IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case NO: 2023-002513

(1)	REPORTABLE: YES / ~~NO~~
(2)	OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3)	REVISED: YES / ~~NO~~

22.03.2024 [redacted]

DATE SIGNATURE

In the matter between:

AFRIFORUM NPC Applicant

and

ESKOM HOLDINGS SOC LTD First Respondent

THE INFORMATION OFFICER:
ESKOM HOLDINGS SOC LTD Second Respondent

JUDGMENT

<u>WINDELL J</u>

Background

[1] This application is the sequel to an exhausted internal appeal procedure instituted by the applicant, Afriforum NPC (Afriforum), against the refusal of the information officer of the first respondent, Eskom Holdings SOC Ltd (Eskom) to grant access to certain records or documents. The application is brought in terms of s 78 read with s 82 of the Promotion of Access to Information Act 2 of 2000, (PAIA).[1]

[2] On 11 July 2022 Afriforum requested certain records from Eskom in terms of s 18(1) of PAIA.[2] The request was only partially complied with, in that Eskom disclosed some of the requested records. The records in respect of which access was denied were the following:

(a) A list of all Independent Power Producers (IPP's) that are in terms of schedule 2 of the Electricity Regulation Act 4 of 2006, as gazetted by the Department of Mineral Resources and Energy in August 2021, currently feeding electricity into the national grid.

(b) Copies of all active contracts that Eskom or any one of its subsidiaries has concluded for the (i) purchasing and (ii) transportation and distribution of coal.

(c) Copies of all active contracts that Eskom or any one of its subsidiaries has concluded for the (i) purchasing and (ii) transportation and distribution of diesel.

[1] Read with the Rules of Procedure published under GNR965 of 9 October 2009.
[2] The procedure for document requests from a public body is outlined in s 18 of the Promotion of Access to Information Act, no. 2 of 2000.

(d) Copies of all active unredacted contracts that Eskom or any one of its subsidiaries have with neighbouring countries of South Africa for Eskom or any one of its subsidiaries to provide electricity to those countries.

[3] Eskom refused to disclose the remainder of the requested records broadly on the grounds that they contain information exempted from disclosure as provided for in terms of s 42(3)(b) and (c) of PAIA. Its partial refusal was contained in a 'response letter' by its Deputy Information Officer, Moleka Tshabalala (Deputy Information Officer), dated 12 September 2022. In relation to the request for access to all active contracts that Eskom or any of its subsidiaries has concluded to purchase, transfer and distribute coal (paragraphs 5.4 and 5.5 of the request), the Deputy Information Officer of Eskom declined to grant access to the contracts. Only a *list* of contracts concluded for purchasing coal and a *list* of active contracts relating to the transportation and distribution of coal were provided.

[4] In relation to all active contracts that Eskom or any of its subsidiaries has concluded to purchase diesel (paragraph 5.6 of the request), the Deputy Information Officer declined to grant access to the contracts. Only a *list* of companies with active contracts to supply diesel to Eskom's open cycle gas turbines was provided.

[5] In relation to all active contracts that Eskom or any of its subsidiaries has concluded with neighbouring countries of South Africa to provide electricity to those countries (paragraph 5.9 of the request) Eskom only provided Afriforum with redacted versions of the contracts. It failed to provide Afriforum with the terms and conditions of each contract in respect of the price of the electricity supplied by Eskom to each neighbouring country and the payment terms of the sales of electricity to such countries. It also redacted the portions of the contracts where references are made to

the persons who represented the contracting parties at the signing of the contracts and the capacities of the persons. The reason given for this refusal was stated as to protect personal information of third parties as well as the mandatory protection of commercial information of such third parties.

[6] Even though Eskom provided information of the total generation from Independent Power Producers (IPP's) from 1 January 2018 to 30 June 2022, it declined to provide a list of all the IPP's as requested by Afriforum in paragraph 5.2 of the request. In fact, Eskom did not address this part of the request at all. However, a list of the IPP's was made available to Afriforum before the hearing of this application. As a result, Afriforum seeks no further relief in as far as the IPP's are concerned (prayer 1.1 of the Notice of Motion).

[7] Dissatisfied with the refusal and the reasons advanced for the refusal, Afriforum gave notice of an internal appeal as provided for in terms of s 74(1)(a) of PAIA. Afriforum subsequently filed an internal appeal against the partial refusal on 28 September 2022. In terms of s 77(3) of PAIA, Eskom was enjoined to decide the internal appeal as soon as was reasonably possible, but in any event within 30 days after the internal appeal was received by its information officer.

