is to grant specified marketing rights to selected commercial affiliates based on their financial contributions to the 2010 FIFA World Cup™, and to prohibit all other commercial entities from advertising or disclosing any affiliation at all with the 2010 FIFA World Cup™. Thus the Organising Committee is obliged to ensure that in all of its service-provision contracts, there is a clause prohibiting the service provider from disclosing the fact of its obligation to provide goods or services to the Organising Committee, since such disclosure would undermine the marketing rights granted by FIFA to paying sponsors.

(iii) The Organising Committee is under a general obligation not to engage in any conduct that would result in an infringement of FIFA's marketing rights or those of the commercial affiliates. Public disclosure in the media of the names and any

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148 AA pp 405 – 405 paras 115.3 – 115.4; AA pp 415 – 416 para 115.8.3

149 Answering affidavit para 115.3 and 115.4 page 405

other details regarding service providers to the Organising Committee which are not commercial affiliates, would undermine the business model of FIFA and jeopardise the position of the commercial affiliates, with consequential harm to FIFA. Because the commercial interests of the Organising Committee are so closely aligned to those of FIFA, this would also cause harm to the Organising Committee.

394 Sections 42(3)(b) and 68(1)(b) of PAIA provide, in virtually identical terms, a ground of refusal for public and private bodies designed to protect the commercial interests of the body to which a request is made.

395 Section 42(3)(b) reads as follows:

> *"(3) Subject to subsection (5), the information officer of a public body may refuse a request for access to a record of the body if the record —*
>
> *...*
>
> *(b) contains financial, commercial, scientific or technical information, other than trade secrets, the disclosure of which would be likely to cause harm to the commercial or financial interests of the State or a public body*;"

396 These sections provide the LOC with a discretionary ground of refusal. As Currie & Klaaren point out, PAIA provides for discretionary (as opposed to mandatory) grounds of refusal when the interests of the body itself, rather than those of third parties, are implicated by the request for access.[150] In this case, it is alleged that the commercial interests of the LOC are affected. If that is indeed so, the LOC is given a discretion whether to disclose this information to the applicants.

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[150] Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 7.6 at pp 105 – 106

397 It is appropriate to interpret the discretionary grounds of refusal in such a manner as to require that the discretion be exercised in favour of the underlying policy of the Act, which favours disclosure.

398 I do not see how disclosure of the records relating to who the successful tenderers in the media of the names and any other details regarding service providers to the Organising Committee which are not commercial affiliates, would undermine the business model of FIFA and jeopardise the position of the commercial affiliates, with consequential harm to FIFA. I am assured by the respondents that it will take at least three weeks for the records to be produced from the date of this order. The suspensive effect of appeal processes aside, likely to delay the implementation of the order for much longer, in three weeks from the date of the handing down of this order the 2010 FIFA World Cup will be almost over. The commercial affiliates' advertising and marketing will have been set in motion on large scale. I very much doubt that the publication of any particular successful tenderer's name in the media will cause much damage to the commercial affiliates interests or indeed those of FIFA. I cannot see the commercial affiliates approaching FIFA for refunds of that which they paid FIFA, or any damages, simply because it is reported in the media that certain entities were successful in obtaining business from the LOC; particularly as the LOC will only make that disclosure pursuant to an order of Court.

399 In any event, even it this were so, the harm that would be incurred would be far less than the harm done to the rights of the people of the country to access to information if these records were to be kept secret. FIFA's business model is of its own making. It awarded the 2010 World Cup to South Africa, no doubt with full knowledge of the fact that this is a constitutional democracy in which access to information is a constitutionally guaranteed right.

400 In *Rubin v Canada Mortgage and Housing Corporation* (1988) 52 DLR 4th 671 (CA), the Federal Court of Appeal overturned a decision to refuse access to the minutes of board meetings of the Corporation, on the basis that the Corporation had failed to conduct a sufficiently through examination of its records to be able to decide whether the records requested were covered in their entirety by the exemption. The blanket assertion by the LOC that it can not disclose even one of the records which have been requested (save for the VWV consortium ones) gives rise to a real question as to whether it has considered every one of those records.

401 Regardless of this issue, the LOC faces a fundamental difficulty in relying on this ground of refusal. That difficulty is that the alleged commercial harm which will be caused by disclosure does not relate to the LOC but, instead, to FIFA – a separate entity entirely.[151]

402 According to the respondents, providing access to the records will result in disclosure of the identity of the parties providing goods and services to the LOC. Public disclosure of these names would, so the respondents say, undermine the business model of FIFA and jeopardise the position of commercial affiliates, with consequential harm to FIFA, and *'because the commercial interests of the LOC are so closely linked to those of FIFA, this would cause harm to the [LOC]'*.[152]

403 This reasoning suffers two fatal defects. First, in order for sections 42(3)(b) and 68(1)(b) of PAIA to be applicable, the body to which the request is made must *itself* be likely to suffer the harm associated with disclosure. Here, it is not the LOC which is alleged to suffer the harm, but instead FIFA. The respondents have therefore failed to bring

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151 AA pp 327 – 329 paras 5.1 – 5.4 and AA p 332 para 7.1.1.

152 AA p 407 para 115.4

themselves within the ambit of these sections. Secondly, even if it is to be assumed that the LOC and FIFA are sufficiently linked that harm to one converts into harm to the other, it is simply not the case that disclosure of the identity of service providers to the applicants would likely result in any harm to either FIFA or the LOC.

