IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 7954/2021

In the matter between:

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	**FIRST APPLICANT**
SKHUMBUZO MACOZOMA N.O	**SECOND APPLICANT**

And

ORGANISATION UNDOING TAX ABUSE NPC	**RESPONDENT**

In re:

ORGANISATION UNDOING TAX ABUSE NPC	**APPLICANT**

And

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	**FIRST RESPONDENT**
SKHUMBUZO MACOZOMA N.O	**SECOND RESPONDENT**

ANSWERING AFFIDAVIT TO RESCISSION APPLICATION

I, the undersigned

STEFANIE FICK

do hereby declare under oath as follows:

1. I am the Executive Director of the Accountability and Public Governance Division of the respondent and am duly authorised to oppose this application. In this regard I refer the honourable Court to annexure "SF1" which is attached to the founding affidavit in respect of the Promotion of Access to Information Act, 2000 ("PAIA") application.

2. The facts contained in this affidavit fall within my personal knowledge and belief, except where the contrary clearly appears from the context or where otherwise stated and are true and correct.

3. Where I make legal submissions, I do so based on the advice of the respondent's legal representatives, which advice I accept.

PARTIES

4. For the sake of convenience and for the purpose of this affidavit, the parties herein will be referred to as they are referred to in the applicant's counter application.

INTRODUCTION

5. I have read the applicant's founding affidavit in the application for rescission of the order, in this affidavit:

   5.1. Firstly, I set out the applicants wilful default;

   5.2. Secondly, I deal with the correspondence as set out in the applicants founding affidavit;

   5.3. Thirdly, to the extent that it is necessary, I respond *ad seriatim* to the applicant's allegations; and

   5.4. Finally, I address the issue of the filing of the notice of intention to oppose. On the face of it, it was filed out of time.

6. Before I proceed, I pause to mention that 1) it is expressly denied that all the facts as they appear in the applicant's founding affidavit are true and correct; 2) any issue raised or allegation made in the founding affidavit not expressly dealt with herein, or which is in contradiction with what is stated herein, is denied.

PURPOSE OF THE AFFIDAVIT

7. The purpose of this affidavit is to oppose the relief sought by the applicant in its notice of motion.

8. To place the relief sought by the applicants and the respondents' opposition

thereto in context, a synopsis of the history of events that led to the judgment being granted, and which the applicants seek to rescind, - the facts dealt with below will indicate that the applicants were aware of the legal proceedings instituted. South African National Roads Agency Ltd ("SANRAL") had knowledge of the application, personally served, against it and had further knowledge of the notice of set down of the application. Despite such knowledge SANRAL failed to oppose the application and answer thereto. The Organisation Undoing Tax Abuse ("OUTA") therefore submits that the applicants are in wilful default of the order.

9. The applicants are not entitled to the relief sought, for the following reasons:

9.1. The applicants have failed to provide sufficient reasons and also good cause as to why the judgement should be rescinded;

9.2. Accordingly, an order as prayed for by the applicants is not appropriate under the circumstances, because no reasonable explanation for the applicants' default exists. The applicants confirm being furnished with a copy of the application and wilfully failed to oppose the application.

9.3. It is respectfully submitted that the applicants do not have a defence worthy of being ventilated in court and has had ample time to oppose the application but failed to do so, prior to the hearing of the matter and even until the granting of the order.

GROUNDS OF OPPOSITION

10. The application is out of time since the applicant's application for rescission comes as a counter application to OUTA's contempt of court application. The relevance thereof will become more apparent below, in answer to the rescission application.

11. The applicants apply for the rescission of judgment under Rule 42 and under the common law. I am advised that to successfully rescind a judgment under this Rule and the common law, it is premised on the grounds that the applicants were to launch the application within a reasonable timeframe of becoming aware of the judgment. It is apparent from the facts and further on the applicant's own version, as stated in the applicant's founding affidavit;

"39.6 With regard to the service of the application itself, although there is evidence of the application having been served on Ms Letsholo of SANRAL on 22 February 2021 (Caselines 006-1). Ms Letsholo furnished me with a copy of the papers"

12. The abovementioned order/ judgment was served by sheriff on the applicant's office on 19 November 2021. The deponent confirms same and states in its answering affidavit to the contempt of court application as follows;

"8 The order was served by the sheriff at SANRALs offices on 19 November 2021. The order was accepted by SANRALs then intern, Ms Gantse Mothobi (who is no longer employed by SANRAL) and was then sent to me via SANRALs internal mail on the same day. I pause to mention that during November 2021, I was absent from

work when the order would have been sent to me. Given my absence, the order was also sent to Mr Mashiyi."