[8] On 26 October 2022 Afriforum's attorney with reference to the internal appeal received an email from Eskom requesting an indulgence for a further 14 (fourteen) days 'to finalise internal deliberations among the various divisions impacted by the request for information'. The request was granted.

[9] On 14 November 2022 the extended period had lapsed. Afriforum's attorney followed up with a further email informing Eskom that the requested 14-day extension had lapsed and should the response not be received by 18 November 2022, Afriforum

'will deem the appeal to have been refused'. On 16 November 2022 Afriforum received a further email from Eskom acknowledging receipt of the previous email and which advised that the 'PAIA Appeal is in the process of being finalised.'

[10] Afriforum did not receive any additional correspondence, reply, or resolution from Eskom regarding the internal appeal within the extended periods. As a result, the appeal is deemed to have been dismissed in terms of s 77(7) of PAIA. Afriforum consequently launched this application in which it seeks an order that the refusal of Eskom to grant it access to the records in respect of its 11 July 2022 request in terms of s 18(1) be set aside and directing Eskom to grant Afriforum and/or its attorney's access in printed form of the records/documents referred to in its Notice of Motion within 10 days from the date of the court's order.

The right to access to information held by organs of State.

[11] Eskom, classified as a major public entity under Schedule 2 of the Public Finance Management Act No. 1 of 1999 (PFMA), is wholly owned by the State. It is an organ of State by virtue of s 239 (b)(ii) of the Constitution.

[12] PAIA provides different regimes for gaining access to information from public versus private bodies. As far as public bodies are concerned, s 11(1) provides as follows:

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

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.'

[13] Section 32(1) of the Constitution provides that everyone has the right to access to any information held by the State. In *President of the Republic of South Africa and Others v M & G Media Ltd* [3], Ngcobo CJ remarked that:

'As is evident from its long title, PAIA was enacted "[t]o give effect to the constitutional right of access to any information held by the State". And the formulation of section 11 casts the exercise of this right in peremptory terms – the requester "must" be given access to the report so long as the request complies with the procedures outlined in the Act and the record requested is not protected from disclosure by one of the exemptions set forth therein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception'[4]

[14] In *SA History Archive Trust v SA Reserve Bank,*[5] the Supreme Court of Appeal (SCA) affirmed that PAIA was enacted to give effect to s 32(1) of the Constitution, and as such, its purpose is to promote transparency. Gorven AJA held that: 'A refusal constitutes a limitation of the right of access to information. As such, a case must be made out that the refusal of access to the requested records is justified.'[6]

[15] Thus, if information is requested from a public body, access should be given to the requester as a matter of right unless there is a valid reason contemplated in Chapter 4 of PAIA. Section 11(3)(a) and (b) specifically provides that such right is not affected by any reasons the requester gives for requesting access or the information officer's belief as to what the requester's reasons are for requesting access.

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[3] 2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011).
[4] At para 9.
[5] 2020 (6) SA 127 (SCA); *De Lange v Eskom Holdings Ltd & Others* 2012 (1) SA 280 (GSJ) at para [35].
[6] At para 6.

[16] Section 33 of PAIA sets out the grounds for refusal of access to records of a public body:

'(1) The information officer of a public body-

(a) must refuse a request for access to a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) (a), 38 (a), 39 (1) (a), 40 or 43 (1); or

(b) may refuse a request for access to a record contemplated in section 37 (1) (b), 38 (b), 39 (1) (b), 41 (1) (a) or (b), 42 (1) or (3), 43 (2), 44 (1) or (2) or 45,

unless the provisions of section 46 apply.'

[17] The State bears the burden of proving a claim that a record is exempt from disclosure. Exemptions are construed narrowly and neither the *ipse dixit* of the information officer (their say-so) nor their recitation of the words of the statute is sufficient to discharge the burden.[7]

[18] Afriforum therefore has a right to the records unless Eskom has discharged its onus to justify its denial of access under one of the grounds in Chapter 4 of PAIA.

The reasons for the refusal

[19] Eskom's response letter cited only one section (ss 42(3)(b) and (c) of PAIA) as the basis for its denial of access to the records. The response letter however neglected to provide an explanation as to why that particular section is relevant to the present request.

