IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO 147/05

In the matter between

TRANSNET LIMITED **First Appellant**

INTER WASTE (PTY) LTD **Second Appellant**

and

SA METAL MACHINERY COMPANY (PTY) LTD **Respondent**

CORAM: **HOWIE P, ZULMAN, CAMERON, MLAMBO JJA, NKABINDE AJA**

Date Heard: 2 November 2005

Delivered: 29 November 2005

Summary: Promotion of Access to Information Act 2 of 2000 – unsuccessful tenderer requesting details of successful tenderer's price composition – information in possession of public body that awarded contract – s 36 (1)(c), meaning of 'could reasonably be expected' – whether court has discretion under s 82 to refuse access even if grounds in ss 36 and 37 not established.

J U D G M E N T

HOWIE P

HOWIE P

[1] The appellant, Transnet Limited, the wholly State-owned national public transport company, has a number of trading divisions. One of them, National Ports Authority of South Africa (NPASA), invited tenders for a two year contract for the removal of galley waste from ships in Cape Town harbour. The successful tenderer was Inter Waste (Proprietary) Limited. Another tenderer was SA Metal Machinery Company (Proprietary) Limited (the respondent).

[2] Some time after the award of the tender the respondent wrote and asked NPASA for copies of various documents. One of them was Inter Waste's completed tender document. The request was made in terms of the Promotion of Access to Information Act, 2 of 2000 (the Act). NPASA wrote back and said that the document sought contained information comprising trade secrets or financial, commercial, scientific or technical information belonging to Inter Waste and declined access in the absence of more specific details of the information which the respondent wanted. The respondent's letter in reply stated that it wished no information such as that which NPASA mentioned, merely the information to which it was entitled. It accordingly requested the completed tender document but with deletion of any of the categories of information referred to by NPASA. Eventually

NPASA forwarded Inter Waste's entire tender documentation but with certain details material to the calculation of the tender price deleted from that portion of the documentation which specified the prices and provisional quantities on the strength of which the tender price was made up.

[3] After fruitless correspondence the respondent's reaction was to apply to the High Court at Cape Town for an order in terms of the Act directing the appellant to furnish it with the completed schedule of prices 'without deletions'. The appellant and Inter Waste were cited as respondents. Inter Waste did not oppose. It confined itself to providing the appellant with information supporting the contention that disclosure had been justifiably withheld by NPASA. The appellant incorporated that information in its opposing affidavit.

[4] The learned Judge in the Court below (Blignault J) granted an order substantially as sought. (He omitted the words 'without deletions' but what he ordered to be produced was a copy of the completed schedule submitted by Inter Waste to the appellant. Obviously that schedule would not have had deletions.) The appeal is with his leave.

[5] In calling for tenders NPASA supplied tenderers with a schedule of printed tender documents together with an accompanying 'Notice to Tenderers'. Some of the documents were intended for completion by the

tenderer. One was a final agreement in draft. Another was headed 'Schedule of Prices and Provisional Quantities'. The schedule divided the contract work into four items and required details in respect of each item. The material part of the printed form was laid out in a block as follows:

Item	Description	Unit	Qty	Rate	Total
1	Minimum monthly charge for provision of service …. Placing, moving and emptying of bins of $2m^2$ each …. Up to 800 "services"	Month	24		
2	Additional charge per service in excess of 800 "services" provided for in item 1. (Estimated average number of additional services/month = 300).	Each	7 200		
3	Disinfect bin (estimate 250 bins/month)	Each	6 000		
4	Disposal of waste at dump-site (Dumping Charge) (Estimated 2000 cu m/month	Per bin Metre	48 000		
	TOTAL				
	VALUE ADDED TAX				
	TOTAL INCLUSIVE OF VALUE ADDED TAX				

In completing the form Inter Waste inserted all details required in the rate column and the total column.

[6] What NPASA did when furnishing the respondent with a copy of this schedule was to blank out the contents of the rate column and all totals save those in the last three lines of the block. In other words it divulged only the pre-tax total, the value added tax and the total inclusive of value added tax. As each item's expunged total was no more than the product of the relevant

quantity multiplied by the relevant rate the essential missing information comprised the rates. What the case is all about is whether their disclosure would, in effect, cause Inter Waste commercial harm.

[7] In resisting disclosure in the Court below the appellant relied on the following provisions of the Act: (i) s 36(1)(b); (ii) s 36(1)(c); (iii) s 37(1)(a); and (iv) s 82. The first three fall under Chapter 4 which specifies grounds for refusal of access to the records of a public body. The fourth confers a discretion on a court to which anybody who has been refused access by the public body may apply for the judicial grant of access. The contention of the appellant was that the Court *a quo* should have exercised such discretion against the respondent. The meaning of the relevant provisions is central to the decision of the appeal.

