

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

CASE NO.: 32095/2020

**ORGANISATION UNDOING TAX ABUSE NPC**

Applicant

and

**SOUTH AFRICAN NATIONAL  
ROAD AGENCY (SOC) LTD**

First Respondent

**THE MINISTER OF TRANSPORT**

Second Respondent

**NAZIR ALLI**

Third Respondent

**DANIEL MOTAUNG**

Fourth Respondent

**SKHUMBUZO MACOZOMA**

Fifth Respondent

**N3 TOLL CONCESSION (RF) (PTY) LTD**

Sixth Respondent

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**SIXTH RESPONDENT'S ANSWERING AFFIDAVIT**

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I, the undersigned,

**CORNELIS JANSE TOLMIE**

do hereby state under oath as follows –

- 1 I am an adult male and the Chief Executive Officer of N3 Toll Concession (RF) Proprietary Limited, the sixth respondent in this application ("N3TC"). I am employed as such at the offices of N3TC, being 1st Floor Block D, Southdowns Office Park, 22 Karee Street, Irene.

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- 2 The contents of this affidavit fall within my personal knowledge, except where otherwise stated or indicated, and are, to the best of my belief, both true and correct.
- 3 In this affidavit I respond to the founding and supplementary affidavits of the applicant as deposed to by Stefanie Fick.
- 4 I deny the averments in both the founding and supplementary affidavits to the extent that they conflict with what is stated in this answering affidavit.
- 5 My failure to respond to any aspect of the founding and/or the supplementary affidavits should not be construed as an admission as to the correctness thereof, but should be read in light of N3TC's stance in opposing the application and what is relevant to the issues to be determined in this application.
- 6 Where I make submissions of a legal nature, I do so based on the advice of N3TC's legal representatives, which advice I accept as being correct.
- 7 I have structured this affidavit as follows –
- 7.1 first, I set out a brief background of the material facts of this matter;
- 7.2 secondly, I will outline the bases of the applicant's application, as I understand them;

7.3       thirdly, I set out N3TC's grounds of opposition and show how the applicant is not entitled to the relief that it seeks and that the application falls to be dismissed with costs; and

7.4       lastly, I respond to specific allegations, made by the applicant in the founding and supplementary affidavits, *ad seriatim*.

8       For ease of reference, I refer to the applicant as "OUTA" and the first respondent as "SANRAL".

## **BACKGROUND**

9       On 2 November 1999, N3TC entered into a contract (Contract No: SAPR N0304102/1) with SANRAL, for the design, construction, financing, operation and maintenance of a portion of National Route 3 from Cedara in KwaZulu-Natal to Heidelberg South interchange in Gauteng as a Toll Highway, together with the developments and associated facilities ("*concession agreement*").

10       As part of executing its duties and rendering services under the concession agreement, N3TC engaged and entered into agreements with various parties for the performance of, amongst others, operations, maintenance and construction works under the concession agreement ("*contractors*" or "*counterparties*").

11 On 30 July 2019, OUTA submitted to SANRAL, as a public body, a request for access to a set of records pertaining to the content of the concession agreement in terms of section 18(1) of Promotion of Access to Information Act 2 of 2000 ("PAIA").<sup>1</sup>

12 OUTA sought access to copies of the following records, as related to the upgrade of the N3 route from Durban to Pietermaritzburg<sup>2</sup> ("*requested records*"):

12.1 in terms of Part A of the request for information –

12.1.1 the concession agreement;

12.1.2 all annexures, amendments, and addenda to the concession agreement,

("concession agreement records");

12.1.3 all operation and maintenance contracts entered into between N3TC and the O&M contractors, relating to the concession agreement;

12.1.4 the operational and maintenance manual pertaining to the concession agreement;

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<sup>1</sup> Paragraph 19 of the founding affidavit (FA) page 002-5 of the Bundle

<sup>2</sup> Annexure SF2 to the FA pages 004-6 to 004-7 of the Bundle

- 12.1.5 the contracts entered into with the independent engineer/s related to the concession agreement;
- 12.1.6 all the independent engineer/s reports submitted to SANRAL related to the concession agreement;
- 12.1.7 all construction work contracts entered into by N3TC relating to the concession agreement;
- 12.1.8 all Performance Certificates issued, relating to the construction works contracts entered into by N3TC;
- 12.1.9 all Taking Over Certificates that have been issued in terms of the concession agreement.
- 12.2 in terms of Part B of the request for information -
  - 12.2.1 N3TC's complete financial statements for each fiscal year, submitted to SANRAL in terms of the concession agreement;
  - 12.2.2 all reconciliations of N3TC's profit and loss accounts, together with proposed budgets for each fiscal year, submitted to SANRAL, from the 1999/2000 fiscal year to present, in terms of the concession agreement;