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[7] *President of the RSA & Others v M&G Media* 2012 (2) SA 50 (CC) at paras [14], [15] and [22]; *Right2Know Campaign and Another v Minister of Police and Another* [2015] 1 All SA 367 (GJ) at para 24.

[20] Section 42(3)(b) and (c) states that 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;

(c) contains information, the disclosure of which could reasonably be expected-

(i) to put a public body at a disadvantage in contractual or other negotiations; or

(ii) to prejudice a public body in commercial competition.'

[21] When a request is denied, adequate reasons for the refusal must be provided, which must include the specific provisions of PAIA that are relied upon (s 25(3)(a) of the PAIA). This implies that a decision-maker is obligated to provide sufficient reasons alongside citing the specific provisions of the statute that support their position. Eskom's mere reference to the provisions of ss 42(3)(b) and (c) of PAIA is therefore insufficient to show that the records fall within the exemptions claimed. Particularly when the request is denied in adherence to s 42 of PAIA, which allows for a discretionary rather than mandatory refusal.

[22] Section 42(3)(b) of PAIA refers to 'financial, commercial, scientific or technical information…' the disclosure of which 'would likely to cause harm to the commercial or financial interests of the State or a public body'. Regarding the requirement that the disclosure is *likely* to cause harm to the commercial or financial interests of a public body, Eskom failed to provide any information at all. In *M&G Media v 2010 FIFA World Cup Organising Committee*[8] the court remarked that: '… a greater degree of probability is required where the ground of refusal uses the language of 'likely to' rather

[8] 2011 (5) SA 163 (GSJ) at para [403].

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 harmful consequences will occur'. Eskom failed to meet this requirement.

[23] The same argument applies to Eskom's reliance on s 42 (3)(c) of PAIA which states that doing so would put Eskom at a disadvantage in contractual or other negotiations or prejudice Eskom commercial competition. The denial of access is issued without providing any justification or supporting evidence.

[24] Regarding Eskom's refusal to furnish certain information of the contracts concluded with neighbouring countries, Eskom failed as is required by s 25(3)(a) of PAIA to include any reference to the provisions of PAIA relied upon. Only a bald assertion is made that 'the redaction is to protect personal information of third parties as well (sic) the mandatory protection of commercial information of such third parties.'

[25] Once more, Eskom failed to present any supporting evidence or attempt to justify its refusal. The nature of the personal information pertaining to third parties is not specified. Furthermore, the nature of the commercial information held by third parties is not specified. It is also not specified how the redacted portions relate to this ground of refusal. The statement is vague and does not meet the requirement of 'adequate reasons'.

[26] Regardless, safeguarding the personal information of 'third parties' does not qualify as a valid justification, given the definition of personal information in PAIA. Section 34 of PAIA pertains to personal information of individuals or natural persons. A 'third party' is defined as a natural person for the purposes of s 34 of PAIA. Contracts

were entered into with juristic persons located in foreign states, as opposed to natural persons.

[27] The only possible personal information of the 'third parties', in reference to the redacted versions of the contracts received from Eskom and in the absence of any additional information in the response, is the names, signatures, and capacities, designations, or positions of the individuals who represented the parties (including Eskom as the electricity supplier) at the signing and conclusion of the agreements. According to s 34(2) (f) of PAIA, a record containing information about a public body official or former official that is relevant to their position or responsibilities may not be withheld. This includes, but is not limited to, the information specified in sub-sections (i) to (iv) regarding the individual. Consequently, this premise for rejection is without merit.

[28] Regarding the mandatory protection of commercial information of third parties there is no specific provision in PAIA relied upon and no reason is advanced to suggest that such disclosure is likely to harm any of the commercial interests of the foreign states or foreign organs of state listed by Eskom.

[29] Eskom's heads of argument belatedly incorporated a new 'ground' for denial by invoking the Protection of Personal Information Act 4 of 2013 (POPI). It is submitted that the personal information of the third parties (including that of juristic persons) is protected by POPI, and disclosure of such information would trample upon the third parties' rights under this Act.

