

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

CASE NO: _____

In the matter between:

SAKELIGA NPC

APPLICANT

and

NATIONAL TREASURY

1st RESPONDENT

INFORMATION OFFICER:

NATIONAL TREASURY N.O

2nd RESPONDENT

NOTICE OF MOTION

TAKE NOTICE that the applicant intends to make application to this Honourable Court in terms of Section 78 of the Promotion of Access to Information Act (Act No 2 of 2000) (hereinafter referred to as "PAIA"), read with the Rules of Procedure published under GNR965 of 9 October 2009 (Government Gazette No 32622) for an order in the following terms:

1. The respondents' deemed decision of 14 MAY 2023 to refuse to grant access to the applicant as sought in its request for information dated 14 APRIL 2023 is

hereby declared unlawful and in contravention of the provisions of the Promotion of Access to Information Act 2 of 2000.

2. The respondents' deemed decision of 14 MAY 2023 to refuse to grant access to the applicant as sought in its request for information dated 14 APRIL 2023 is hereby reviewed and set aside.
3. The respondents' deemed dismissal dated 19 JUNE 2023 of the applicant's internal appeal dated 19 MAY 2023 is reviewed and set aside.
4. The respondents are directed to grant the applicant and/or its attorneys the access so sought, as described in the initial request, within 10 (ten) days of this order.
5. The respondents shall bear the costs occasioned hereby, including the costs of the internal appeal.
6. Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of **TOBIAS VIVIAN ALBERTS** together with annexures will be used in support of this application.

TAKE NOTICE FURTHER that the respondents are called upon:

- (a) to give notice within 15 (fifteen) days of receipt of this application, of their intention to oppose the application, which notice shall also contain an address within eight (8) kilometres of the Court to which the application is brought where notice and service of documents will be accepted.
- (b) to file their answering affidavits, if any, within 15 (fifteen) days after service of notice of intention to oppose this application.
- (c) In default of the respondents complying with rule 3(5) of the Promotion of Access to Information Rules, the applicant may request the registrar of this honourable court to place the application before Court for an order in terms of section 82(b) of PAIA.
- (d) In default of the respondents delivering a notice of intention to oppose, the matter will without further notice, be placed on the roll for hearing after expiry of the period mentioned in paragraph (a) above, on a date fixed by the registrar of this Court.

DATED AT PRETORIA ON THIS _____ DAY OF _____ 2023

KRIEK WASSENAAR VENTER

Attorneys for applicant

TEL:

FAX:

EMAIL:

REF:

**TO : THE REGISTRAR OF THE HIGH COURT
PRETORIA**

**AND TO : NATIONAL TREASURY
[ADDRESS]
[SERVICE BY SHERIFF]**

**AND TO : INFORMATION OFFICER: NATIONAL TREASURY
[ADDRESS]
[SERVICE BY SHERIFF]**

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FOUNDING AFFIDAVIT

I, the undersigned:

TOBIAS VIVIAN ALBERTS

Do hereby make an oath and swear as follows:

1. I am an adult male with full legal capacity and currently employed as a legal officer by the applicant. I have been seized with this matter from the outset.

2. The contents hereof fall within my personal knowledge by virtue of such employment and involvement, and are to the best of my belief both true and correct. Where I make legal submissions I do so on the advice of the applicant's legal representatives, which advice I accept.

3. I am authorised to depose hereto as evidenced by annexure "**TVA1**", attached hereto, being a duly signed resolution of delegation of authority confirming same.

PURPOSE OF APPLICATION

4. This application has been launched in terms Section 78(2), read with Section 82 and 27 of PAIA, for the purpose of compelling the respondents to provide the applicant ('Sakeliga') with access to the information and documents specified hereunder.

5. Sakeliga sought certain information relating to decisions made by the first respondent in respect of exemptions from the application of the Public Finance Management Act 1 of 1999 ('PFMA').
 - 5.1 In the interests of brevity, a full list of records sought will not be herein repeated and can be perused as per the copy of the initial request for information as attached hereto (annexure "**TVA2**").

