IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA

Case No: 39646/12

In the matter between:

VAAL ENVIRONMENTAL JUSTICE ALLIANCE First Applicant

and

COMPANY SECRETARY OF ARCELORMITTAL SOUTH AFRICA First Respondent

ARCELORMITTAL SOUTH AFRICA LIMITED Second Respondent

RESPONDENTS' HEADS OF ARGUMENT

OVERVIEW

1. The applicant ("**VEJA**") seeks to set aside the decision of the second respondent ("**AMSA**") to refuse two requests made in terms of section 50 of the Promotion of Access to Information Act 2 of 2000 ("**the PAIA**").[1]

   1.1. VEJA's first request ("**the Master Plan request**") was made on 15 December 2011. The request was for a document described as the "**Environmental Master Plan**" and for all updated versions of this

[1] Prayer 1 of the Notice of Motion, p 1.

document and any progress reports relating to it.[2]

1.2. The second request ("**the disposal site request**") was made on 13 February 2012. That request was for certain government reports pertaining to compliance inspections of AMSA's Vaal disposal site in Vereeniging.[3]

2. AMSA refused the requests on the basis that they had not met the threshold requirements of section 50(1)(a) of the PAIA. As a result of this decision, AMSA did not process the requests any further. In particular, it did not consider the substance of the requests and has not determined whether any of the grounds of refusal are applicable to the information in the requested records.[4]

3. In addition to setting aside the refusal of these requests, VEJA seeks an order directing AMSA to provide it with the requested records.[5] In so doing, it seeks access to those records notwithstanding that AMSA has not yet considered whether any of the provisions of the PAIA apply to the records that have been requested. AMSA submits that VEJA is not entitled to either of these orders.

4. The prescribed request form requires a requester "*to identify the right the requester is seeking to exercise or protect and provide an explanation of why the*

[2] Master plan request form, page 103.
[3] Disposal site request form, p 167.
[4] AA para 76.2, p 235.
[5] Prayer 2 of the Notice of Motion, p 2.

requested record is required for the exercise or protection of that right".[6] This explanation is required because private bodies do not have a general obligation to process and consider requests for access to information. They are obliged to do so only in respect of those requests that meet the threshold imposed by the Act, namely that the requested record must be "*required for the exercise or protection of any rights*".[7] This means that the requester must show (i) a substantial advantage or an element of need in respect of the information sought and (ii) some connection between the requested information and the exercise or protection of the right.[8]

5. The explanation provided by a requester when completing this form is therefore crucial. It is the only information that can inform the assessment of the private body that receives the request as to whether it meets the threshold requirements imposed by the Act. It is the requester's identification of the right that is relied upon and the explanation for the reliance on that right <u>provided in this form</u> that the recipient uses to assess whether the threshold is met and whether the request must then further be processed and considered under the Act. If it is not, the recipient of the request is entitled to decline it on the basis that the requirements of section 50(1)(a) of the PAIA have not been met. If the request is declined on this basis the recipient of the request is not obliged

[6] Section 53(2)(d) of the PAIA.
[7] Section 50(1)(a). *M&G Media Ltd and others v 2010 FIFA World Cup Organising Committee South Africa Ltd and another* 2011 (5) SA 163 (GSJ) [354] (requesters to private bodies must demonstrate a "*need to know*" the information that is requested).
[8] *M&G Media Ltd and others v 2010 FIFA World Cup Organising Committee South Africa Ltd and another* 2011 (5) SA 163 (GSJ) [351 - 352]

additionally to consider whether there is a basis for granting or refusing access to the information that has been requested.

6. VEJA gave an identical explanation for both requests:

6.1. It identified the right to be exercised or protected as follows: "*rights under Chapter 2 of the Constitution of the Republic of South Africa, 1996: section 24 –environment*".