[30] Afriforum took issue with the delayed raising of this 'ground' since it was not given the chance to answer to it in the pleadings. This is unsurprising, given that Eskom did not rely on POPI in its answering papers. It is trite that a party should refrain

from introducing a new basis for opposition to the relief sought if doing so would be unjust to the opposing party, unless that ground is explicitly addressed in the pleadings.[9] The introduction of this new ground evidently prejudices Afriforum as it was denied the opportunity to canvass this issue in the pleadings. The reliance on POPI is plainly an attempt by Eskom to supplement its case and cannot be allowed.

[31] In any event, the reliance on POPI is bad in law. Section 11(1)(c) of POPI provides that 'personal information may only be processed if processing complies with an *obligation imposed by law* on the responsible party'. The disclosure of records that may contain personally identifiable information of third parties will not infringe *unjustifiably* on the rights of such third parties under POPI. In terms of PAIA records of a public body must be provided except if one of the exemptions in chapter 4 applies. If none of the exemptions applies, the information officer would not act unlawfully or in contravention of POPI by providing such records as PAIA mandate the information officer to give access to such information. If the information officer refuses to grant access to certain records, the refusal must be justified on one or more grounds set out in Chapter 4 of PAIA.

Additional reasons provided by Eskom

[32] The internal appeal notice addressed in detail the grounds for appeal pertaining to the access denial grounds specified in the response letter. In addition, the public interest override provision of s 46 of PAIA was raised as a supplementary ground of appeal. Section 46 provides that:

'Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34 (1), 36 (1), 37

[9] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) 23D-H; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) 290E-H). Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA) at para 30.

(1) (a) or (b), 38 (a) or (b), 39 (1) (a) or (b), 40, 41 (1) (a) or (b), 42 (1) or (3), 43 (1) or (2), 44 (1) or (2) or 45, if-

(a) the disclosure of the record would reveal evidence of-

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

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

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

[33] In the answering affidavit submitted by Eskom in this application, the Deputy Information Officer affirms that further correspondence was transmitted to Afriforum's attorneys on 18 November 2022, which coincided with the date the appeal was deemed dismissed. The apparent purpose of this correspondence was to provide additional clarification regarding the denial of the request in both the response letter and the internal appeal. Eskom not only provided justifications for its denial of the requested records under ss 42(3)(b) and (c), but also expressed its intention to extend its reliance to ss 36(1)(b) and 36(1)(c)(i) and (ii) of the same legislation.

[34] Section 36(1)(b) and (c) (i) and (ii) deals with mandatory protection of certain commercial information of a third party and provides as follows:

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

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

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

(i) to put that third party at a disadvantage in contractual or other negotiations; or
(ii) to prejudice that third party in commercial competition.'

[35] The letter from the Deputy Information Officer is clearly an attempt to bolster *ex post facto* a complete lack of adequate reasons at the time Eskom took the first decision to refuse the request. It is both irregular and unlawful. Firstly, as previously stated, s 25 of PAIA states that a decision on a request must be made within 30 days and reasons must be provided where the request is refused. The Deputy Information Officer of Eskom, in this instance, has no option to clarify the reasons or grounds for her decision once it has been taken, much less while an appeal is still underway. She was *functus officio* and where an internal appeal has been lodged the information officer must in terms of s 75(4) submit the internal appeal to the *relevant authority*. The *appeal authority* then makes the final decision about the appeal and is required to provide sufficient justification for that decision.

[36] Secondly, the Deputy Information Officer's belated response is also wholly erroneous and unlawful insofar as it appears to pertain to the internal appeal. As the first decision-maker, the Deputy Information Officer is precluded from deciding the appeal. Not only does it violate PAIA requirements, but it also violates the *nemo iudex in sua causa* concept (no one is judge in their own case).

[37] Nonetheless, even if the additional reasons and s 36 are taken into account, Eskom's additional justifications for refusal are without merit. I say this for the reasons that follow.

<u>The coal and diesel contracts</u>

[38] As justification for invoking ss 42(3)(b) and 42(3)(c), Eskom stated in its belated response that the coal contracts are commercially sensitive and that disclosing such information would put *Eskom* at a competitive disadvantage in the marketplace, allow suppliers to supply coal to Eskom at exorbitant prices, and expose the information to

manipulation by coal suppliers and transporters. Furthermore, according to Eskom, the coal supply and transportation agreements contain confidentiality clauses and commercially sensitive information and would cause harm to the interest of *third parties,* putting them at a disadvantage in contractual and other negotiations and would prejudice their ability to compete in the marketplace (ss 36(b) and (c)).