6. Organs to which the PFMA applies may, in terms of s92 of same, apply to the Minister of Finance for exemption from same. Over the years, the Minister has granted such exemptions from time to time. What Sakeliga seeks is to better understand the basis for these decisions, given that irregular procurement and mismanagement of public funding is a national crisis.
7. Self-evidently, such information is not only in the interest of Sakeliga and its members, but in that of the public generally. The information explicitly pertains to national governance and the financial workings of the Republic, transparency in respect of which are intrinsic to the proper functioning of Constitutionalism and participatory democracy.
8. Despite the substantive importance hereof, the first respondent has handled Sakeliga's duly delivered request for information in an unlawful, irresponsible and dilatory fashion. Such conduct prejudices Sakeliga's interests as well as Constitutional imperatives, and for that reason stands to be disdained.
9. Concomitantly, the deemed refusal flowing from such conduct stands to be declared unlawful and set aside.

PARTIES, STANDING & JURISDICTION

10. The applicant is SAKELIGA NPC, a non-profit company with registration number 2012/043725/08 and registered address at Block A, Floor 5, Loftus Park, 416 Kirkness Street, Arcadia, Pretoria, Gauteng Province.

- 10.1 Sakeliga is a business interest organisation with a supporter and donor base of more than 12,000 businesspeople, companies and organisations, and a network of more than 40,000 subscribers in South Africa.
 - 10.2 Sakeliga was established in 2011 and was incorporated and registered as a non-profit company in terms of the Companies Act, Act 71 of 2008, in 2012. The Applicant's main objective is the protection of constitutional rights, constitutional order, the rule of law, free-market principles, and a just and sustainable business environment within the Republic of South Africa.
11. The applicant is a "requester" as envisaged in part (a)(i) of the definition of a "requester" in section 1 of PAIA and brings this application on behalf of its members in terms of section 38(e) of the Constitution as well as in the public interest in terms of section 38(d).
12. The first respondent is the National Treasury, a national department of state as provided for in the Public Service Act and as described in s1 of PAIA specifically under sub-paragraph (a) of the relevant item, with its address at 240 Madiba Street, Pretoria Central, Pretoria, 0002.
 - 12.1 National Treasury's stated mandate is to manage the Republic national government finances, and in particular "to promote government's fiscal

policy framework; to coordinate macroeconomic policy and intergovernmental financial relations; to manage the budget preparation process; to facilitate the Division of Revenue Act, which provides for an equitable distribution of nationally raised revenue between national, provincial and local government; and to monitor the implementation of provincial budgets.”

13. The second respondent is the designated information officer of the first respondent as per paragraph 3.3 of the first respondent’s official PAIA manual and cited herein *nominee officio* due to the fact that the first respondent has designated multiple individuals in terms of same, and furthermore that the contact details of said individuals do not appear to be current or up to date.
14. The second respondent also has address at 240 Madiba Street, Pretoria Central, Pretoria, 0002. The second respondent is joined in the capacity as having statutorily prescribed interest in the matter, in particular but not limited to the provisions of Rule 3(1) of the PAIA Procedural Rules, and bearing overall responsibility for the processing and handling of requests for information directed at the first respondent.
15. The above Honourable Court has jurisdiction to hear this application by virtue of the definition of ‘Court’ in Section 1 of PAIA which provides that a ‘Court’ includes the High Court within whose area of jurisdiction the requester is domiciled or ordinarily resident.

16. Furthermore, the National Treasury is a “public body” as defined in section 1 of PAIA and stated herein above.
17. Sakeliga has furthermore exhausted the relevant internal appeal procedures in terms of s74 read with s75 and 76 of PAIA and has no other alternative than to approach the above Honourable Court for the necessary relief.
18. Moreover, and as elaborated herein below, Sakeliga has exhausted the internal remedies afforded by PAIA as against the respondents, to no avail.

BACKGROUND & TIMELINE

19. The initial request for information was duly submitted in terms of the prescripts of PAIA on 14 April 2023. A copy of the request and accompanying annexures is attached hereto as annexure “**TVA2**”.
 20. The request was delivered via e-mail to the address as set out in para 3.3 of the first respondent’s official PAIA manual, being “paia@treasury.co.za”.
- 20.1 I reiterate that the details of certain designated individuals do not appear to be updated and current as listed in the manual. All four individuals so designated share the above e-mail address.

21. The allowed 30-day period for response in terms of s25 lapsed on 14 May 2023 without response or acknowledgement from the first respondent. The request was thus deemed refused in terms of s27.