13. It is then settled that the applicants became aware of the judgment on 19 November 2021.

WILFUL DEFAULT

14. If the applicants do not succeed on the issue of wilful default, their application for rescission must fail, and in that event, the applicants' purported defences would become academic.

15. In their application for rescission, the deponent as the head of legal at SANRAL, admits that she was aware of the application, but contends that it was due to human error that SANRAL was not aware of the existence of the application. SANRAL was well aware of the application and also of the notice of set-down and simply chose to ignore it. Once SANRAL knew of the matter's existence and the fact that it was proceeding, the correct course of action for a responsible litigant is to seek a postponement. The appropriate course of action is not to ignore and disregard the legal process.

16. On 20 October 2021, OUTA's attorney personally served the notice of set down for 5 November 2021. On the same day, the notice of set down was emailed to the

same legal coordinator, Ms Letsholo, that brought the serving of the application to the attention of the deponent. Similarly confirming receiving the notice of set down for 5 November 2021. From 20 October 2021 to 5 November 2021, it is not plausible that SANRAL still suffered from the same human error and did nothing in respect of the matter.

17. There is no evidence before the Court that SANRAL at least brought the service of the notice of set down to the attention of its appointed attorney of record it believed was dealing with the matter. The attorney would have then advised on the error made and contacted OUTA's attorney and filed a notice to oppose. Instead SANRAL did nothing. Such conduct is an example of wilful default, SANRAL simply chose to ignore the proceedings.

18. The referred to service affidavit, as deposed to by OUTA'S attorney of record, reflects at pages 009-1 to 009-11 and 010-1 to 010-5 on Caselines that SANRAL was aware of the notice of set down.

19. If circumstances did not allow SANRAL to oppose the application at that stage as it expects the Court to believe, SANRAL was from 20 October 2021 in a position to request a postponement from OUTA's attorney or from the Court, either in person or through an attorney (the same attorney that it thought was handling the matter). SANRAL could have even done so telephonically, by calling OUTA's attorney who served the notice of set down or even by email. Ms Letsholo was also called to confirm receiving the notice of set down electronically.

20. The same avenues that OUTA used to make SANRAL aware of the set down, the same avenues could have been used, seeking at minimum a postponement. It cannot be disputed that OUTA's attorney went to great lengths to ensure that SANRAL was aware of the set down date. SANRAL was well aware of the application proceeding and was reminded of the application several times, but simply chose to ignore it.

21. Even considering the "difficult" circumstance SANRAL expects the Court to believe, SANRAL and its then CEO, had the ability and obligation to demonstrate a minimum degree of respect for OUTA, for the Court and for the legal process, and at the very least attempt to communicate with OUTA's attorney or with the Court. SANRAL's circumstances did not justify the applicants showing a total disregard for the legal proceedings.

22. Accordingly, as appears from the papers and above, OUTA's attorney communicated with SANRAL in writing, and telephonically on different occasions but all such attempts were ignored by the applicants. The applicants were repeatedly informed of the impending application. To make matters worse, in its founding papers to the rescission application, the applicants make no mention of such adequate service because on this point alone, the rescission application ought to be dismissed. Any denial to the contrary is highly improbable and it can be rejected on the papers, seeing that communication was sent numerous times by email, sheriff and confirmed telephonically.

23. This is indicative of the bad faith which underlies this rescission application, and the applicants conduct in general. SANRAL's explanation for its default is wholly inadequate. I submit that the application for rescission should be dismissed on this basis alone.

CORRESPONDENCE

24. I wish to deal with the correspondence as it is sporadically and vaguely dealt with throughout the applicants' founding affidavit. The allegations made with support of correspondence between the legal representatives, is for the most part not relevant in consideration of the rescission application, nor in the applicant's favour in totality.