[39] Eskom provided no evidence regarding the potential injury to Eskom or to third parties. Instead, it merely asserted that the agreements are confidential, contain information that is sensitive to commerce, and would disadvantage Eskom and third parties in contractual negotiations. It is however not clear what is ultimately commercially sensitive about the supply of coal and transportation thereof and the contractually agreed costs at which it is supplied and transported to Eskom's power stations. Eskom does not specify the necessary particulars whilst it carries the burden of proof to do so. I agree with counsel for Afriforum, Mr Lamey, that the reference to the harm and disadvantage to *third parties* in contractual negotiations is in any event mutually destructive to Eskom's version that the disclosure would place *Eskom* at a disadvantage in negotiation and lead to potential inflated costs.

[40] Eskom, being an organ of State, is after all constitutionally obligated to conduct its operations in a transparent and accountable manner. As remarked in *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd*,[10] when an organ of State enters into a commercial agreement of a public character, the imperative of transparency and accountability entitles members of the public in whose interest the organ of State operates, to know what expenditures such an agreement entails. Once a contract is

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[10] 2006 (6) SA 285 (SCA).

awarded the confidentiality clause offers no further protection from disclosure as regards the tender price.[11]

[41] According to Afriforum, the fact that coal constitutes Eskom's largest purchased commodity further supports the necessity for adherence to s 217 of the Constitution in the procurement of coal contracts. In support of its contention, Afriforum referred to the State Capture Commission's report and the most recent independent auditor's report to Parliament regarding Eskom's financial situation. Particularly, the auditors' report shed light on the malfeasance and irregularities involving coal contracts in which Eskom was implicated:

'In the light of the above observed and control deficiencies and the existence of fraud and corruption being widely reported both internally and externally of Eskom, we have concluded that there has been a significant breakdown in the controls over the management of coal, fuel oil, consumables and spares. This is considered to be a key audit matter due to the significant pervasive impact this has had on the overall timing, level of expertise and effort associated with the current audit of the financial statements.'

[42] According to Eskom's Integrated Report, annexed to the replying affidavit, as of 31 March 2022, the quantity of coal purchased in the 2022 financial year amounted to 108,70 megaton (one megaton = 1,000,000.00 tons). Considering these enormous quantities, the public ought to know at what prices the suppliers have contracted with Eskom and for what period. Furthermore, the coal contracts Eskom concludes with suppliers are not private. Eskom is a major public body in terms of the PFMA and public interest is of paramount importance in such transactions. As with other

[11] At [55] — [56]. See also *De Lange v Eskom Holdings Ltd and Others* 2012 (1) SA 280 GSJ at para [128].

commodities, coal price data is widely published, including the World Bank. There can thus be no sensitivity relating to coal prices.

[43] Afriforum has also attached the World Bank's 2 May 2023 commodities price statistics (The Pink Sheet) to its papers. In April 2023, the average cost of coal in South Africa was $133.70 per metric ton. The average cost of coal is thus known to suppliers and Eskom. That ought to be the primary factor that influences the contract pricing.

[44] In addition, an extract from the website of Eskom regarding the coal procurement process was attached to the Afriforum's replying affidavit. According to Eskom, the legislative framework that governs Eskom's coal procurement is derived from certain legislation which includes the PFMA. This document indicates that Eskom's standard coal procurement procedure is an open tender process. Hence, the determination of competitive and cost-effective tendering is the responsibility of the Eskom bid committees and the tender process; it is not a subject of private negotiation. In accordance with PAIA, any other bidder would be granted access to the contract following the conclusion of a bidding process and prior to the awarding of a contract to the successful bidder. This access would enable the bidder to examine the contract's pricing and other terms with the intention of determining whether to contest the award of the contract. There can be no commercial sensitivity or confidentiality when it comes to these contracts.

[45] Consequently, with a competitive bidding process there can be little scope for manipulated negotiation power. As stated, data on average coal prices is known world-wide. The total costs and expenditure by Eskom in respect of its generation costs is also published in the audited financial statements of Eskom. This is evident

from an extract from the financial statements and relates to the notes pertaining to Eskom's generation costs.