[8] A survey of the material in the light of which that meaning has to be determined must start with s 32(1) of the Constitution.[1] This section confers upon every person the right of access to any information held by the State. It is an entrenched right in the Bill of Rights. That a juristic person (such as the

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[1] S 32 reads

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

respondent) is entitled to the right was not in dispute.[2] The Act is the legislation demanded by s 32(2) of the Constitution. The appellant was formed in terms of s 32 of the Legal Succession to the South African Transport Service Act 9 of 1989 (the SATS Act). Pursuant to the SATS Act the appellant is an institution 'exercising a public power' and 'performing a public function'. That function includes providing a transport service 'that is in the public interest'.[3] This brings it within the definition of 'organ of state' in s 239(b) of the Constitution[4] and within the definition of 'public body' in the Act.[5] Section 8(1) of the Constitution provides that the Bill of Rights binds an organ of State.

[9] The Constitution also confers an entrenched right to privacy.[6] Once again it was not disputed that a juristic person (such as Inter Waste) is

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[2] S 8(4) of the Constitution reads:

'(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.'

[3] S 15 (1) of the SATS Act.

[4] '"Organ of state" means –

'(a) …

(b) any other functionary or institution –

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

(ii) exercising a public power or performing a public function I terms of any legislation, but does not include a court or judicial officer;'

[5] Section 1 defines 'public body' as follows:

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

(b) any other functionary or institution when –

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

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

[6] '14. Everyone has the right to privacy, which includes the right not to have –

(a) their person or home searched;

(b) their property searched;

entitled to this particular right. And this court has held that a company has a right to privacy in respect, for example, of sensitive and confidential information.[7] How the exercise of these competing rights is to be effected and managed is dealt with in the Act.

[10] The relevant wording of the long title declares that the Act was enacted to

'give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith'.

[11] The preamble recognises the Act's need to give effect to the right in s 32 of the Constitution and, subject to reasonable and justifiable limitation under s 36, the need to foster transparency and accountability *inter alia* in public bodies.

[3] Turning to the relevant individual sections of the Act, one finds in s 2(1) the injunction:

'When interpreting a provision of this Act, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with those objects.'

[12] The objects of the Act are set out in s 9. Those presently material are –

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

(i) any information held by the State …

(c) their possessions seized; or
(d) the privacy of their communications infringed.'

[7] *Financial Mail (Pty) Ltd v Sage Holdings* 1993 (2) SA 451 (A).

(b) to give effect to that right –

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

(c) …

(d) …

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

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

(ii) …

(iii) to effectively scrutinise … decision-making by public bodies that affects their rights.'

[13] The words 'the State' in s 9 are not defined but, as indicated above,[8] 'public body' is defined in s 1 to mean not only an organ of State but also to mean '*inter alia*', a department of State. In other words for 'State' in s 9 one really has to read 'public body'.

[14] Section 11 requires that access to a record [9] of a public body must be given if the requester [10] complies with all the Act's procedural requirements and access is not refused on any ground in Chapter 4.

[15] Every public body has an information officer who is, by definition relative to a body other than a government department or a municipality, its

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[8] See footnote (4)

[9] 'Record' is defined in sec 1. Where presently material it means any recorded information –
'(a) regardless of form or medium;
(b) in the possession or under the control of [the] public body; and
(c) whether or not it was created by that … body …'

[10] 'Requester' is defined in sec 1. The wording currently relevant in relation to a public body is 'any person … making a request for access to a record of that public body'.

chief executive officer.[11] Section 17 requires the public body to designate deputy information officers and that there be as many as are necessary to render the body as accessible as reasonably possible for requesters.

[16] This brings me to the Chapter 4 provisions primarily relied on by the appellant. Sections 36 and 37 deal with the mandatory protection of a third party's information, access to certain specified categories of which a public body's information officer must refuse access. A third party is defined. In respect of a request to a public body it means (omitting presently irrelevant wording) any person other than the requester and the public body.

[17] Sec 36(1), subject to the presently irrelevant provisions of subsec (2), prohibits access to the following information of a third party:

> (a) trade secrets;
>
> (b) financial, commercial, scientific or technical information, other than trade secrets 'the disclosure of which would be likely to cause harm' to the third party's commercial of financial interests; or
>
> (c) information supplied in confidence by the third party ' the disclosure of which could reasonably be expected'
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> (i) to put the third party at a disadvantage in contractual of other negotiations; or

[11] Sec 1. The definition includes 'equivalent officer or the person acting as such'.