6.2. It gave the following explanation of why the record requested was required for the exercise or protection of this right:

> *"…VEJA is a non-profit alliance of all environmental organizations, groups, institutions, agencies and individuals operating in the Vaal Triangle. VEJA challenges environmental degradation and aims to promote a culture of environmental awareness and sustainable development. Another of its objectives is to provide a local network of support and assistance to community-based organizations, non-governmental organizations, trade unions, religious groupings, youth, women's groupings and similar bodies. VEJA seeks to improve the quality of life of vulnerable people in South Africa, through assisting civil society to have a greater impact on environmental governance. It places particular emphasis on assisting vulnerable and previously disadvantaged people who are most affected by environmental injustices. In this manner, VEJA represents the interests of ordinary people in understanding and defending their constitutional rights, which specifically include those in section 24.*

> *The requested documents are necessary for the protection of the section 24 constitutional rights and are requested in the public interest. VEJA requires the requested documents to ensure that …[AMSA] carries out its obligations under the relevant governing legislation, including the National Environmental Management Act 107 of 1998, the National Environmental Management: Waste Act 59 of 2008, and the National Water Act 36 of 1998. VEJA seeks to ensure that the operations of … AMSA are conducted in accordance with the law, that pollution is prevented, and that remediation of pollution is properly planned for, and correctly and timeously implemented."*

7. AMSA refused the requests on 18 April 2012. Its attorneys informed VEJA that it did so on the basis that "*you have not set out in your requests, a right which you are entitle to protect or exercise as required in terms of section 50(1)(a) of the …[PAIA].*"[9] In response to a subsequent query from VEJA's attorneys, AMSA's attorneys elaborated on the basis for refusal as follows: "*your client's request for the record does not establish why the record would be "required" as contemplated in the Act, and the requests therefore, do not satisfy the requirements of section 50 of the Act*".[10]

8. The conclusion set out in the letters above is correct. The requests do not satisfy the threshold requirements of section 50(1)(a) of the Act and AMSA was justified in refusing the request on that basis.

[9] "SM17", p 126.
[10] "SM19", p 129.

9. Having so refused the requests, AMSA was not required to process the requests any further. This would have entailed, inter alia, considering the merits of the requests and determining whether any of the grounds for refusal apply to the records, determining whether any part of the record that was subject to refusal was severable from the remainder and whether any third parties had to be notified of and be given an opportunity to participate in the consideration of the request. These are burdensome requirements that are imposed on private bodies in respect only of requests that meet the section 50(1)(a) threshold.

VEJA HAS NOT DEMONSTRATED IN ITS REQUEST FORM THAT IT REQUIRES THE REQUESTED RECORD FOR THE EXERCISE OR PROTECTION OF A RIGHT

WHAT IS REQUIRED OF A REQUESTER

10. The determination of the issues raised in this application entail the interpretation of the PAIA. The Act must be interpreted purposively.[11]

11. The principal purpose of the PAIA is to give effect to the constitutional right of access to information.[12] The starting point of interpretation of the Act is a consideration of the constitutional right to which it seeks to give effect. The Act

[11] Section 2(1) of the PAIA.
[12] Section 9(1)(a).

must be taken to bear the same meaning as that right.[13]

12. Section 32 of the Constitution distinguishes between an unqualified right of access to information held by "*the state*" and a qualified right to information held "*by another person*". The distinction is fundamental. Only the state has general obligations of transparency and accountability.[14] "*Another person*", ie a private individual or entity, has a duty to respect the right of access to information only insofar as it is necessary for the exercise or protection of rights.

13. PAIA gives effect to this "*fundamental distinction*"[15] by providing separately for the provision of access to records on request depending on whether the record that has been requested is held by a "*public body*" or a "*private body*". The Act defines "*private body*" widely. The definition includes any juristic person other than a public body and any natural person who carries on or who has carried on a trade, business or profession.[16]

14. Despite this separate provision, the duties of public and private bodies that receive a request for access to information are substantially similar. They must consider whether access to the record may or must be refused on the grounds listed in the Act and, if so, must consider severing those parts of the record to

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[13] *M&G Media Ltd and others v 2010 FIFA World Cup Organising Committee South Africa Ltd and another* 2011 (5) SA 163 (GSJ) [136]-[137]; *Centre for Social Accountability v Secretary of Parliament* 2011(5) SA 279 (ECG) [62] (the PAIA fleshes out and elaborates on the constitutional rights, and provides a structure for their operation).