25. In the correspondence dated 8 December 2021, SANRAL's attorney addressed an email to OUTA's attorney of which paragraph 5.1 thereof states that for the avoidance of any doubt, they record their client does not intend to avoid the order and its conduct is not wilful. Their client only seeks to be given the opportunity to respond to the request for information. Going forward, the manner in which the applicants conducted the matter was improper, evident in its rescission application being a counter application to a contempt of court application and not an application on its own. This reflects the lack of merit in its rescission application reiterated in correspondence dated 8 December 2021.

26. Fasken attorneys addressed an email to OUTA's attorney stating that they act on behalf of Trans Africa Concessions (Pty) Ltd ("TRAC"). Their client will seek leave to intervene, to be joined as a party to the proceedings and participate not only in the main application, but also the rescission application. To date, there has been no such leave sought and if TRAC has a substantial interest in the matter which SANRAL and the TRAC claims to have, there would be a leave to intervene in the rescission application. There has been no such leave sought.

27. Furthermore, in paragraph 15 of the correspondence, OUTA's attorney was advised that should OUTA seek to act and enforce the court order, any attempt to do so, their instruction is to bring an urgent application to stay the court order pending determination of the application. Again, no such application has been forthcoming.

28. The applicants in correspondence dated 4 January 2022, a day before OUTA's proposed deadline for the serving of a rescission application, undertook to bring a rescission application as soon as possible before 21 January 2022, no such rescission application was forthcoming.

29. Again in correspondence dated 14 January 2022, Fasken on behalf of their client, which is not a party to the proceedings, again, in attempting to silence OUTA in paragraph 15 of its letter, stated that should OUTA knowing full well that it is not entitled to the default judgment which impacts on the interests and affects parties rights, seek to enforce and execute the order, they hold instructions to approach the

court for urgent interlocutory relief with an appropriate *de bonis propriis* cost order.

30. OUTA takes great exception to the letters by Fasken, who is not a party to the proceedings, and who should have addressed its concerns to SANRAL and is entitled to bring whatever relief it seeks in protecting its rights instead of threatening OUTA and its attorneys with a punitive costs order and urgent court intervention. OUTA submits that TRAC has not actioned any of its threats because such an action reflects SANRAL and TRAC's lack of defence and *mala fide* intentions behind refusing the disclosure of the requested information.

AD SERIATIM

31. I now respond to the individual allegations in the founding affidavit. Where I respond briefly I do so because the substance of such an allegation has been addressed above.

AD PARA 35

32. It is noted that SANRAL is applying for rescission to the judgement in terms of Rule 42 of the Uniform Rules of court. I deny that the judgment was erroneously sought and granted.

33. The Court granted the default judgment on the strength of the return of service of the applicants in the papers before it and, accordingly, was satisfied with the form

of service, it is for the Court to be satisfied with service and not the applicant.

AD PARA 37

34. The provisions of Rule 42 are uncontentious. However, I deny they provide a basis for rescission for the default judgment and further deny that the applicants have met the requirements as set out in the judgment as referred to by the applicants.

AD PARA 38

35. The content of this paragraph is denied as it relates to the absence of the applicants, it did not amount to the applicants "opting to be absent." The Court's insistence on a supplementary service affidavit at the hearing of the matter, ensured by all possible means that the applicant was notified of the application before it. The Court was duly satisfied. Any allegation that SANRAL's absence was, not on the applicants' own account, opting to be absent, is wholly disingenuous. SANRAL was the author of its own misfortune, at all material times it was aware of the application.

36. In amplification of such denial, OUTA submits that once SANRAL became aware of the consequence of its tardiness, and appointed the current attorneys of record, it fabricated the current application, which is why it struggled to keep to its own deadline to serve the rescission application. But for the contempt of court application, we would still be waiting. SANRAL sprung to action at the realisation that OUTA had a judgment which ordered it to produce the requested information.

This information SANRAL wishes to, by all means necessary, not to be in the public domain, due to the consequence on SANRAL and TRAC, if OUTA is correct in the information sought be remain confidential, is disclosed.

AD PARA 39.1-39.5

37. To settle the email allegation in respect of there being no confirmation of a read receipt or of actual delivery, OUTA set out in its founding affidavit to the PAIA application in paragraphs 22 to 27 which states the following:

"In this regard I refer the court to a letter sent from Mr Macozoma to OUTA. Although the letter was addressed to OUTA in relation to a different request for information in terms of PAIA, its relevance will be demonstrated in the paragraphs below. A copy of the letter dated 29 July 2020 is annexed hereto marked as SF5. The Court would note from SF5 that Mr Macozoma not only acted as the information officer of SANRAL at the time, but that, in addition he is reflected as the chief executive officer of SANRAL, on the letterhead of SANRAL, which would mean that he is in fact and in law, information officer of SANRAL."