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

[18] Section 37(1), in so far as presently material, prohibits disclosure if it would ‘constitute an action for breach of a duty of confidence’ owed to the third party in terms of an agreement. (There is no doubt the legislature intended to say ‘constitute grounds for an action’ and must be so understood.)

[19] Sections 74 to 76 provide for an internal appeal against refusal of access. (During the exchange of correspondence referred to above the respondent indicated the intention to appeal against the appellant’s failure initially to comply with its request but while the parties engaged in yet further correspondence the time to prosecute such appeal expired.)

(20) Sections 78 to 82 provide for applications to court, *inter alia* by a requester (such as the respondent) who has been refused access. Sec 81 declares that such application proceedings are civil proceedings, that the rules of evidence applicable to civil litigation apply in such proceedings and that the burden of proof is on the party that has refused access to show that refusal was in accordance with the provisions of the Act.

[21] Lastly, s 82 gives the court the power to make any order that is just and equitable. This includes the power to make orders

(a) confirming, amending or setting aside the refusal decision;

(b) requiring the information officer to take, or refrain from, specified action.

(c) granting an interdict, interim or specific relief, a declaratory order or compensation; and

(d) as to costs.

[22] Turning to the issues on appeal, it must be said at the outset that the appellant did not persist in its reliance on s 36(1)(b). In effect, therefore, it accepted that disclosure of the requested data would not be likely to harm Inter Waste's commercial or financial interests.

[23] As to the contested issues, it is convenient to begin with a point raised by the appellant which is really jurisdictional in nature. It contended that in an application under s 78 the relevant material on which a court had to make its decision was limited to such material as was before the information officer when access was refused. That cannot be right. A court application under the Act is not the kind of limited review provided for, for example under the Promotion of Administrative Justice Act 3 of 2000.[12] It is much more extensive. It is a civil proceeding like any motion matter, in the course of which both sides (and the third party, if appropriate) are at liberty to present evidence to support their respective cases for access and refusal. As

[12] That statute is concerned with what it defines as 'administrative action', which definition excludes a decision taken under the Act.

the present matter serves to illustrate, the parties' respective cases in such an application will no doubt in most instances travel beyond the limited material before the information officer.[13] That conclusion is reinforced by the legislature's having catered for the presentation of evidence and the resolution of disputes of fact by reference to an onus of proof. Those provisions would have been unnecessary if the suggested limitation applied. Moreover it is unlikely that a Court, acting under s 82, would be sufficiently informed so as to be in a position to make a just and equitable order were the limitation to apply.

[24] To take the present case as an example once again, it is apparent from the appellant's opposing affidavit that after the respondent's request was received it was first considered by the appellant's personnel. After that Inter Waste was approached to establish its attitude to disclosure of the rates. It was not prepared to consent to their disclosure. Mr Oosthuizen discussed the matter at length with colleagues in the appellant's service and 'having taken the relevant advice' refused access. There is no indication that he was then in possession of the material evidence which Inter Waste provided for inclusion in the opposing affidavit. And of course he did not have a detailed exposition of the respondent's case. This is not surprising. In the nature of a

[13] In this case the person who dealt with the request was NPASA's Administration Officer, Mr PA Oosthuizen. He was also the deponent to the opposing affidavit. Whether he was a designated deputy information officer is not apparent but that was not an issue.

public body's day to day administrative functions one would not envisage an information officer being able to assemble such evidence and conduct such evaluation as would be necessary properly to explore the effects of disclosure on a third party's commercial interests. And even if he or she did acquire full information from the third party it would be only fair to call for equally full input from the requester. As it is, a requester does not have to motivate a request. It is for the public body or third party to motivate refusal. By the same token one cannot imagine that a court hearing a s 78 application could properly explore the effects of disclosure without evaluating full evidence from both sides. It could not do so – and do justice – on the flimsy material that is likely to be the sum total of what is before an information officer.

[25] There is a further consideration to be borne in mind in this regard and that is that the Act lays down no guidelines as to who should qualify as deputy information officers. A public body might act responsibly enough in assigning middle management staff to this task but it would be placing an undue burden on somebody of that rank to expect him or her to be able to dispose with the necessary knowledge and experience of the factual and legal questions to which implementation of ss 36 and 37 can give rise. The inference is compelling that the legislature intended those questions to be

visited anew by the court hearing a s 78 application. The appellant's argument on this point must fail.

