

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 7954/2021

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC

APPLICANT

And

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD

FIRST RESPONDENT

SKHUMBUZO MACOZOMA N.O

SECOND RESPONDENT

REPLYING AFFIDAVIT TO CONTEMPT OF COURT APPLICATION

I, the undersigned

ANDRI JENNINGS

(Identity Number: 8804050112082)

Do hereby declare under oath as follows:

1. I am still authorised on behalf of the applicant to depose to this affidavit.
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. I have read the answering affidavit deposed to by Sinomtha Linda on behalf of the respondents and wish to reply thereto in short. I will not deal with each and every allegation in the answering affidavit and will only deal with those allegations that are pertinent to the resolution of this matter. My failure to deal with any other allegation should not be construed as an admission of same. I do so because the majority of the allegations have been addressed in applicants answering affidavit to the respondent's rescission counter application. In this regard I repeat paragraphs 12, 14-21, 22-25, 35, 40, 46, 50-52, 55 and 62 thereto.

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 this contempt application.

INTRODUCTION

5. Once the Court adjudicates upon the rescission application, if so dismissed, the contempt application, then finds relevance and the majority of the contentions raised by both parties would have been resolved, specifically as it relates to wilful default, the defences raised by the respondents and as well as the correspondence. The correspondence between the legal representatives seems to be the basis of the respondent's contention and/or opposition to the contempt of court application in respect of its wilful disobedience of the Court order.

6. Should the respondent's rescission application be so granted, and the respondents are granted leave to respond to the applicants' PAIA application, there would no longer be a judgment in place to which the respondents would be in contempt of court, and this application would then be rendered moot.

7. The relevant timeline reflects that the respondents were served with the court order on 19 November 2021, the respondents appointed its attorneys on record on 29 November 2021. On 2 December 2021, I confirmed to the respondent's attorney telephonically that the applicants would not consent to a rescission of the order, the respondents were aware of the PAIA application since 22nd February 2021, when it was served by sheriff personally, the respondents failed to oppose the application. The order was duly served and in line with the court order, the expiry for the providing of the information was 10 December 2021.

8. The fact remains that the respondents did not provide the requested information by 10 December 2021 and thus are in disobedience of the court order. Further upon the respondents being served with the Court order and being aware that they had 15 days to provide information, it would not have been unreasonable to expect the respondents to file its rescission application on or before 10 December 2021.

AD SERIATIM

9. I now respond to the relevant allegations in the answering affidavit that require an

answer. Where I respond briefly I do so because the substance of such an allegation has been addressed above or in the applicant's answering affidavit to the respondents rescission application.

AD PARA 7-10

10. The content of these paragraphs is noted. The background provided in the answering affidavit by the respondents is noted and the applicant would only like to emphasise that the parties are ad item that the order was served by Sheriff on South African National Roads Agency Ltd ("SANRAL") offices on 19 November 2021 and was sent to the deponent via SANRALs internal mail on the same day the servicing of the order, and has been canvassed in the applicants answer to the respondents rescission application and thus for the purposes of the rescission application, the Court should so be satisfied that the first two requirements for contempt of court have been satisfied from the admitted facts in the respondent's answering affidavit.

11. It is clear that the respondents admit the existence of the order as against the respondents, and that the respondents have knowledge of the order. The only issue to be dealt with is in respect of the third requirement being that the respondents have wilfully, and mala fide failed to comply with the order and provided no compelling reasons for such failure. The respondents rely on email correspondence for such compelling reasons. The applicants submits that such is not sufficient and when subjecting the correspondence to scrutiny it is not in favour

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of the respondents and their conduct.

12. The respondents are in clear disobedience of the court order and such disobedience must not only be wilful, but also mala fide. The hurdle the respondents are to overcome relates to the fact that their rescission rests as a counter application which clearly reflects their wilful and mala fide conduct, but for the present application there would be no rescission application. That aside Organisation Undoing Tax Abuse ("OUTA") is armed with a validly obtained judgment which the respondents were fully aware of and cannot wish away.

AD PARA 11

13. The deponent to the answering affidavit repeatedly makes mention to OUTAs attorney not including the correspondence in support of the application for the contempt of court, and further sets out in paragraph 12 of its answering affidavit the correspondence between the attorneys in the continuation of this negative narrative in attempting to escape focus being the respondents are in disobedience of the Court order. I paused to mention that the respondents must defend themselves by advancing evidence that establishes a reasonable doubt as to whether the non-compliance is justified or proper, is incompatible with the intention to violate the court, integrity, repute or authority. It is not for the applicant to make out the respondent's case for them.
14. The respondent's disobedience must not only be wilful, but also mala fide, the respondents must then defend themselves by adducing whatever evidence that

establishes a reasonable doubt as to whether non-compliance is justified or proper. The applicants contend that the respondents failed to adduce evidence that establishes a reasonable doubt as to whether non-compliance is wilful and mala fide, contempt has been established beyond a reasonable doubt. It is not for the applicants to assist the respondents in adducing evidence that establishes a reasonable doubt in respect of their non-compliance, it being wilful and mala fide, so any allegation in regard to the evidence, the respondents wish the applicants attorneys to offer the court in support of the case to be made out by the respondents is wholly incorrect.