38. OUTA submits that, at all relevant times the information officer of SANRAL was Mr Macozoma, the second applicant, and that he was required, as the information officer of SANRAL to respond to the PAIA request by no later than 24 September 2020 as required in terms of section 25 (1) of PAIA. SANRAL confirms that the second applicant only resigned from SANRAL with effective date of 17 November 2021. The same manner in which he could have responded to the previous PAIA

request, he could have done the same in the present matter. At the very least OUTA has shown that the email address was functional and received by Mr Macozoma. Again, there is no need to further explore the service of the application because the deponent as SANRAL's head of legal, confirms that Ms Letsholo furnished her with a copy of the papers served on 22 February 2021.

AD PARA 39.6

39. The content of this paragraph must be emphasised and brought to the court's attention. The applicants in this paragraph, admits being served with the application allowing the applicants to peruse the application and applied its mind and further having full knowledge of the application. However, due to a similar application, failed and or neglected to oppose the matter. The applicants expect the Court to believe that the applicants received both applications, but only opposed one and had the intention of opposing the other. Such contentions cannot be accepted by the Court in light of the above, I respectively submit that the applicants:

    39.1. Wilfully neglected to act, and

    39.2. Only filed this application for rescission of the court order to delay providing information to OUTA, against the public interest to such information.

40. The applicants, upon receiving the judgment not only dragged its feet but failed to serve its promised rescission application and further failed to adhere to its own deadline.

AD PARA 39.7 to 39.8

41. The contents of these paragraphs are denied as far as it relates to the administrative failure in confusing matters serves as any justification. Even if it were to be accepted by the Court, OUTA submits that it is unreasonable for an organisation such as SANRAL to make such a mistake. It explains the failure to respond to the application within a reasonable time being unintentional, it certainly does not explain the lack of response to the notice of set down which would have further highlighted this administrative error but inspired no reaction by SANRAL.

42. SANRAL willingly elected not to be present at the time the application was called in Court. OUTA strongly denies that SANRAL was unaware of the fact that the application existed and was proceeding. The evidence and service enquiry before the Court reflects that SANRAL not only knew of its existence, but further, that it was proceeding. The true test, OUTA submits, is whether the default was deliberate. SANRAL had full knowledge of the set down and of the risks associated with its default, freely took the decision to refrain from appearing and now expects this Court to come to its aid, after realising the consequences thereto.

AD PARA 39.9

43. These events do not adequately explain the applicants wholesale disregard for the impending application and for OUTA's attorney various attempts to notify them of

the hearing date of the matter. It is therefore evident that SANRAL's reliance on human error is not *bona fide*. This explanation demonstrates that SANRAL is able to function and to look after its affairs in a responsible manner, as and when it chooses. There is no legitimate reason why it could now, in between dealing with other matters, have appointed an attorney to assist in the litigation of this matter or at minimum called OUTA's attorney or sent an email advising of the circumstance it found itself in.

AD PARA 39.10

44. The contents of this paragraph are noted and OUTA only wishes to state that SANRAL's ability to get its administrative house in order in respect of another matter, but not this one, cannot be a valid defence justifying the rescission of judgment. It can also not be considered as a factor for good cause shown. If the Court were to accept such a justification, it would excuse SANRAL's improper conduct and set a bad precedent by allowing all entities, both private and public, to use unreasonable improper administration, when diligence is required in the scope of the work executed by SANRAL as a public body. It is dangerous and would open the floodgates to rescission applications before the Courts on the perceived allegation that an applicant confused a case number but managed to get their job right on another occasion.

AD PARA 40-41

45. The contents of these paragraphs are denied as SANRAL's default was intentional. OUTA submits that SANRAL is aware that its defences are weak, which is why it needs to refer to other matters. It is OUTA's prerogative on how it conducts its various litigation. It is not for SANRAL to dictate the rules of engagement for other matters and on how these matters are to be presented before the court. With its own set of facts before this court, other concessionaires have nothing to do with SANRAL's default. The facts currently before this Court in this matter are relevant and ought to be the only consideration in the adjudication of this matter. SANRAL cannot escape that there was proper service of the application and further the notice of set down.