[26] Focusing next on the meaning of s 36(1)(c), it was accepted on both sides that Inter Waste's tender price and its component details were supplied to the appellant in confidence. What requires decision is whether the third party's contemplated disadvantage and prejudice (which for convenience I shall call 'harm') were such that they 'could reasonably be expected'. The respondent submitted that this expression meant (if I may break down the submission) (i) an expectation which a reasonable person could properly entertain and (ii) an expectation of probable harm. The appellant had no real quarrel with portion (i) of that submission but contended that portion (ii) was wrong. On the respondent's argument the expectation had to be one of no more that possible harm. In advancing this argument counsel for the appellant set great store by certain statements in a review of a provision in the Canadian Access to Information Act which employs virtually the same wording as the Act.[14] Having referred to the leading Canadian cases the review turned to Australian authority in respect of similar legislation and

[14] Section 20(1), Access to Information Act, SC 1980 – 81 – 82 – 83, c.111, Sch I refers in paras (c) and (d) to information the disclosure of which 'could reasonably be expected' to result in a third party's material financial loss or prejudice its competitive position or interfere with its contractual relations. The review, apparently under governmental auspice, was by a unit referred to as Access to Information Review Task Force.

quoted the following from an Australian judgment[15] in which consideration was given to the words 'which would, or could reasonably be expected to, unreasonably affect':

'We are in the field of predictive opinion. The question is whether there is a reasonable expectation of adverse effect. It is to that question that the witnesses' evidence had to be directed, and their assertions are incapable of proof in the ordinary way. What there must be is a foundation for a finding that there is an expectation of adverse effect that is not fanciful, imaginary or contrived , but rather is reasonable, that is to say based on reason, namely "agreeable to reason; not irrational, absurd or ridiculous". (Shorter Oxford Dictionary).'

In the submission of the appellants' counsel this passage supported the conclusion that the prospect of harm had to be not fanciful but rational, and it was enough for the prospect to be rational, said counsel, that the contemplated harm was merely possible, not probable.

[27] In my view this submission flows from a misreading of the quoted passage. The Australian court was concerned with the degree of expectation, not the degree of likelihood of resultant harm. It therefore fails to assist the appellant's case. This view is reinforced by the reviewers' proceeding immediately after the quoted passage to summarise the surveyed case law as requiring 'convincing evidence of probable material harm'.[16]

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[15] Re *Actors' Equity Association of Australia and Australian Broadcasting Tribunal* (1985) ALD 584 at 590.

[16] It is to be noted that the Canadian review focused on the onus cast on a third party but the same considerations apply in equal measure to the onus on a South African public body. One should add: and a South African private body (see s 64(1) of the Act).

[28] Another part of the review relied on by the appellant for the argument that the possibility of harm is enough, is one which comments on the extent of the burden on a third party to prove the probability of harm. The reviewers say –

> 'A concern with this test [probable harm] is that it may be difficult, if not impossible, for a third party to produce cogent and convincing evidence that the harm is probable, rather than possible, until after the harm has occurred … The fact that the harm does or does not occur after the fact is not decisive as to whether harm was probable or not and this high test may place too high an onus on third parties.'

[29] Perhaps part of the problem perceived by the Canadian reviewers stems from some of their courts' having used epithets such as 'cogent' and 'convincing'. Some South African judges in cases of advanced vintage were wont to say, for example, that a particular kind of case required the clearest proof or that a certain onus could only be discharged by the clearest evidence. Later judgments would respectfully point out that such terminology did not alter the nature and degree of either the criminal or civil onus. No doubt one would only ever hold either onus discharged if one found the evidence to be cogent. The question in a civil case remains whether the onus bearing litigant has proven its case (or a required element of its case) on a balance of probability. Whether one refers to the prevailing evidence as cogent, convincing or merely sufficiently satisfactory is a stylistic choice of minimal moment.

[30] That brings me to the reviewers' concern with the difficulty or impossibility of proving that harm is probable until after it has occurred. They seem to me to misconceive the onus. Of course, certainty cannot be established until after the event. However, the party resisting disclosure does not have to prove a certainty but a probability. Proof of a probability (or, more accurately, proof of a likely result on a balance of probability) is something litigants and courts are concerned with every day all over the world. If the reviewers' problem were real rather than imagined, countless damages claimants could never succeed in proving probable harm. It is standard in bodily injury cases, for example, for a plaintiff to have to prove (and to prove successfully) that a particular adverse anatomical consequence will eventuate at some time in the future with the concomitant need for future medical treatment.