[46] In terms of third-party interests in the disclosure of the contracts, Eskom's comments are generalised and lack any factual basis. I am thus not persuaded that the suppliers are likely to suffer commercial or financial harm as a result of the disclosure. Eskom has also not sent the request to the relevant third parties for them to consider as provided for in s 48 of PAIA. As the contracts are subject to transparent procurement processes as mandated by s 217 of the Constitution, every third party that contracts with Eskom would know that it contracts within this legislative framework. Hence, they ought to know that the contracts are of a public nature.

[47] It is thus essential that the procedure Eskom adopts in contracting with suppliers is transparent, competitive, cost-effective, fair, and equitable. Eskom is accordingly obligated to disclose the coal contracts and purchase prices for the supply of coal in the interest of transparency and accountability.

[48] In respect of coal transportation, Eskom only furnished a list of the rail contracts. No information regarding road transport contracts, costs, or prices has been provided. Considering the list of entities with which Eskom has active coal contracts and the close proximity of several coal mines in Mpumalanga and the majority of Eskom's power stations located in that area, it is inevitable that Eskom uses road transport for coal. Given Eskom's significant yearly expenditures on coal delivery and its well-known precarious financial position, full transparency of coal transportation contracts is required. The public interest in the disclosure of these records clearly outweighs any harm or potential harm.

[49] Eskom grounds for refusing access to the diesel contracts are essentially the same to those it has provided for the coal supply contracts. Eskom's answering affidavit makes it clear that the company relies heavily on diesel supplies to generate electricity, which accounts for a substantial portion of its expenditures. Considerations of transparency in respect of procurement of diesel contracts and compliance with procurement legislation as well as the overriding public interest overrides the non-disclosure grounds. Similar to the coal industry, Eskom must adhere to open and competitive bidding procedures in its procurement processes. Contracts for the delivery of diesel cannot be concluded through private discussion.

[50] It is further highly unlikely that disclosure of the diesel contracts could prejudice Eskom or that Eskom and the competition would suffer if they were made public. Similar to coal, the average diesel prices that are used to gauge pricing and supply agreements are available to the public and are posted on the internet. An excerpt from the Globalpetrolprices.com website, which periodically discloses South Africa's diesel prices, was attached to Afriforum's papers. In South Africa, the price of diesel is currently R22.211 per litre. Pricing for diesel cannot be a sensitive commercial issue.

[51] It is in the public's interest that the diesel contracts be disclosed so that it can be determined whether the agreed-upon prices or pricing formula are cost-effective in relation to the average diesel price at the time, as well as the duration of these contracts. It is unlikely that the public disclosure of these contracts will harm Eskom's commercial and financial interests, put Eskom at a disadvantage in contractual negotiations, prejudice Eskom in commercial competition, or harm third parties' commercial interests. Eskom has failed to discharge the onus it bears in order to justify a refusal of access to the diesel supply contracts in terms of PAIA.

[52] Lastly, as far as the transportation of diesel is concerned, it is important to be able to assess this aspect in the interest of the public to determine what component of the transportation costs is paid for and charged by the suppliers over and above the diesel price. As the average diesel price is publicly known the component pertaining to transport costs factored into the pricing can then be ascertained.

[53] In conclusion: Eskom has failed to demonstrate that it has reasonable grounds for refusing access to coal and diesel supply and transportation contracts. Afriforum and the general public have an interest in accessing all of these contracts to view the terms, purchase price, and periods of the contracts, as well as determining whether the agreed-upon prices differ from the average published pricing data to determine whether Eskom is paying market-related prices or inflated prices.

<u>Contracts with neighbouring countries</u>

[54] Eskom provided redacted contracts for contracts with neighbouring countries. Certain material information of the contracts with neighbouring countries have not been disclosed, which includes the prices for the electricity, the payment terms, escalation clauses and the persons that represented the parties.

[55] No facts have been placed before the court by Eskom to justify the refusal of access to this information. To the contrary, Afriforum demonstrates in paragraphs 32.3-32.6 of the answering affidavit that providing the unredacted contracts to Afriforum is in the public interest. The South African public, which is increasingly paying higher power rates, has the right to know what price Eskom sells electricity to surrounding nations and to compare such pricing to that in South Africa. These

contracts are likewise public and should be publicised for transparency and accountability.

Afriforum's commercial motive

[56] The public interest override as provided for in s 46 of PAIA would only come into play if Eskom has successfully justified the reliance upon ss 36(1) and 42(3) and where the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question. Eskom has failed to discharge the onus it bears for a justification of exclusion of the information sought in terms of ss 36(1)(b), 36(1)(c)and 42(3)(b) and 42(3)(c) of PAIA. But, for the sake of completeness I will now also discuss whether the requirements of s 46 have been satisfied.