22. Sakeliga thus launched an internal appeal against the deemed refusal on 19 May 2023 in terms of s74, a copy of which is attached hereto as annexure “**TVA3**”. The notice of appeal was duly delivered to the information officer group via the indicated e-mail address, in the expectation that the statutorily prescribed process would follow and the appeal delivered to the Minister of Finance for decision.
 - 22.1 The appeal was moreover sent directly to one of the two designated deputy information officers, Ms Talent Mtungwa, at the e-mail address “talent.mtungwa@treasury.gov.za”.

23. The 30-day period for response to the internal appeal elapsed on 19 June 2023 and the appeal was therefore deemed dismissed in terms of s77(3).

24. I am advised that Sakeliga was thus entitled to approach this honourable Court for relief on even date in terms of s78 as read with s27 and s82.

25. Despite the aforesaid, in an effort to avoid litigation, a courtesy email was again sent to the paia@treasury.gov.za address and the e-mail address of Ms Mtungwa on 20 June 2022 in which they were advised that the request and

appeal had been duly filed and that in the absence of a response, an application to court would follow by 23 June.

26. On the same day, I received an automated reply from Ms Mtungwa that she is out of office from 19 - 23 June 2023 and that urgent PAIA related enquiries should be sent to "paia@treasury.gov.za".
27. Copies of the above communication are attached hereto as annexure "**TVA4**".
28. I pause to mention that at this point the applicant was amenable to reasonable requests from the respondent as to indulgence to allow respondent more time to notify the Applicant of its decision with regards to the internal appeal. Had the respondents at this point requested a few more days or weeks to inform the applicants of the decision to the internal appeal, the applicant would have been amenable to agreeing appropriate timelines for finalisation of the matter without litigation.
29. On 21 June 2023, Sakeliga received an e-mail from one Mr Danny Boikhutso, the Director: Strategic Projects and Support at the first respondent, a copy of which is attached hereto as annexure "**TVA5**". Mr Boikhutso is not listed or indicated as the information officer of the first respondent. It is moreover not apparent how Mr Boikhutso became aware, or when he became aware, of the application, in light of the information set out herein below.
30. Mr Boikhutso indicated the following:

- 30.1 National Treasury acknowledges receipt of the Sakeliga's "request for access to information which was received on the 20 of June 2023."
- 30.2 The respondents "have never received" the request initially.
- 30.3 The respondents had no record of any request fee paid for the request and no acknowledgement of receipt from the respondents.
- 30.4 That a further 30 days was requested for the respondents to process and deal with the request.
- 30.5 That a prescribed fee of R35.00 must be paid by Sakeliga.
31. Sakeliga responded to Mr Boikhutso's e-mail on even date, copy of which is attached hereto as annexure "**TVA6**", and indicated the following:
- 31.1 It was not correct that the respondents had only received the Request on 20 June 2023. Proof of delivery of the initial request and notice of internal appeal on 14 April 2023 and 19 May 2023, respectively, was provided.
- 31.2 At no point did Sakeliga's indicate non-delivery of the aforesaid documents, *viz*, Sakeliga received no 'bounceback' mail which ordinarily indicates that the mail did not enter the recipient's servers.

- 31.2.1 I pause make plain that in cases where an e-mail is not delivered into the information system of an intended recipient, Sakeliga's mail server notifies the sender by e-mail. To demonstrate this to the Court, an unrelated example of a notification to this effect is annexed hereto and marked "**TVA7**". No such notification was received in the present case.
- 31.3 Sakeliga was not liable to pay a fee because the respondent had failed to indicate, as prescribed by PAIA, that such fee was payable at the first instance of asking.
- 31.4 Sakeliga would not acquiesce to the request for a further 30 days.
32. I thus instructed Sakeliga's attorneys of record to draft and deliver a final letter of demand to the respondents via the now established points of contact.
33. Said letter was delivered on 22 June 2023, a copy of which is attached hereto as annexure "**TVA8**".
34. The communication indicated that a formal response should be sent by 23 June 2023, whereafter the requested information should be sent by 30 June 2023, failing which an application to Court would ensue.

35. The following day, being 23 June 2023, Sakeliga's attorneys were contacted by a Mrs K.D Mogoro of the first respondent. It is not clear whether Mrs Mogoro is attached to the information officer contingent designated in the PAIA manual. Mrs Mogoro explained, via a combination of telephonic and e-mail communication, the following:

35.1 The respondents had been able to discern that the initial request and notice of appeal had been "quarantined due to the subject line".