[31] Apart from reliance on the Canadian review, the appellant's counsel sought to enlist in aid a statement by Greenberg J in *Kaplan and Fineman v R* (1933 Justice Circulars para 636). That case involved the alleged offence by two insolvents of having contracted debts over a specified amount prior to sequestration 'without any reasonable expectation' of being able to discharge them.[17] The statement in question reads:

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[17] The offence was created by s 139(4) of the previous Insolvency Act 32 of 1916

> 'Now, in asking oneself whether they had a reasonable expectation of being able to discharge those debts, one must guard against the mistake of being wise after the event, of looking at the position today; looking at the result and deciding as in fact they have failed to pay their debts, they ought to have realised at the time that they would not be able to pay their debts. One must try to put oneself in the position of a reasonable man and ask oneself whether the facts could have conveyed to them the possibility that they might not be able to pay their debts.'[18]

[32] Counsel emphasised the use of the word 'possibility' in that statement and proceeded to argue that it justified the conclusion that a reasonable expectation (assuming it to correspond to something that could reasonably be expected) was one which entailed the contemplation of an outcome that was merely possible. I disagree.

[33] To understand the statement of Greenberg J in context one must bear in mind that the 1916 provision, unlike s 135(3) of the present Insolvency Act,[19] placed the onus on the prosecution in all circumstances to show that accused did not have the required reasonable expectation of being able to pay their debts. In determining whether the onus was discharged the learned Judge was concerned, firstly, to caution against reasoning by way of hindsight and, secondly, to explain how one had to determine whether the

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[18] This statement of Greenberg J was referred to in the judgement in *R v Vather and Another* 1961 (1) SA 350 (A) at 358B-D as having been cited by the appellants' counsel in that case. It was not commented on favourably or unfavourably. It seems to have been assumed to be correct. The statement was again cited, this time with implied approval, in *S v Scheepers* 1972 (4) SA 604 (A) at 606B-C. It was relied on in *S v Ostilly and Others* (1) 1977 (4) SA 699 (D) at 728H-729A.

[19] The current statute is the Insolvency Act 24 of 1936. Section 135(3) also places the onus generally on the prosecution but in the case of debts incurred within six months of sequestration it places the onus on the accused to establish the required reasonable expectation.

prosecution had discharged the onus of showing that a professed expectation of future solvency was in fact not reasonably founded. The reasoning in the quoted passage was in no way focused on the question whether the expectation itself meant the contemplation of a mere possibility of future ability to pay as against the probability of such ability. Indeed, nothing in the repealed or current sections indicates that the proper interpretation of the words 'expectation of being able to discharge' is 'expectation of possibly being able to discharge'. The required expectation is clearly one which has to contemplate future ability to pay as a fact. This is reinforced by the Afrikaans text of s 135(3) which uses the words ''n redelike verwagting … dat hy (die) skuld … sal kan vereffen' (the expectation that he will be able to pay the debt).

[34] Where possible inability to pay does become relevant is, as the quoted passage demonstrates, in relation to the question whether a professed expectation was based on reasonable grounds. That inevitably involves the enquiry whether an accused foresaw at the material time the reasonable possibility of future inability to pay. If the facts establish that foresight then the accused's expectation of ability to pay will not have been reasonable. That will be so whether it is for the State to establish the foresight or for the

accused to establish its absence.[20] I conclude, therefore, that the appellant's case derives no support from the quoted statement of Greenberg J.

[36] It may be mentioned that further reference to the insolvency statutes reveals their use of the very words in issue in a provision criminalising the failure by an insolvent to keep a proper record of his transactions including all such books (clearly setting out such transactions) as he 'can reasonably be expected to have kept'. There can be no doubt that that expectation entails the contemplation as a fact, not a possibility, of the keeping of the necessary books.

[37] Counsel for the respondent relied in the present connection on the Canadian Appeal Court cases of *Re Canada Packers Inc and Minister of Agriculture*; *Romahn Intervenant* and *Re Saint John Shipbuilding Ltd and Minister of Supply and Services*.[21] As indicated above, the Canadian statute requires refusal of disclosure of information which could reasonably be expected to result in various forms of commercial harm. In the former case (at 256) it was held that the governing verb in the relevant provisions was 'expected'. In the light of what was said to be a clear statement of principle in the statute that government information should be available to the public

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[20] Cf *S v Ostilly and Others* (1) 1977 SA 699 (D) at 728H-729A

[21] *Canada Packers*: (1988) 53 DLR (4th) 246 (FCA); *Saint John Shipbuilding*: (1990) 67 DLR (4th) 315 (FCA). Both cases were cited with approval in the unreported judgment of Southwood J in CC 11 *Systems (Pty) Limited v Lekota NO* (Case 23554/2002 TPD)

and that exceptions to the public rights of access should be 'limited and specific' it was decided that the expectation concerned was of probable harm. In a footnote reference was made to an earlier Canadian case in which it was said that 'reasonable expectation … implies a confident belief'. Confirming what was held in *Canada Packers* the Court in *Saint John Shipbuilding* added that setting the threshold at the point of probable harm was warranted by the context and the whole statute.