AD PARA 42

46. I deny each and every allegation in these paragraphs and submit the following:

46.1. The applicant failed to provide a plausible explanation for its default and failed to prove no wilfulness on its part. Relating to its failure to oppose the matter existed at both the service of the application and further the notice of set down.

46.2. If the purported defence was valid, the applicant could have easily raised

same in an answering affidavit or by showing up on the day of the hearing and put its human error version before the Court since it was fully aware of the application.

47. The rescission application was filed after the fact. Only once the penny dropped in respect of the consequences to the judgment and the information sought, was the rescission of the order a consideration.

AD PARA 43-48

48. The contents of these paragraphs are denied. In amplification thereof SANRAL sets out that there are a number of problems in the manner in which the application was presented, and order subsequently sought. Such allegations are denied. It is further denied that an incorrect submission was made to the Court, the applicants insinuate that the drafter of the practice note suffered from the same human error in confusing matters. Consequently, such a submission placed a wholly different legal position before the Court in respect of the application. If one puts into context the complained parts of the practice note it reads:

"8.10 The information officer, acting on behalf of the First Respondent, i.e., being the Second Respondent, responded to the request as per Annexure "SF5" to the founding affidavit. ***See: Case Lines 005-6***

8.11 In terms of the aforesaid letter the Second Respondent, in effect, refused to comply with the request. ***See: Founding affidavit par 22 to 30"***

49. As stated in the practice note and reference to paragraph 22 to 30 of the founding affidavit, I repeat paragraphs 32 and 33 above and only state the paragraph which dispels the allegations, wrongfully painted by SANRAL, which reads:

"24. Although the letter was addressed to OUTA in relation to a different request for information in terms of PAIA, its relevance was to re-enforce the fact that the second applicant was in fact and in law the information officer of SANRAL."

50. That is the point and submission made in the practice note. There is no merit to the allegation in respect of the Court being misled or that the order was erroneously sought and granted.

AD PARA 49

51. In respect of this paragraph and its sub-paragraphs, OUTA only admits paragraphs 49.1 and 49.2. In respect of the remaining sub-paragraphs the content thereof is denied and OUTA submits the following:

51.1. In respect of PARA 49.3: The judgment reserved, as reflects on Caselines at page 003-1, is dated 1 November 2021, which was a public holiday - the date was allocated to the national elections - the matter was not heard on this day, as outlined in the directive issued by the Deputy Judge President dealing with matters enrolled on 1 November 2021. Such matters would be heard on 5 November 2021. That is as far as OUTA can take any allegation

in respect of any hearing on 1 November 2021 relating to the judgment being reserved on even date. OUTA's attorney confirmed same in that she did not upload the Court Order and cannot comment on the reason why it was uploaded or the origin thereof.

51.2. In respect of PARA 49.4-49.5: The content of this paragraph is noted. Caselines page 012-13 reflects all the widely shared notes, dated from 4 November 2021 to 11 November 2021 in which the Judge required certain aspects, as it related the manner of service to be addressed, which was subsequently addressed by the uploading of the service affidavit.

51.3. In respect of PARA 49.6: The content of this sub-paragraph is denied, and I submit that the Court requested an explanation pertaining to service of the notice of set down for 1 November 2021, being the public holiday.

51.4. In respect of PARA 49.7: The content of this sub-paragraph is denied, upon the uploading of the affidavit as directed by the Court, the Court was satisfied and granted the order on 15 November 2021. The Court was presented with an unopposed application, there was no attorney on record and no notice to oppose the application. Since the application was not opposed, consequently there was no duty for the subsequent interactions to be notified to SANRAL. I pause to mention that even when OUTA's attorney called Ms Letsholo on 11 November 2021, to confirm having

received the notice of set down, this still prompted no response from the applicants. It is denied that interactions amounted to a postponement and that the matter should have been postponed for further consideration. OUTA could not have served a set down on SANRAL as it had no knowledge that the Court, after the uploading of the service affidavit would grant the order on 15 November 2021.