35.2 That the respondents "understand the urgency of the request" but required additional opportunity to process same.

36. Mrs Mogoro provided no indication as to whether the respondents required further time to process the request and reach a decision thereon.

37. I note that our attorneys inquired of Mrs Mogoro as to whether the 'quarantined' portion of the respondent's mails were monitored, to which Mrs Mogoro responded that they were not. Mrs Mogoro could not indicate as to why this is the case when asked.

37.1 For the sake of clarity I note that "quarantined" e-mail messages are not tantamount to e-mail messages that have not reached the intended recipient's information system. Quarantined e-mail messages enter the information system of a receiver but are placed in a separate "quarantined" section because of protection algorithms

designed to provisionally detect malware and phishing. Whether an e-mail is detected and quarantined can also depend on whether the administrator, in this case the First Respondent, applies standard or strict detection policies.

37.2 A system administrator can monitor the quarantine portal for quarantined messages and decide to release a given e-mail message based on a human assessment that no real threat exists. An extract from Microsoft's website explaining this process is annexed hereto and marked "**TVA9**".

38. It would appear that the respondents neglect/neglected to duly and properly monitor their e-mail systems.

39. Aggrieved by the respondent's explanation for its default; the evident neglect for Constitutionally mandated systems of transparency and accountability' and the fact that the respondent wished to effectively re-start the process *ab initio* to Sakeliga and its members' prejudice, Sakeliga's attorneys addressed further communication to the respondents on 27 June 2023, in which it was indicated that:

39.1 The respondent's explanation was unacceptable.

39.2 Sakeliga had complied with the statutory prescripts of PAIA.

39.3 That Sakeliga and its members would not be held liable and prejudiced for the respondent's internal oversight and systemic failures.

39.4 That in a final effort to avoid litigation, the deadline for response to the appeal would be extended to 30 June 2023.

40. A copy of this letter is attached hereto as annexure "TVA10".

41. I note also that whilst Sakeliga maintains that notice of the payable fee was not duly given in the prescribed fashion, Sakeliga nevertheless paid the amount indicated on 23 June 2023 as a further gesture of good faith. I attach proof of payment hereto as annexure "TVA11".

42. At the time I deposed hereto, no response has been received to said communication of 27 June 2023. As such, Sakeliga has no other alternative than to approach this honourable Court for relief.

SUBMISSIONS IN RESPECT OF RELIEF SOUGHT

Sakeliga entitled to approach this honourable Court

43. I am advised that having met the statutory requirements prescribed by PAIA for delivery of a request for information, and upon expiry of the statutorily allotted

time for a response to the notice of internal appeal, Sakeliga was lawfully entitled to approach this honourable Court for relief on 20 June 2023.

44. Any leeway granted the respondents pursuant to such expiry amounts to no more than good faith indulgences, which the respondents failed to reciprocate and take advantage of.
45. It appears that the respondents have attempted to create a unique or otherwise unorthodox system for the processing of PAIA requests by appointing no less than four individuals as information officers, which officers all share the exact same e-mail address, and which mail server is capable of erroneously filtering legitimate requests for information.
46. Such a system is patently ill-conceived, given the importance of the right of access to information held by the state, and as demonstrated by its failure in the matter at hand. Any attempt to excuse such failure as an oversight should properly be met with contempt, given further the importance of PAIA and its principles as set out herein below.
47. It must be noted in summary that:
 - 47.1 The system of 'quarantine' was deliberately implemented by the first respondent.

- 47.2 The 'paia@treasury.gov.za' is the explicitly stated and designated address provided by the first respondent for the delivery of PAIA requests.
- 47.3 The first respondent bears responsibility for the effective working of its implemented e-mail system.
- 47.4 The first respondent admitted to failing to monitor and regulate the implementation and working of the system and was thus on its own version negligent.
- 47.5 The respondent responded only on 20 June 2023 despite the fact that one of its stated deputy information officers was expressly included in the subsequent delivery of the notice of appeal on her personal e-mail.
- 47.6 Sakeliga complied with the procedure prescribed by PAIA and delivered its request to the addresses specified by the first respondent in its PAIA manual.
- 47.7 Sakeliga and its members cannot and should not be prejudiced in the exercise of its Constitutional rights for the internal failings of the first respondent.