[38] In their commentary on the Act Currie and Klaaren discuss the difference between 'likely' in s 36(1)(b) and 'could reasonably be expected' in s 36(1)(c).[22] They say both provisions require that harm will be a probable result but that the test in (c) is less stringent and this indicates a lesser degree of probability than 'likely'. They consider that the effect of 'reasonable' is to indicate a 'moderate' or 'fair' probability as opposed to 'likely' which implies a 'strong' probability.

[39] Clearly (c) in s 36(1) requires something less than 'likely'. Significantly it avoids 'possible' or 'possibly'. One could conclude therefore that what was intended was something between a probability and a possibility. It is understandable, therefore, that the authors opt for a moderate probability. However, that necessarily involves elevating 'likely'

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[22] Iain Currie and Jonathan Klaaren, *The Promotion of Access to Information Act Commentary* at 102-3.

in (b) to mean strong probability in order to explain the difference between (b) and (c).

[40] In my view an interpretation that involves the use of degrees of probability creates the potential for confusion and could well lead to problems in the practical application of the legislation to concrete cases. "Probable' is a word well known in the law. It should bear the same meaning in all situations absent indications to the contrary. The same considerations apply to the equivalents of 'probability', 'likely' and 'likelihood'. The question remains whether the results specified in (c) were intended to be probable, not merely possible, consequences.

[41] My conclusion is that the legislature intended that those consequences should be probable. I say so for two reasons. The first is a linguistic one. Leaving aside 'reasonably' and focusing on 'could … be expected', the Oxford English Dictionary states the following in regard to the use of 'can' with 'expect' (we have the words here in the subjunctive mood):

> '4. To look forward to (an event), regard (it) as about to happen; to anticipate the occurrence of (something whether good or evil). Also, to "look for", anticipate the coming of (a person or thing) …
>
> 5. In sense 4 with various additional notions.
>
> a. In combination with *can*, with expressed or implied negation, this vb often = "to look for with reason or likelihood, or without great risk of disappointment"'.

What can be expected is accordingly the contemplation of something that will, not might, happen. If we say we are expecting somebody this evening we mean that we think that person will be coming, not merely might be.

[42] It follows that the difference between (b) and (c) of s 36(1) is to be measured not by degrees of probability. Both involve a result that is probable, objectively considered. The difference, in my view, is to be measured rather by degrees of expectation. In (b), that which is likely is something which is indeed expected. This necessarily includes, at least that which would reasonably be expected. By contrast, (c) speaks of that which 'could reasonably be expected'. The results specified in (c) are therefore consequences (i) that could be expected as probable (ii) if reasonable grounds exist for that expectation.

[43] The second reason is context. In line with the Canadian statute and the Canadian cases, I consider that consideration of the long title, preamble, objects and content of the relevant sections of the Act, read with the Constitution, demonstrate that government information must be available to the public as a matter of right. That is the basic rule. To cater for third parties' rights to privacy there are exceptions to the rule. They are limited and specific. 'Probable' makes it more difficult to refuse disclosure than 'possible' and favours the rule rather than the exceptions. On the other hand

‘could’ in s 36(1)(c) rather than ‘would’ is a concession to a third party’s right. This interpretation achieves the necessary proportionality in balancing the competing rights. To require the consequences in (c) to be mere possibilities would favour the third party unduly. It would demand an interpretation in conflict with the injunction in s 2(1) of the Act.

[44] I have not overlooked the argument for the appellant that the information in issue originated from a third party not from government but for the reasons given above that consideration is amply provided for by the provisions of ss 36 and 37.

[45] Turning to the factual grounds for the refusal under s 36(1)(c), the appellant adopts the information supplied to it by Inter Waste (as well as some of the latter’s phraseology). Briefly summarised, the case for refusal was this. The rate for each item of service tendered for was the ‘co-efficient of constant and variable factors’. Those that were constant were, roughly speaking, common to all competing tenderers such as labour and fuel. The variable factors were those peculiar to Inter Waste. They included its profit margins, gearing, costs of infrastructure and assessment of what the work would involve. Such costs can vary from one tenderer to another but the variable of special sensitivity to Inter Waste was its prediction as to what the contract work would entail ie the quantities of waste to be removed, the