AD PARA 12

15. The respondents are correct in that it appears to them and only them, the best way forward in the circumstances is for OUTA to abandon the order correctly obtained by OUTA. In the correspondence dated 8 December 2021, the respondent's attorney highlights that the alternative being to OUTA not abandoning the judgment is for their client to launch an application for rescission to the judgement and thus from 8 December the rescission application has been pending. It must also be noted that in paragraph 2.2 of that correspondence, the respondent's attorney advises that there are still in the process of investigating the reasons that the applicants failed to react to OUTA, despite the respondents having prior knowledge to the application and the notice of set down, this is precisely why OUTA insisted on the filing of such an affidavit in order to assess the merit to the respondent's investigation for their failure to act.

16. Again, in paragraph 4.1 of the same email, the respondent's attorney concludes that their client will launch a rescission application to the order and have thus always advised OUTAs attorney that it would be bringing a rescission application. Such a promise does not vindicate the fact that OUTA has a valid judgment against the respondents at paragraph 16, over and above the allegations raised and dealt with in the applicant's answering affidavit in the paragraph titled correspondence being paragraph 22 to 25.
17. The applicants' only wish to add and wholly dispute any contention that the applicants accepted that the concessionary ought to be respondents in the application. The correspondence from Fasken attorney is clear that in previous proceedings, OUTA delivered a courtesy copy of the application to Fasken's client, the emphasis is on courtesy, it is disingenuous for Fasken to now come before this Court, to which it is not a party to, and based its allegations towards OUTA on the premise of a previous matter and the courteous manner or approach by OUTA in that matter.

AD PARA 15

18. The contents of this paragraph are noted, and I only wish to highlight that the respondent's intention to bring a rescission application does not invalidate a court order or negates the respondents from conducting themselves in a mala fide manner in respect of being in contempt of the order.

AD PARA 16

19. In correspondence dated 13 December 2021, I confirm that we cannot indefinitely wait for a rescission application which may or may not be served and filed, the respondents were given until 5 January 2022 to file such necessary rescission application and it was clearly stated in the correspondence that should the respondent's fail to serve the rescission application the applicants would proceed with further legal action.

20. The day before the deadline being 4 January 2022, the respondent's attorney advised that the rescission application would follow by 21 January 2022. I responded to such correspondence, stating that no reason was given for the further delay, and it can only be assumed that it is a delaying tactic. In considering the perceived calibre of the firm that is representing the respondents and the respondents continued dragging of its feet in relation to this matter the deadline for the respondents to file its rescission application was extended to 14 January 2022 for the respondents to at some point approach this matter with some sense of urgency.

AD PARA 18

21. The contents of this paragraph are denied as set out in the applicant's answering affidavit as it relates to the defences raised by SANRAL and TRAC in respect of confidential documents. It is denied that OUTA is not entitled to such documentation and is attempting to obtain such information via the proverbial back door. The court set aside the refusal by the respondents of the applicant's request

for access to records requested in its request for information in terms of PAIA and dated 24 August 2020. The first respondent was directed to provide the requested records to the applicant within 15 days of that order being served on it. The first respondent is to pay the costs of the application. The applicants approached the Court to the full knowledge of the respondents and obtained an order and thus any allegation that it is via the proverbial back door is wholly incorrect. OUTA finds it in its entitlement to the documents in such an order. Unless the respondents consider the Court granting an order as the back door, further disrespecting the authority of the Court.

AD PARA 19

22. The content of this paragraph is brought to the attention of the Court as the respondents admit that the forever promised rescission application was not issued by 21 January 2022 being the second indulgence provided to the respondent's and alleged that it was in the course of being finalised on 24 January 2022 when the application for contempt was served and uploaded to caselines. The conduct of the respondents forced the hand of the applicant.

AD PARA 20

23. The content of this paragraph is denied, the respondents being surprised by the application since OUTA was made aware of the fact that SANRAL had every intention to bring the rescission application and it would be brought forth when the respondents failed to adhere to either deadline and in the correspondence dated

13 December 2021, the correspondence concludes that should you fail to serve the rescission application OUTA will proceed with further legal action. The respondents were not surprised by such an application.

AD PARA 21

24. The contents of this paragraph are denied from the expiry of the 15 days being 10 December 2021, from 11 December 2021 the respondents were in wilful disobedience of the order by not providing the applicant with the requested information as ordered. Further, despite both indulgences provided there was no rescission application forthcoming, and thus the applicant was fully entitled to serve its contempt of court papers as the respondents were in clear contempt.

AD PARA 22

25. The contents of this paragraph are denied in amplification of such denial OUTA but for the interest of civil society and bringing to light any irregularity at the hands of SANRAL and TRAC, those are the only motives OUTA has and thus any vindicating or negative nuances, the respondents wish to create is denied. Further, this application is not an abuse of process and the respondents in this paragraph state that the application should be dismissed with costs, yet in the conclusion of its answering affidavit in paragraph 34 of the respondent's answering affidavit, they state that the applicants do not seek a punitive costs order.