404 According to Currie & Klaaren, '*likely to*' is the more stringent of the tests applicable to the causative element of the grounds of refusal.[153] This means that a greater degree of probability is required where the ground of refusal uses the language of '*likely to*' rather than '*reasonably be expected to*'. A body invoking a 'likely to' ground of refusal must therefore show *'based on real and substantial grounds, that there is a strong probability that a harmful consequence will occur.'*[154]

405 In terms of the *2010 FIFA World Cup South Africa™: FIFA Public Information Sheet (a guide to FIFA's Official Marks)*, FIFA Rights Holders are entitled to the exclusive use of the official marks. The FIFA Rights Holders are further allowed to create an association with FIFA and with the World Cup *inter alia* through their use of the official marks.[155]

406 In this case, the LOC contends that the harm it (actually, FIFA) is likely to suffer flows from the fact that disclosure of the identity of the service providers – who are not FIFA Rights Holders — would permit those service providers to benefit from their association with FIFA, without paying FIFA for the rights to be so affiliated.

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153 Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 7.3 at p 102

154 Currie & Klaaren *The Commentary on the Promotion of Access to Information Act* (2002) 7.3 at p 103

155 Annexure RA3 pp 715 – 727

407 The applicants accept that the protection of the exclusive rights to use the official marks is important for the funding of the World Cup and FIFA.[156] However, making the identity of the preferred suppliers known *to the applicants* will not enable the preferred suppliers to use the Official Marks or market themselves on the basis of their relationship with FIFA.[157]

408 The LOC's service provision contracts explicitly prohibit the service provider *itself* disclosing the fact of its obligation to provide goods and services to the first respondent. Giving the names of the service providers to the applicants would not constitute a breach of this provision. It would not enable the service providers to market themselves on the basis of their relationship with FIFA: that prohibition would remain in force and effective.

409 The allegation of commercial harm is therefore without substance.

410 The respondents also base their refusal under these sections of PAIA on the assertion that if they are required to disclose the contracts concluded between the LOC and its service providers, the commercial information contained in these contracts will be disclosed and will likely cause harm to the LOC.

411 However, the respondents provide no specifics whatsoever about this commercial information. They do not say which of the records contain such commercial information. They do not address the question of the extent to which redaction of the contracts could protect this information from disclosure. It is in keeping with the purpose of PAIA to require, as the Canadian courts do, that a body consider whether any information can

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156 RA p 689 para 49

157 RA pp 689 – 690 para 49

reasonably be severed from that for which a ground of refusal is asserted under the Act. Just as the Canadian Federal Court of Appeal has rejected a blanket refusal of access to all of the documents sought without this type of exercise being conducted,[158] so too, this court requires more from the respondents than a bald assertion that there is sensitive commercial information in their contracts with service providers.

412 For the reasons set out above, there is no merit in the grounds of refusal raised by the LOC. The disclosure will not permit service providers to make unauthorised use of the official marks of the World Cup; it will not cause harm to *the LOC*; and the commercial interests of the LOC.

THE DOCUMENTS SOUGHT IN PARA 16.6 OF THE FOUNDING AFFIDAVIT

413 The respondents have indicated that they rely on section 42(3)(b) of PAIA in order to refuse access to the documents requested in paragraph 16.6 of the founding affidavit.[159]

414 The reasons are analogous to those given above. For the same reasons they are rejected.

CONCLUSION

415 Access to information is a constitutionally entrenched right. Any refusal of access is a limitation of that right and therefore must be approached as the exception rather than the rule.

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158 *Rubin v Canada Mortgage and Housing Corporation* (1988) 52 DLR 4th 671 (CA) para 22.

159 Answering affidavit para 115.8 page 415

416 The LOC, charged with organising the most significant sporting event in the world, and purporting to do so in the public interest, takes a legally insupportable stance in seeking to keep its conduct inaccessible to public scrutiny.

417 Refusing access to these records would enable the organiser of this event to keep from the public eye documents which may disclose evidence of corruption, graft and incompetence in the organisation of the World Cup, or which may disclose that there has been no such malfeasance. It will make it impossible for any enquiry into those matters to be undertaken. This apparently is what the LOC wants.

418 This would be inconsistent with the principles of transparency and accountability which underpin our Constitution, and which are given effect in the right of access to information, contained in the Constitution and in PAIA.

> *"82 **Decision on application***
>
> *The court hearing an application may grant any order that is just and equitable, including orders-*
>
> *(a) confirming, amending or setting aside the decision which is the subject of the application concerned;*
>
> *(b) requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order;*
>
> *(c) granting an interdict, interim or specific relief, a declaratory order or compensation; or*
>
> *(d) as to costs.*"

419 I accordingly order that:

1. The decisions of the first respondent dated 23 and 30 July 2009 refusing the applicants' request in terms of section 11 and 50 of PAIA to the records are set aside;

2. The respondents are to supply the applicants, within thirty days of payment by applicants to first respondent of the prescribed charges, with copies of:

    a. *all records of the First Respondent in respect of all tenders awarded by the First Respondent, including advertisements and letters of award;*

    and

    b all records of the First Respondent relating to the award of the tenders, including but not limited to the providers it was awarded to, the price to be paid and the contracts between the first respondent and the providers.

3 Directing the first respondent to pay the costs of this application including the costs of two counsel.

LJ Morison AJ

8 June 2010

South Gauteng High Court