frequency of removal, the number of bins required and how the capital cost of the bins (which would be specific to the contract) would be treated. The exercise of assessing all this in advance required knowledge, experience, expertise and research. By performing this exercise a tenderer was enabled to weight the pricing of each item. An example was offered in respect of items 1 and 2. (As the reproduced extract from the Schedule of prices and quantities shows item 1 was a minimum monthly charge for up to 800 removals and item 2 was an additional charge for every removal over 800.) The example was as follows. If research led to the prediction of 500 to 600 removals per month a tenderer could quote a lower price than for 800 or it could quote at 800 for item 1 and quote less for item 2. On the other hand if the informed prediction was over 800 the tenderer could set the item 1 price at below cost and secure profits by loading its item 2 price. Even assessment of the price in respect of item 4 (the dumping charge) required knowledge and skill because one had to know the type of material to be removed.

[46] Based on all those considerations the appellant contended that disclosure of the rates would give the respondent insight into the fruits of Inter Waste's research and enable the respondent to ride on Inter Waste's efforts by adjusting its own rates in the light of Inter Waste's tender.

[47] The respondent's counsel countered this contention on a two-fold basis. The first was that, as a matter of logic, it would be impossible to deduce Inter waste's profit margin, for example, simply from knowing its rates. To do so necessitated knowing all the other variable and constant factors to which the appellant referred and which it was not alleged the respondent had. On the assumption that all those factors comprised confidential information, the disclosure of which would harm Inter Waste, revealing the rates would not amount to such a disclosure in respect of any of the four items in question.

[48] As regards the price adjustment example based on reference to items 1 and 2, counsel argued that the rates would at most provide a rough indication of Inter Waste's prediction of the number of monthly removals. It could not lead to a precise enough answer to be useful to the respondent. It was submitted in the alternative, on the assumption that the rates could enable the respondent to make a precise deduction, the answer obtained could be of no use to the respondent, either in respect of the tender in question or any tender called for in respect of a new contract from 2005 onwards.

[49] Plainly that argument is right in so far as the awarded contract is concerned. The term of that contract began in February 2003 and was due to end in January 2005. Access was sought in March 2003. The tender had

been awarded in April 2002. One should add that it is not comprehensible how the respondent could have adjusted its rates in the light of Inter Waste's tender. At least pre-award, each tenderer's tender was confidential in terms of the tender provisions in the notice to tenderers.

[50] As to whether knowledge of Inter Waste's rates (determined in 2001) could reasonably have been expected to advance the respondent's ability effectively to compete with Inter Waste for a new contract in 2005, and concomitantly to cause Inter Waste harm in the sense under consideration, the answer must, in my view, be in the negative. For a new contract tenderers would have needed data relative to the period of the awarded contract. That actual information they could obtain from the appellant, with or without the aid of the Act. There are no reasonable grounds at all for the expectation that disclosure of the 2001 rates would cause Inter Waste probable harm in regard to competition for the award of a new contract in 2005.

[51] Coming now to the appellant's case based on s 37(1)(a), the relevant provisions of that paragraph (repeated for convenience) are that non-disclosure is mandatory if disclosure –

> 'would constitute (grounds for) an action for breach of a duty of confidence owed to a third party in terms of an agreement'.

[52] The notice to tenderers which accompanied the issued tender documentation contained the following sentence:

> 'Transnet does not bind itself to accept the lowest or any tender/quotation nor will it disclose the successful tenderer's tender price or any other tendered prices as this is regarded as confidential information.'

In terms of the eventual written agreement entered into pursuant to acceptance of Inter Waste's tender the tender documentation, including the notice and the confidentiality clause just quoted, was made part of the agreement.[23]

[53] The submission of the appellant on this aspect was that disclosure of the rates, being components of the tender price, would breach the confidentiality clause and expose the appellant to an action by Inter Waste either for damages or at least for cancellation of the contract.

[54] The respondent's contention was that only the tender price itself was referred to in the confidentiality clause and as Inter Waste had (as was indeed the case) consented to disclosure of the tender price, the clause was no longer a bar to disclosure of that sum. The clause therefore never had any bearing on the schedule of prices and quantities. In any event, so the contention went, any action for breach of the clause would need to entail proof of a material breach with or without proof of damages. For the same

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[23] Clause 2 of the agreement.

reason for contending in respect of s 36(1)(c) that there was no probable harm reasonably to be expected, and more importantly because there was no appeal against the Court's finding that no harm was likely in respect of s 36(1)(b), disclosure could not realistically expose the appellant to an adverse judgment for contractual relief.