51.5. In respect of PARA 49.9: The content of this sub-paragraph is denied. The Court hearing this matter would be best accustomed with the realities of the unopposed motion Court. OUTA submits that the matter was at no point postponed *sine die* by the Court and further that an additional notice of set down needed to be served on SANRAL. Such an expectation is ambitious of a party who did not file a notice of intention to oppose the matter. OUTA further denies that the Judge's concerns not being brought to SANRAL's attention is a significant irregularity and sufficient reason for the rescission of the order. The facts before the Court and the realities of the motion Court, are not in favour of the applicants, such argument is misplaced and incorrect.

AD PARA 50-51

52. The content of these paragraphs is noted.

AD PARA 52

53. The allegations in this paragraph in denied as already set out herein.

AD PARA 53

54. The content of this paragraph is denied, and the applicants is put to the proof thereof.

AD PARA 54

55. The content of this paragraph is irrelevant as far as it relates to the abandonment of previous relief sought in a different matter and in respect of the terms of the sections of PAIA, paragraph 10 of the founding affidavit states that the application was brought in terms of section 78(2) read with section 82 of the PAIA.

AD PARA 55-57

56. The contents of these paragraphs are denied. I am advised that the overriding principle in relation to this "disclosure" or "confidence" defence is that a public body is obligated to conduct its operations transparently and with accountability. Once a public body enters into a commercial agreement of a public character like the issue here, (disclosure of the details of which does not involve any risk, for example to state security or the safety of the public) the importance of transparency and accountability entitles members of the public, in whose interest SANRAL is meant to

operate for, to know what such an agreement entails.

57. Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause or agreement. Further the defence raised fails because the applicants as stated in paragraph 51 of its founding affidavit in respect of good cause, the applicants must show that on the merits, a bona fide defense which has *prima facie* a prospect of success. OUTA submits that these defences have no prima facie prospect of success.

58. The applicants have failed to show that it is probable that the disclosure, even of the confidential information would cause harm to TRAC's commercial interest. A party relying on such a provision must show that harm is not simply possible but probable. In the circumstances, SANRAL has not put up any reasons that justify a defence. Further TRAC will not suffer any damages should there be such disclosure, as it has not supported this application. Its correspondence referred to the bringing of urgent applications, but nothing has been forthcoming on record.

AD PARA 58

59. The content of this paragraph is denied. The preamble states the purpose of PAIA as:

"... to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and actively promote a society

in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights."

60. In light of this and section 42 of PAIA, the applicants have failed to discharge the onus of disclosure of the requested information would materially jeopardise the economic or financial welfare of the Republic or the ability of the government to manage the economy of the Republic effectively in the best interest of the Republic. Such a defence is far reaching of the applicants and has no prospect of success.

AD PARA 59

61. The content of this paragraph is denied. Paragraph 16 of the PAIA application, OUTA states, "as the agreement entered into between SANRAL and in this instance TRAC, is within public interest. OUTA further wishes to establish whether TRAC is generating revenue in terms of the concessionaire agreement that disproportionally exceeds the actual costs related to maintaining the toll roads. Should this be the case, SANRAL may potentially be in contravention of the Public Finance Management Act, 1999 ("PFMA")."

62. OUTA agrees that the information sought would reflect the amounts generated by TRAC from the concessionaire contract and made out a case in these papers. The parties are *ad idem* on this aspect.

AD PARA 61

63. The content of this paragraph is denied. Section 46 of PAIA has been engaged as already set out, the disclosure of the record could reveal evidence of substantial contravention of failure to comply with the law. SANRAL is to have consideration to paragraphs 17-19 of the PAIA application, the indication of public interest is clear.

AD PARA 62

64. The allegation is denied for reasons already set out herein.

AD PARA 63

65. The content of this paragraph is noted. OUTA submits that TRAC is duly notified and has gone further than making submissions not only to SANRAL but also to OUTA's attorney. The refusal to provide the records is clear from both parties and does not take the matter any further. The section makes provision for a third party to be notified to either consent or refuse to the disclosure of the records and provide reasons. The defences raised by SANRAL reflects those reasons which have no prospect of success and do not justify the rescission of the judgment granted.

AD PARA 64

66. The allegations made in this paragraph are denied and I am advised that it is also irrelevant. I point out that the applicants filed their founding affidavit with an irrelevant matter (case number 32095/2020) in an attempt to obscure the issues and to create the impression that there is a bona fide dispute which needs to be adjudicated over.