[14] Section 195(f) and (g) of the Constitution.

[15] *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) [51].

[16] Section 1, sv "*private body*".

which those grounds are applicable and disclosing the remainder. They must protect the rights of third parties to whom the information relates by informing them of the request and allowing them to participate in the decision to grant or refuse access. However, in order not to erase the distinction between public and private bodies and impose general obligations of transparency on private bodies, these duties are subject, in the case of private bodies, to the requester meeting an initial threshold onus. If this onus is not met, the private body is not obliged to process the request any further.

15. That onus is set out in section 50(1)(a) read with section 53(2)(d) of the PAIA, both quoted above. The requester must complete Form C or the form of the request must correspond substantially with it, identifying the right it is seeking to exercise and must provide an explanation as to why the requested record is required for the exercise or protection of that right.

16. It follows from the procedural logic of these provisions that this explanation must be provided by the requester in the request form, or in correspondence exchanged before the decision is taken to accept or refuse the request, or at least contemporaneously with it.[17] Subsequent elaboration on the reasons for the request by a requester in their founding papers in proceedings such as these brought in terms of section 78(2)(d) cannot be a basis for the discharge of this initial onus; it must be discharged at the outset so that the recipient can assess whether to proceed further or whether the request falls to be refused for lack of

[17] *Fortuin v Cobra Promotions CC* 2010 (5) SA 288 (ECP) [15]-[17].

an adequate explanation.

17. In this matter, VEJA has considerably elaborated on the reasons for its requests in its founding affidavit and also in its replying affidavit. These elaborations did not and could not have informed the earlier decision of AMSA to decline the requests and are therefore irrelevant to the consideration of this application.

18. In terms of section 50(1)(a) a requester must show (i) a right that he or she seeks to exercise or protect and (ii) that access to the record requested is required in order to exercise or protect that right.[18] Only once this has been shown does the requester have a right of access to the record that may be defeated by a valid ground of refusal.[19] Once the threshold requirement of section 50(1)(a) is met a private body is obliged to process and grant the request unless a ground of refusal applies to the information requested (section 50(1)(c)).

19. A failure to meet the threshold requirement of section 50(1)(a) therefore entitles the private body that has received the request to decide to refuse the request on this basis and to decline to process the request any further. A requester aggrieved by a decision to refuse a request is entitled to challenge it by way of an application to court in terms of section 78. The only decision that such an application can challenge is the decision taken to refuse the request on the basis that section 50(1)(a) was not complied with. No decision has been taken, nor

[18] *M&G Media Ltd and others v 2010 FIFA World Cup Organising Committee South Africa Ltd and another* 2011 (5) SA 163 (GSJ) [331].
[19] Ibid [146].

needs to be taken at this stage, in terms of section 50(1)(c), i.e. whether a ground of refusal applies to the whole or part of the records requested.

20. VEJA has nevertheless contended in its replying affidavit, that AMSA is required to make out a case in the alternative that a ground of refusal applies to the records. It contends that AMSA must make this case in its answering affidavit and that it will not have a further opportunity to do so.[20] It seeks relief that would entail the granting of the request, notwithstanding that AMSA has not yet considered whether any ground of refusal applies to the information requested.

21. This interpretation of the Act would, in effect, require a private body to consider the substance of a request, notwithstanding its decision to refuse it on the ground that it does not need to be considered because the threshold requirement of section 50(1)(a) has not been met. Such an interpretation collapses the fundamental distinction between public and private bodies, a distinction that turns on the initial burden placed on a requester to justify its request.

22. As to the first requirement of section 50(1)(a) (namely a right that is sought to exercise or protect), a constitutional right undoubtedly qualifies as a right for these purposes.[21] Neverthless, it is insufficient simply to list one of the rights in the Bill of Rights in the absence of an indication how that right is to be protected

[20] RA, paragraph 42, p 262.
[21] *M&G Media Ltd and others v 2010 FIFA World Cup Organising Committee South Africa Ltd and another* 2011 (5) SA 163 (GSJ) [337].

or exercised by way of access to the records sought. That indication must of necessity entail an accepted or acceptable interpretation of the scope of the right that is relied upon. We will deal further below with the particular constitutional right relied upon by VEJA in their requests. In essence, we will show that VEJA advances an unsustainable interpretation of the scope of the right in section 24 of the Constitution.