[57] Although Afriforum's *locus standi* as a recognised civil rights organisation in various matters has been recognized by courts throughout the country, Eskom contends that Afriforum is not genuinely acting in the public interest and that the request was only instituted under the 'guise' of public interest. It is submitted that the refusal is therefore 'reasonable and justifiable' as Afriforum requires the records for its 'self-serving purpose' as it wants to become 'the alternative power utility to generate, transmit and distribute bulk electricity within the Republic of South Africa.' It is submitted that Afriforum is utilizing the provisions of PAIA to conduct its own market research as an incumbent competitor of Eskom and amounts to an abuse of court process and a misuse of legislation intended to promote constitutionally entrenched rights.

[58] Afriforum disputes this claim and argues that Eskom is merely attempting to deflect attention from its "deplorable track record concerning irregularities in procurement," which has become widely known, especially since the State Capture

Commission's report, which extensively examined the irregularities in coal contracts pertaining to procurement contracts and is a public document. Afriforum asserts that it has no commercial intent or motivation to establish diesel or coal-fired power plants, as the latter have been rendered outdated and negatively impact the environment. It is asserted that following a media briefing by the National Energy Regulator (NERSA), Afriforum launched an initiative to explore the possibility of developing new generation capacity unrelated to conventional power stations, which rely primarily on diesel and coal to generate electricity. Coal contracts and diesel contracts are not used for purposes of renewable energy resources for electricity power generation such as solar energy, wind energy or even nuclear energy.

[59] In support of this contention Afriforum referred to its MyPower campaign whose purpose is to activate individual households and businesses to make use of the growing opportunity and scope for private power generation (which obviously has to be done with renewable energy sources such as solar power) and for this purpose to obtain a mandate from households and businesses to negotiate with the Energy Crisis Committee as well as NERSA so that households and businesses can also benefit from sales to the power grid. It is submitted that it is for this reason that Pionier Dienste Maatskappy, a separate non-profit company from Afriforum, had been established and registered in February 2021 with a view to assist communities in municipalities with supporting services.

[60] Regarding Afriforum's alleged intention to become a competitor in the provision of electricity generated by coal and diesel, there are no factual grounds to support Eskom's assertion. Therefore, Eskom's claim regarding an ulterior motive is a red herring. It is not necessary for a requester to establish why it has a right to have access

to records of a public body. The records must be disclosed as a matter of right, unless the public body discharges the onus of establishing justifiable grounds with reference to PAIA and a proper factual basis as to why access to the records should be refused. It is also not a requirement that the requester has to establish that the record is required for the exercise in protection of any rights. That is only a requirement when a requester seeks access to a record of a private body in terms of s 50 of PAIA.

[61] The factual basis for the public interest override in terms of s 46 has been laid in Afriforum's founding affidavit and in the replying affidavit. One example is the Integrated Report of 2022 (which is a public document to be found on Eskom's website) in the message of the Chairman of the Board of Eskom, that one of the 'top priorities is to reduce Eskom's drain on the public purse, together with dealing with irregular expenditure and Eskom's unsustainable high debt.' At page 55 of the said 2022 Integrated Report, the following is stated:

'At 31 March 2022, the closing balance of irregular expenditure amounted to R67,1 billion. The vast majority of which relates to the prior year transgressions. The opening balance has been restated from R37,2 billion to R59,2 billion. The process of collecting information and reporting on irregular expenditure continues to be a focus area to reduce the occurrence of restatements in the future.'

[62] What is telling in this regard, over and above the findings of Commission of Inquiry into State Capture, is the report of the auditors of Eskom. In the audited financial statements, the following is stated with reference to expenditure management:

'Effective and appropriate steps were not taken to prevent irregular expenditure, as required by s 51(1)(b)(ii) of the PFMA. As reported in the basis for the qualified opinion the amount of irregular expenditure disclosed in note 51.1 of the company financial statements does not reflect the full extent of the irregular expenditure incurred. The majority of the irregular expenditure disclosed in the financial statements was caused by non-compliance with s 51 1 a iii of the PFMA. Similar non-compliance was reported in the prior year. Effective steps were not taken to prevent fruitless and wasteful expenditure, as required by s 51(1)(b)(ii) of the PFMA. As reported in the basis for the qualified opinion the amount of fruitless and wasteful expenditure disclosed in note 51.2 of the company financial statements does not reflect the full extent of the fruitless and wasteful expenditure incurred. The majority of the fruitless and wasteful expenditure disclosed in the financial statements was caused by poor procurement and project management. Similar non-compliance was reported in the prior year....'[12]