AD PARA 65

67. The content of this paragraph is denied. OUTA denies that there exists a number of *bona fide* defences in the application. OUTA submits that there are none. What the applicants are inappropriately attempting to do in the application is to visit and argue the application under a different case number or have this Court ignore that the applicants have failed to reach the threshold required in a recission application and escape such failure by wanting this matter to be joined to pending litigation.

68. Each individual case must be adjudicated on its own merits. As such OUTA submits that the Court must be careful not to be influenced by having regard to other matters where similar relief is averred, when relief turns to the current subject matter. The Court should stay clear of random application of perceived crystallised principles as the applicants wish to present, without regard to the unique facts of the matter before it. It remains a value judgment by the Court, informed by the specific facts before the Court. A "one size fits all" approach will not deliver a just outcome.

AD PARA 66

69. The content of this paragraph is denied. It is evident that the applicants are in wilful default in opposing the PAIA application and showed a contemptuous disregard for the proceedings and for the Court, despite various efforts by OUTA's attorney. In the circumstances OUTA denies that the requirements of both the Uniform Rules of Court and the common law are satisfied and prays that the application for rescission be dismissed with costs.

CONDONATION

70. The correspondence between the parties' attorneys reflects OUTA's stance was always that it could not abandon the order sought as requested by the applicant's attorney because OUTA was uncertain of the merits of the rescission application to be presented by the applicants. This is why OUTA's attorney persisted with the filing of a rescission application, for the applicant's defence and reason for default to be forthcoming, given the extent of informing the applicants of the application sought by OUTA.

71. Further as stated in OUTA's founding papers to the contempt of court application that we are a non-profit company, exclusively serving the interest of civil society, OUTA is not in the business of invoking unnecessary and costly litigation. Once the complete rescission application was served and filed on 31 January 2022, the notice

of intention to oppose was due to be filed on or before 7 February 2022 but was only filed on 22 February 2022, being 11 days late.

72. OUTA did not want to file a notice to oppose just for the sake of filing such a notice and then have to withdraw such a notice after applying its mind in respect of the rescission application. On 1 February 2022, a day after the complete application was served on OUTA's attorney, a brief was sent out requesting an opinion on the merits of the rescission counter application. The opinion was sent to OUTA's attorney on 7 February 2022. The opinion was considered by OUTA's attorney and OUTA. On 18 February 2022 I met with our legal representatives regarding the rescission application and the way forward was discussed and concluded that OUTA would oppose the application. Subsequently on 22 February 2022 the notice to oppose the counter application was filed and served.

73. I submit that in the event that OUTA be granted condonation for the late filing of its notice of intention to oppose, upon the applicants by virtue of the fact that at the time of service of the notice to oppose, good cause has been shown, and that the applicants have suffered little to no prejudice as a result of the delay in service of the answering affidavit.

74. I submit that the applicants have not been unreasonably prejudiced as a result of OUTA's perceived failure to provide the applicants with a notice to oppose within the stipulated 5 days and consequently the answering affidavit then being filed. The necessary procedure must still unfold for the hearing of this matter on the opposed

motion roll. In order to succeed in the Court exercising its discretion in granting such condonation, OUTA must show that it is in the interest of justice that condonation be granted and in proving such interest OUTA must prove "good cause". OUTA has furnished a full, reasonable and acceptable explanation for the full period of its delay, including the cause of the delay.

CONCLUSION

75. SANRAL has failed to establish that the default judgement was erroneously sought and granted in terms of Rule 42 of the Uniform Rules of court or under the common law. The Court was satisfied with the form of service and the strength thereof, granted the default judgement. The rescission application is ill-conceived, contains a number of bold and unsubstantiated allegations and inconsistencies. This is a last-minute attempt by SANRAL to avoid and delay the consequence of providing OUTA with the requested information as the Court order sets out.

76. The defences the applicants rely on have no prospect of success, however OUTA has clearly illustrated that the applicants are in wilful default and the rescission falls to be dismissed on this consideration alone, thus the defences raised are merely academic.

Wherefore, I pray for an order dismissing the applicant's counter rescission application with costs on an attorney and client scale.

DEPONENT

The Deponent has acknowledged that she knows and understands the contents of this affidavit which was signed and sworn to before me at Johannesburg on this the 16th day of March 2022 the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended and Government Notice No. R 1648 of 17 August 1977, as amended having been complied with.

COMMISSIONER OF OATHS

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