23. As to the second requirement (namely, that access to the record requested is required in order to exercise or protect a right), the case law establishes the following:

23.1. "*Required*" means "*reasonably required*".[22] This is a flexible standard, compliance with which must be assessed on a case-by-case basis.[23]

23.2. A number of factors must be taken into account in this assessment.

23.3. The purpose of the "*need to know*" condition on the right of access to information in private hands must be kept in mind when interpreting and applying the provision. Neither the Act nor the constitutional right to which it gives effect dissolves the boundaries between the public and private sector by imposing a general duty of transparency on the latter. Rather, the right of access to information in private hands is intended to

[22] *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) [6].
[23] Ibid.

protect rights that might be harmed by secrecy. Private bodies should not be required to consider requests for access to information from requesters who have only an ideological or abstract interest in the information sought, or from requesters who are on a fishing expedition in contemplation of possible litigation.[24]

23.4. Requesters must demonstrate a "*substantial advantage*" to be gained from access to the information or an "*element of need*" to have it.[25]

23.5. The test is objective. The requester must make out a case that the records requested are "*required*", in an objective sense, for the exercise or protection of rights.[26] It is insufficient that the record is merely desired by the requester.

23.6. Although the requester is required to make out a case, the constraints under which he or she operates must be kept in mind. The point of a right of access to information is to allow a requester to obtain information that he or she does not currently possess. As a result, in most cases, the requester will not have had sight of the requested record, will not know its contents or even whether it exists. Obviously, in such circumstances, the requester cannot be expected to

[24] Ibid [21], [22] (private-body provisions of PAIA not intended to allow pre-action discovery "as a matter of course", pre-action discovery under PAIA the exception rather than the rule).
[25] *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) [13].
[26] *Fortuin v Cobra Promotions CC* 2010 (5) SA 288 (ECP) [27] (requester must lay a 'cogent foundation' for the request).

demonstrate a link between the record and rights with any degree of detail or precision.[27]

23.7. The existence of alternative remedies under the common law or legislation is a factor to be taken into account, in assessing whether access to the information required by a party invoking the PAIA is "*required*" for the exercise or protection of any of that party's rights.[28]

THERE IS NO CONSTITUTIONAL RIGHT TO ENFORCE DIRECTLY THE REGULATORY PROVISIONS OF THE ENVIRONMENTAL LEGISLATION

24. AMSA submits that the explanation provided in the letters of request does not meet the requirements of the Act. The explanation is reproduced in paragraph 6 above. In summary:

24.1. It contains a description of VEJA and an overview of its activities as a non-governmental organisation aimed at promoting environmental awareness and sustainable development and countering "*environmental injustices*".

24.2. It says that the documents are necessary for the protection of the

[27] *M&G Media Ltd and others v 2010 FIFA World Cup Organising Committee South Africa Ltd and another* 2011 (5) SA 163 (GSJ) [353].
[28] *Fortuin v Cobra Promotions CC* 2010 (5) SA 288 (ECP) [26]-[27], citing *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) [14] and [17].

"*section 24 constitutional rights*".

24.3. It claims that the documents are required to "*ensure that …[AMSA] carries out its obligations under the relevant governing legislation*". The request is made to ensure that AMSA's operations "*are conducted in accordance with the law, that pollution is prevented, and that remediation of pollution is properly planned for and correctly and timeously implemented*".

25. As set out above, a requester is entitled to rely on a constitutional right to ground a request. The request must however, be located within the accepted scope of this right. If it is not, the requester seeks to exercise or protect a right that does not exist and this cannot ground an entitlement to seek information pertinent to it.

26. By analogy, the request for the record of the investigation into nursing standards in *Unitas Hospital* could not plausibly have been grounded on an alleged threat to the right of access to health care services in section 27 of the Constitution. The scope of that right (a right to have measures taken by the state to ensure progressive realisation of access to health care services) does not extend to the protection of any of the interests that the requester sought to advance by having access to the record that was requested in that case.