AD PARA 24.1

26. The vague manner that this paragraph is presented is denied and it is denied with concern, the respondents deny that a qualified attorney cannot set out the requirements for a finding in a contempt application, if not a qualified attorney, then who is better qualified in the eyes of the respondent?

AD PARA 24.2

27. The contents of this paragraph are denied. I absolutely could form the view that the rescission application would not be forthcoming as it was not forthcoming twice before and was not forthcoming even after the respondent's own deadline, and thus it was safe to conclude that the respondents were continuing with their disregard of the default order since the rescission application was not served on 21 January 2022. As was with the previous deadline being 5 January 2022, the day before, the respondents attorney reached out to me in providing an update that the rescission application would not be provided for by 5 January 2022, but only by 21 January 2022, no such correspondence was forthcoming by close of business on 21 January 2022. I further attempted to phone the respondent's attorneys of record twice, once on 20 January 2022 and again on 21 January 2022 in an attempt to establish the status of the rescission application – no response was received to my calls. The respondents cannot have the expectation that the applicant would keep chasing the respondents to file its rescission application.

AD PARA 26.2

28. The contents of this paragraph are denied and I further state that the respondents

have failed to include the rider in paragraph 8(1)(b) being that depending on whether that record relates to the exercise of a power or performance of a function as a public body or as a private body, so as admitted by the applicants that the first applicant is a public body remains.

AD PARA 27

29. The contents of this paragraph are noted. The applicant is concerned with the position of CEO itself and not the personal holder thereto. SANRAL has advised that the CEO has resigned and is no longer employed as a CEO of SANRAL but has failed to state who the new CEO is. Be that as it may, it is the position as CEO, which finds relevance in these proceedings.

AD PARA 28

30. The content of this paragraph is noted and the explanation the respondents seek has been set out in full in the applicants answering affidavit and I repeat the explanation hereunder.

AD PARA 30.3

31. The content of this paragraph is denied and in amplification it is the rules which dictate the timeframe the respondents were to file their rescission application. The rule the applicant relies on dictate that it be filed within a reasonable time. The fact that the applicants could serve and file a contempt of court application before the respondents could file a rescission application, after the expiry of the time set out



in the order, is indicative that the respondents failed to file and serve their rescission application within a reasonable time.

AD PARA 30.4

32. The contents of this paragraph are denied, the correspondence which the respondents rely on and further place such heavy reliance on is not in their favour because it presents the true and supported facts which the respondents seek the allegation is warranted that SANRAL used the threat of a rescission application as a delay tactic because on both of the extensions provided to it, it failed to provide such a rescission application.

AD PARA 31

33. The contents of this paragraph are denied and in amplification thereof the court is referred to the paragraph in the applicant's answering affidavit, entitled wilful default being paragraphs 14-21. The reasons the respondents have to now go through "at pains" of applying for a rescission of order is set out clearly.

AD PARA 32

34. The contents of these paragraphs are denied and further in respect of paragraph 32.3, the respondents allege that it will deal with this issue in further detail in the second part its affidavit and has failed to address same in further detail in its second part of the affidavit.



AD PARA 33

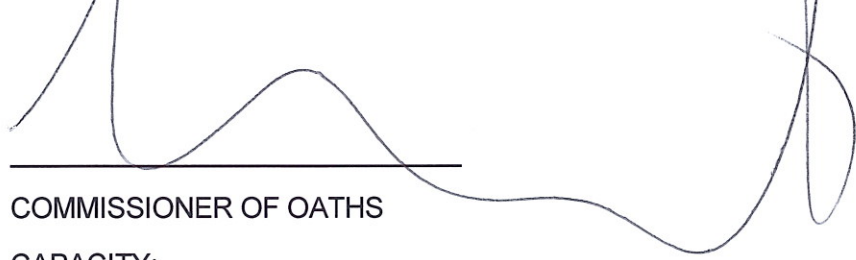
35. The contents of this paragraph are denied, the facts of the matter warrant the dismissal of the respondent's counter rescission application and further warrant a finding that SANRAL and its erstwhile CEO are in contempt of court.

Wherefore the applicant seek an order in terms of the relief sought in its notice of motion to the contempt of court application.



DEPONENT

SIGNED AND SWORN TO BEFORE ME AT Pretoria ON THIS THE 16th DAY OF MARCH 2022, THE DEPONENT HAVING ACKNOWLEDGED THAT THE DEPONENT KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND CONSIDERS THE OATH BINDING ON THE DEPONENT'S CONSCIENCE AND UTTERED THE WORDS "SO HELP ME GOD".



COMMISSIONER OF OATHS

CAPACITY:

FULL NAMES:

BERNARD BEZUIDENHOUT
KOMMISSARIS VAN EDE
COMMISSIONER OF OATHS
PRAKTISERENDE PROKUREUR R.S.A
PRACTISING ATTORNEY R.S.A
149 ANDERSON STREET
BROOKLYN, PRETORIA, 0181