[55] To my mind the overriding consideration here is that the appellant, being an organ of State, is bound by a constitutional obligation to conduct its operations transparently and accountably.[24] Once it enters into a commercial agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to State security or the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails. I therefore fail to see how the confidentiality clause could validly protect the successful tenderer's tender price from disclosure after the contract has been awarded. Accepting a need for confidentiality in the pre-award phase, it seems to me that the intention of the drafter of the notice was no more than that a tenderer should not be able to know a competing tenderer's price in that period, hence the reference to 'other tendered prices'. In the context of the notice the tender

[24] Section 195(1) of the Constitution, paras (f) and (g) read with (2)(b). And see the objects in s 9(e) of the Act.

price contemplated as protected by confidentiality was the total price without component details. It follows that once the contract was awarded the confidentiality clause, certainly in so far as the successful tenderer is concerned, was a spent force and offered Inter Waste no further protection from disclosure as regards its tender price. (I refrain from considering the question whether the clause continued to protect the unsuccessful tenderers.)

[56] Moreover, the agreement, in incorporating the tender documentation also incorporates the schedule of prices and quantities. The agreement is not Inter Waste's document. It is a contract document to which the appellant, a public body, is a party. What applies to public entitlement to know the contract price applies equally, on the facts of this case, to the agreement itself. What is more the tender documentation included the agreement in draft. Inter Waste must have known in advance that its schedule of prices and quantities would, if it secured the contract, become part of the agreement and therefore exposed to public scrutiny. Accordingly even if 'tender price' in the notice included the schedule the parties' intention could never have been to maintain confidentiality in respect of the rates after the award. Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause.

[57] It follows that at the time of the respondent's request the confidentiality clause provided no reason to refuse disclosure of Inter Waste's rates under s 37(1)(a). This renders it unnecessary, strictly speaking, to decide whether disclosure of the rates would constitute grounds for an action for breach of confidentiality. However, in the circumstances, it is appropriate to add that the respondent is right in submitting that if disclosure of the rates would not be likely to cause the harm referred to in s 36(1)(b) (the court *a quo's* finding as to which is not appealed against) and could not reasonably be expected to result in probable harm of the kinds referred to in s 36(1)(c) (which I have found to be the case) there is no basis to conclude that if Inter Waste did indeed sue the appellant for breach of confidentiality the latter would be at any risk of an adverse finding whether as to material breach entitling cancellation or as to an award of damages. The appellant's case therefore fails in regard to s 37(1)(a).

[58] Turning, finally, to the court's discretion in s 82, the appellant's main submission entails that despite a public body's failure to establish its case for refusal under ss 36 and s 37 it can still be entitled to a discretionary order dismissing a requester's application. This is not a tenable argument. As the court *a quo* observed, it would be remarkable, to say the least, for the legislature to lay down detailed provisions governing refusal of access and

then to enable a court by way of an unlimited discretion to confirm refusal even if the public body failed to justify refusal. However, the more important consideration is this. The primary purpose of the Act is to give effect to the constitutional right of access to State information. The limitations on that right, in favour of a third party's right to privacy in general and commercial confidentiality in particular, are set by ss 36 and 37. If the public body fails under those sections to justify its refusal of access there can no longer be anything in the way of the requester's right to access. It follows that there can be no such discretion as that contended for. This conclusion accords with the aim and objects of the Act. If confirmation were needed it is provided by the terms of s 11. The power to 'grant any order that is just and equitable' is therefore intended to enable the court to tailor the relief to which a successful applicant is entitled.

[59] It remains to deal with the appellant's assertion – made in the hope of a favourable exercise of the supposed discretion – that the respondent had failed to show any or adequate legitimate reasons for wanting to know the rates. What is necessary to emphasise here is that once a requester has complied with the procedural requirements for access and overcome the refusal grounds in chapter 4, he or she must be given access. Sec 11 makes

that clear. Not only that, s 11(3) makes it equally plain that the requester's reasons are not relevant.[25]

[60] As it is, the respondent maintains that it requires the rates because it has in the past, so it alleges, been the victim of irregularities in the award of contracts by the appellant. Even the perception, if not the reality, of that situation would entitle the making of a request given the Act's object in s 9(e).[26]

[60] For the reasons given I think that the court *a quo* was right. The appeal is dismissed, with costs.

CT HOWIE
PRESIDENT

CONCUR:
ZULMAN JA
CAMERON JA
MLAMBO JA
NKABINDE AJA

[25] Section 11(3) says:
'(3) A requester's right of access contemplated in subsection (1) is, subject to this Act, not affected by –
(a) any reasons the requester gives for requesting access; or
(b) the information officer's belief as to what the requester's reason are for requesting access.'

[26] Para [12] above.