27. The same difficulty affects the right that VEJA alleges that it seeks to exercise or

protect in this case. The organisation seeks to protect a right to monitor and to enforce AMSA's compliance with environmental laws and to hold AMSA accountable to the public for remedying and/or preventing any harmful pollution it may have caused. But there is no such right and accordingly VEJA cannot seek access to information in terms of the PAIA to protect this assumed right.

28. The request refers generally to "*the section 24 constitutional rights*", but at best VEJA can rely only on the right in paragraph (a) of section 24, namely the right to an environment that is not harmful to health or well-being. This is because paragraph (b) of section 24 is a right to have reasonable legislative and other measures taken by the state to protect the environment and cannot be invoked directly against AMSA, or even indirectly through the mechanism of a PAIA request.[29] In the event that the state has failed in its constitutional obligation to make and implement legislation to protect the environment, the applicant could rely on section 24(b) of the Constitution for relief.

29. But that is not VEJA's case. It seeks information from AMSA to ensure that AMSA is carrying out its legislative obligations. VEJA seeks, through the indirect mechanism of a PAIA request, to require AMSA to give an account to it of its compliance with environmental laws. Should it then be established that AMSA has fallen short and the environmental authorities have failed properly to hold it

[29] *MEC, Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC) [17]: section 24*(b)* is "*in the nature of a directive principle, having the character of a so-called second generation right imposing a constitutional imperative on the state to secure the environmental rights by reasonable legislation and other measures*".

to account for the breach of its obligations, then VEJA intends to act so as to ensure that AMSA complies with its obligations. The scope of the constitutional right does not extend to such a claim.

30. Though it is not obliged to do so, AMSA's attorneys entered into correspondence with VEJA in which it invited it to motivate further its requests.[30] This correspondence is annexed to the founding affidavit at "SM12" and "SM13".[31]

31. It appears from this correspondence that VEJA's motivation for seeking to ensure that AMSA complies with its environmental obligations and for seeking to hold AMSA accountable to the public for remedying and/or preventing any environmental harm it may have caused is its belief that the authorities responsible for ensuring environmental compliance are not capable of doing so.

32. VEJA's attorneys stated that the organisation "*works with the regulators to ensure compliance with environmental laws*". The letter further elaborated that:

> *"The Compliance Monitoring and Enforcement ("CME") Units of the relevant regulators are woefully understaffed – this situation is particularly acute within the Department of Water Affairs, where, as at August last year, only the Mpumalanga regional office had a fully functional CME unit. As a result, there is certainly not capacity within government to monitor compliance at all facilities in the country, and it is crucial for the public to*

[30] Section 19 of the PAIA obliges public bodies to assist requesters to make requests. There is no equivalent duty placed on private bodies.
[31] Pages 108 and 111.

play an active role in this regard."[32]

33. It appears from this letter that VEJA believes that the authorities that ought to be ensuring compliance with environmental laws are not doing their job properly because they lack the resources to do so. On the strength of this belief, VEJA seeks to constitute itself as a parallel enforcement agency and it is to this end that it alleges that it is entitled to the requested information to assist it in performing the role that it has assumed.

34. AMSA is subject to environmental legislation and to the jurisdiction of the state environmental authorities which enforce that legislation. It has numerous statutory duties to provide comprehensive access to information about the environmental impact of its activities to those authorities to enable them to monitor and enforce its compliance with the law. AMSA gives its full co-operation to the authorities and complies with all its duties in this regard. It does not however have similar obligations to non-state entities such as VEJA who have taken it upon themselves to monitor its activities because they are of the view that the state is not able properly to do so. VEJA's requests, and the reasons that it gave for them, suggest that AMSA owes it an obligation of transparency so that it can monitor the extent to which AMSA is complying with the law and the extent to which the authorities are properly enforcing it. AMSA has no such obligation to VEJA.

[32] "SM13", paragraphs 8-9, p 112-13.

35. While VEJA's efforts to assist the environmental authorities are undoubtedly undertaken in good faith and in the public interest, this does not give it a right to set up a parallel enforcement agency and enforce the law itself because it believes the state is incapable of doing so properly.