[63] It is therefore a well-known fact that one of the major issues which Eskom has experienced for years is irregular expenditure pertaining to procurement of goods over a wide spectrum. What the above demonstrates is that it is likely that the disclosure of the records in relation to the coal and diesel contracts would reveal a substantial contravention or failure to comply with the law. This is a requirement in terms of s 46(1)(a)(i). The contracts which the Afriforum seeks access to, inter alia, relates to the purchasing of coal, contracts in relation to the transportation and distribution of coal, purchasing of diesel and contracts in relation to the transportation and distribution of diesel. The procurement of these contracts falls squarely within the provisions of s 217 of the Constitution. It is a constitutional imperative that such procurement must be transparent, competitive and cost-effective.

[64] Over and above, all organs of State must comply with s 195 of the Constitution. Section 195(1)(f) and (g) and places an obligation on public administration to be accountable and to foster transparency by providing the public with timely, accessible and accurate information. It is therefore in the interest of Afriforum, its members and

[12] At page 33 of Eskom's audited annual financial statements for 2022.

the broader public that these contracts be disclosed in the interest of transparency and accountability and be subject to scrutiny so as to determine whether they are competitive and cost-effective.

[65] The requirement in s 46(b) has been established by the Afriforum. Given Eskom's profile as a major organ of State, it has duty to comply with the Constitution in terms of s 217 as far as transparent procurement is concerned. The ongoing reports of serious irregularities pertaining to fuel and coal contracts and the heightened duty of transparency and openness and avoidance of secrecy and the public interest in the disclosure, outweighs any potential harm contemplated in the provisions on which Eskom relies in order to refuse access to the records pertaining to coal and diesel contracts.

[66] In the result the following order is made:

1. The refusal of the respondents to grant the applicant access to the following records/documents in respect of applicant's request in terms of Section 18(1) of the Act and dated 11 July 2022 is set aside:

   1.1 Copies of all active contracts that the first respondent or any one of its subsidiaries has concluded to purchase coal.

   1.2 Copies of all active contracts that the first respondent or any one of its subsidiaries has concluded relating to the transportation and distribution of coal.

   1.3 Copies of all active contracts that the first respondent or any one of its subsidiaries has concluded to purchase diesel.

1.4 Copies of all active contracts that the first respondent or any one of its subsidiaries has concluded relating to the transportation and distribution of diesel, to the extent that the transportation and distribution of diesel by any supplier is not covered by the contracts referred to in paragraph 1.3 of the order and/or separate contracts for the transportation and distribution of diesel to the first respondent or any one of its subsidiaries have been concluded with any party.

1.5 Copies of all active unredacted contracts that the first respondent or any one of its subsidiaries have concluded with neighbouring countries of South Africa for the first respondent or any one of its subsidiaries to provide electricity to those countries.

2. The first and second respondents are directed to grant the applicant and/or its attorneys access in printed form of the records or documents referred to in sub-paragraphs 1.1 to 1.5 above within 10 days from date of this order.

3. The first respondent is ordered to pay the costs of the applicant which costs shall include the following:

3.1 The costs occasioned by the applicant in the employment of one counsel up to 31 August 2023;

3.2 The costs occasioned by the applicant in the employment of two counsel as from 1 September 2023;

[67] 3.3 The costs of two counsel in respect of the costs occasioned by the applicant with regards to the respondents' application for leave to file a supplementary affidavit as well as the application for the referral to oral evidence.

[redacted]

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 March 2024.

APPEARANCES

Counsel for the applicant:	Advocate A.T. Lamey
	Advocate C. van Schalkwyk
Instructed by:	Hurter Spies Inc.
Counsel for the first and second respondent:	Advocate M.C. Makgato
	Advocate S. Kunene
	Advocate V. Qithi
Instructed by:	Dyason Inc.
Date of hearing:	30 October 2023
Date of judgment:	22 March 2024