Importance of PAIA and right of access to information

48. The first respondent has in this case dismally failed its Constitutional and statutory obligations.

49. Although it is by now trite, it is worth reiterating the principals involved in an application of this nature. In seeking the requested information, Sakeliga relies, *inter alia*, on the following rights:

49.1 The right to access to information.

49.2 The right to just administrative action.

49.3 The right to effective, transparent, accountable, and coherent governance.

50. Furthermore, and as explicitly stated in its preamble, the purpose of PAIA is two-fold:

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

50.2 To promote a society in which the citizens have effective access to information, to enable them to more fully exercise and protect their rights.

51. As a public body entrusted with the financial health of the entire Republic and concomitant authority to fulfil such mandate, the National Treasury has a

heightened constitutional obligation to conduct itself in a transparent and accountable manner.

52. I am advised that where a PAIA request is made to an organ of state, the point of departure is that the state organ so requested is obliged to disclose the information requested. The default position is subject only to an exhaustive list of exceptions, to be interpreted in favour of the right of access to information whenever possible. This is clear from s11(1) of PAIA which reads:

'(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.'

53. I am further advised that in terms of s81 of PAIA, the respondents bear the burden of proof in demonstrating that their refusal was in accordance with the provisions of PAIA.
54. Transparency is perhaps the single most important principle governing public administration. I am advised that the Constitutional framework demands that transparency is fostered by providing the public with accessible, true information when it is called upon to do so – in a timely and effective fashion.
55. I am furthermore advised that PAIA is intended to be an expedient, user-friendly act which is to be interpreted in favour of the requester and Constitutionalism whenever there is uncertainty as to its application. Its underlying aims are in

favour of citizens and this fact most certainly finds application in this matter, given the conduct of the National Treasury and its information officers in handling the case.

No stated grounds of refusal and no prospect of success with same

56. It is common cause that the first respondent has not made a decision on whether access as sought by Sakeliga should be granted or refused within the statutorily allotted time frame.

57. I am advised that the first respondent should not properly be allowed to make out a case for refusal in its answering papers. In the event that this honourable Court is inclined to allow it such leeway however, Sakeliga reserves its right to answer such case in a replying affidavit. For the moment, Sakeliga submits the following in pre-emption, without purporting to make full legal argument, which will duly be delivered at the hearing hereof should same become necessary:

57.1 The respondent is under a heightened obligation to disclose, as outlined above.

57.2 The grounds for legitimate refusal contained in PAIA are exhaustive. The records so sought do not fall under any of the above grounds.

57.3 The interests and/or personal information of private or third parties are not affected by the records sought. The records do not pertain to trade

secrets or sensitive commercial information the disclosure of which would harm the interests of the state. The records do not pertain to defence or international relations.

57.4 The sole potential ground on which the first respondent may seek to rely is contained in s42 and s44, which may seem to find application but does not, in particular as these decisions are not currently live and consequently that disclosure of reasoning processes would not frustrate any deliberative process. Moreover, these grounds are not categorical in terms of refusal.

57.5 The importance of the information and records sought outweigh any potential prejudice to the National Treasury in any event. The public interest override clause contained in s46 of PAIA would find application herein, given that the records sought may reveal evidence of illegality or irregularity, and relates to the very structure of governance.

57.6 Moreover, I am advised that the public interest override is in any event not confined to the terminology of PAIA's provisions, but clearly is intended to also encompass the furthering of PAIA's goals generally, to wit, fostering and facilitating a culture of open government.

CONCLUSION

58. Sakeliga avers that it has exhausted its internal remedies and that the conduct of the respondents has been needlessly dilatory and inefficient, to the extent that its handling of the request amounts to a violation of the Constitutional right of access to information.
59. Moreover, there is simply no basis in law for refusing access to the information sought. Indeed, the respondents have not even attempted to find such basis. On that fact alone should this application succeed.

WHEREFORE I pray for an order as set out in the notice of motion.

DATED & SIGNED AT _____ THIS _____ DAY OF _____ 2023

TOBIAS VIVIAN ALBERTS

THUS SIGNED AND SWORN TO BEFORE ME AT _____ ON THIS _____ DAY OF _____ 2023, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THAT IT IS

**BOTH TRUE AND CORRECT TO THE BEST OF HIS KNOWLEDGE AND BELIEF,
THAT HE HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND THAT
THE PRESCRIBED OATH WILL BE BINDING ON HIS CONSCIENCE.**