36. Interested and affected parties are encouraged to report instances of environmental non-compliance to the environmental authorities.[33] They have all the further remedies provided for by environmental legislation, by administrative law and by the Constitution itself to enable them to stir the state into action if they believe that it is not properly performing its duties. In respect of AMSA's operations, there are specific forums aimed at providing reliable information to the public on AMSA's environmental impact and the status of the receiving environment.[34]

37. VEJA does not have a right simply to bypass the statutory mechanisms and processes that have been put in place for ensuring statutory compliance as they seek to do in this application. Yet this is precisely the "*right*" that it purports to protect and enforce by way of its requests for access to information. There is no such right and therefore no basis for VEJA to justify its requests on the assertion that access to the records is required for the exercise or protection of this right.

38. AMSA was therefore entitled to refuse the requests and decline to deal further

[33] VEJA refers to a hotline established for this purpose in its letter at "SM13", p 113.
[34] AA paragraph 65, p 228-9.

with them on this basis.

THE REQUEST DOES NOT SHOW THAT THE RECORDS ARE REQUIRED TO PROTECT OR EXERCISE THE CLAIMED RIGHT

39. Even if VEJA did have the right that it claims, it failed to meet the threshold requirement of explaining why the records that it had requested were required to exercise or protect that right in the sense of demonstrating a "*substantial advantage*" to be gained from access to the information or an "*element of need*" to have it.[35]

40. This is particularly so in the case of the Master Plan request. In this regard VEJA alleges that it requires access to the records in order to take measures to ensure –

40.1. firstly, that AMSA's "*operations are conducted in accordance with the law"*;

40.2. secondly, that "*further pollution is prevented*"; and

40.3. thirdly, that "*rehabilitation of the environment and remediation of pollution are properly planned for and correctly and timeously*

[35] *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) [13].

implemented".[36]

41. Regarding the first submission, the Master Plan cannot provide any information as to whether AMSA's operations are being conducted in accordance with the law. This is so for the following reasons:

41.1. The Master Plan was compiled between 2000 and 2003 and has never been updated.[37]

41.2. The document was based on numerous studies undertaken by external consultants between 2000 and 2002 and covered a wide range of environmental issues.[38] The studies assessed the operations being undertaken at the Vanderbijlpark works at that time.

41.3. Subsequent to the completion of the Master Plan in 2003, AMSA implemented numerous environmental management measures which required new licenses or permits or amendments to existing licences or permits. During this process it was found that the information contained in the Master Plan was out-dated and obsolete and could no longer be relied on to support the new licence applications. Consequently, new studies were commissioned which replaced the studies comprising the Master Plan and a new dynamic environmental management process

[36] Paragraph 37, pages 25 – 26.
[37] AA paragraphs 32.2 – 32.3 and 38, pages 207 and 218.
[38] AA paragraphs 32.2, page 207.

was embarked upon which replaced the out-dated Master Plan.[39]

41.4. Since the Master Plan contains an out-dated description of the operations being undertaken at the Vanderbijlpark works and does not deal with the numerous environmental management measures that have been implemented since its compilation in 2003 or the new environmental management process that has embarked upon, it cannot assist VEJA in determining whether AMSA's operations are being conducted in accordance with the law.

42. As regards the second submission, the Master Plan will not enable VEJA to take measures to ensure that further pollution is prevented. This is principally because, upon re-evaluation of the Master Plan for the purposes of obtaining various licences and permits in subsequent years, as mentioned above, the findings, recommendations and baseline environmental data contained in the various studies which formed the basis of the report were found to be scientifically and technically flawed in two fundamental respects:[40]

42.1. Firstly, the baseline environmental data was scientifically flawed in that inappropriate methodologies were employed to gather the data,

[39] AA paragraph 32.4.2, page 208; paragraph 32.7, pages 212 – 215. Paragraph 32.7 provides details regarding the new studies which have replaced the outdated studies informing the Master Plan.
[40] AA paragraphs 32.4.1 and 32.5, pages 208 and 209.

resulting in conclusions that were scientifically unfounded.[41]

42.2. Secondly, the environmental and human health risks posed by the Vanderbijlpark works were assessed in terms of inappropriate standards, resulting in an inaccurate and flawed assessment of the actual risks posed.[42]

43. As a result of these fundamental errors the Master Plan did not accurately portray the environmental and human health impacts of AMSA's operations.

44. Consequently, the report cannot be relied on to assess present impacts. Put differently, pollution prevention measures based on the findings, recommendations or baseline data contained in the Master Plan will not ensure that further pollution is prevented.

45. Regarding the third submission, the Master Plan will not enable VEJA to take measures to ensure that rehabilitation of the environment and remediation of pollution are properly planned for and correctly and timeously implemented because the rehabilitation and remediation measures set out in the Master Plan no longer inform AMSA's environmental management practices.[43] In particular:

[41] Paragraph 32.6, pages 210 – 212. See in particular the criticism of the methodology followed in the groundwater assessment in paragraph 32.6.1, page 210, the solid waste study in paragraph 32.6.4, page 211 and the air quality study in paragraph 32.6.5, page 211.
[42] AA paragraph 32.5, page 209.
[43] AA paragraphs 33 - 35, pages 215 – 218.

45.1. AMSA's current environmental process is developed in accordance with and in response to current legislation; permits, licences and environmental authorisations required for the site (such as its atmospheric emission licence, water use licence and waste management licence); available monitoring data; baseline assessments and day-to-day environmental management system deliverables (such as incident reports or new risks that are identified and remedied).[44]

45.2. AMSA's environmental management process derives strategic direction and develops priorities from the ISO 14001 environmental management system and the various environmental permits, licences and environmental authorisations required for the site.[45]

45.3. The priority areas identified in the Master Plan for the Vanderbijlpark Works (and referred to in paragraph 15.7 of the founding affidavit[46]) are no longer the priorities that receive attention from the AMSA environmental management division.[47]

46. The Master Plan accordingly has no bearing on AMSA's current environmental management process and accordingly cannot assist VEJA to take measures to ensure that proper and timeous rehabilitation of the environment and

[44] AA paragraph 34, pages 216 – 217.
[45] AA paragraph 35, page 217.
[46] FA page 16.
[47] AA paragraph 33, pages 215 – 216.

remediation of pollution occurs at AMSA's Vanderbijlpark works.

47. It is evident therefore that the information contained in the Master Plan is out-dated and inaccurate and does not inform AMSA's current environmental practices. It therefore does not reflect the impact of AMSA's operations on the environment in and surrounding the Vanderbijlpark Works nor does it provide any reliable information in regard to AMSA's compliance with its environmental obligations.

48. There is therefore no connection between the information contained in the Master Plan and the right VEJA seeks to protect in this application. As a result VEJA has not demonstrated that the Master Plan is required to protect the claimed rights.

CONCLUSION

49. For the reasons given above, VEJA has failed to meet the threshold requirement of section 50(1)(a) of the PAIA and as a result the application falls to be dismissed with costs, such costs to include the costs of two counsel.

50. However, in the event that the court finds that VEJA has indeed shown that it requires access to the records that it has requested to protect or enforce a right, AMSA submits, for the reasons above, that this does not entitle VEJA to the relief sought in prayer 2 of the Notice of Motion, i.e. an order directing AMSA to supply

it with copies of the requested records. AMSA has declined VEJA's request on the basis that it has not met the threshold requirements of section 50(1)(a). AMSA has therefore not considered and is not yet required to have considered, whether any of the grounds of refusal apply to any of the records requested or to any part of those records.

51. Accordingly, in the event that the court finds that VEJA has met the threshold required by section 50(1)(a), the appropriate relief would be an order in terms of Prayer 1 of the Notice of Motion, setting aside AMSA's decision to refuse the requests for that reason. In that event, AMSA would be entitled further to consider the request in terms of section 50(1)(c) and determine whether any of the grounds of refusal listed in Chapter 4 of part 3 of the PAIA apply to the records that have been requested and to grant or refuse the request, in whole or in part, on that basis.

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29 May 2013