- 12.2.3 all annual reports submitted to SANRAL pertaining to the concession agreement, issued by N3TC's appointed auditors, certifying that the computation of the Highway Usage Fee for the previous year was correctly calculated; and
- 12.2.4 the lists, submitted to SANRAL in terms of the concession agreement, of N3TC's lenders and creditors to which N3TC owes a sum in excess of the equivalent of R10 000 000, including the amounts due to each of any such lender and/or creditors.
- 12.3 SANRAL was required to respond to OUTA's request for the records by not later than 30 days from 30 July 2019.<sup>3</sup>
- 12.4 SANRAL did not respond to OUTA within the prescribed 30 days.<sup>4</sup>
- 13 Following further requests and extensions of time by OUTA to SANRAL, specifically on 13 September 2019, 25 September 2019, no response was received from SANRAL by OUTA.<sup>5</sup>
- 14 On 22 October 2019, having been requested by SANRAL to provide its views on OUTA's request for records, N3TC outlined its representations, as contemplated in section 48 of PAIA in respect of the request. A copy of

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<sup>3</sup> Paragraph 36 of the FA page 002-10 of the Bundle

<sup>4</sup> Paragraph 37 of the FA page 002-10 of the Bundle

<sup>5</sup> Paragraphs 37 and 39 of the FA page 002-10 and 002-11 of the Bundle

N3TC's letter addressed to SANRAL dated 22 October 2019 is hereto annexed as "CJT1".

15 According to OUTA, SANRAL's failure to respond to OUTA's requests for the requested records amounted to a "*deemed refusal*" by SANRAL, in terms of section 27 of PAIA.<sup>6</sup>

16 On 4 November 2019, OUTA lodged an internal appeal against SANRAL's refusal to provide access to the requested records, in terms of section 75 of PAIA. SANRAL failed to respond to OUTA's internal appeal.<sup>7</sup>

17 OUTA has now brought this application in terms of sections 78(2) and 82(2) of PAIA.<sup>8</sup>

18 OUTA seeks an order in the following terms –

18.1 declaring that SANRAL's deemed refusal of access to the requested records is unlawful and in conflict with the provisions of PAIA;<sup>9</sup>

18.2 setting aside the deemed refusal by SANRAL to OUTA's request;<sup>10</sup> and

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<sup>6</sup> Paragraph 41 of the FA page 002-11 of the Bundle

<sup>7</sup> Paragraph 45 of the FA page 002-12 of the Bundle

<sup>8</sup> Paragraph 13 of the FA page 002-3 of the Bundle

<sup>9</sup> Paragraph 2 of the Notice of Motion (NOM) page 001-2 of the Bundle

<sup>10</sup> Paragraph 3 of the NOM) page 001-2 of the Bundle

- 18.3 directing SANRAL to supply OUTA with a copy of the requested records within fifteen (15) days of granting of the order.<sup>11</sup>
- 19 N3TC was not joined as a party to this application, notwithstanding N3TC being a third party, for purposes of PAIA, to the request for records. Given N3TC's direct and substantial interest in the subject matter of this application and the outcome thereof, N3TC brought an application to intervene as a party in this application.
- 20 On 17 February 2021, the above Honourable Court granted N3TC leave to intervene as the sixth respondent in this application.
- 21 The contractors, with whom N3TC concluded contracts, were not joined as respondents to this application. It is not apparent to me whether or not the contractors were notified by SANRAL, as it was obliged to do, upon receipt of OUTA's request for the records.

## **OUTA'S GROUNDS FOR THE APPLICATION**

- 22 I have been advised that a litigant in OUTA's position must make its case out in its founding affidavit and thereafter must stand or fall by that founding affidavit. It cannot make out a new case in reply or, save with the leave of

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<sup>11</sup> Paragraph 4 of the NOM) page 001-2 of the Bundle

the court on good grounds shown, supplement its founding affidavit. I therefore deal strictly with OUTA's case as contained in its founding affidavit.

23 OUTA has brought this application in terms of sections 78(2) and 82 of PAIA.

24 Section 78(2) of PAIA provides, *inter alia*, that a requester aggrieved by a decision of the information officer of a public body to refuse a request for access to records held by that public body, may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.

25 In terms of section 82 of PAIA, the court hearing an application may grant any order that is just and equitable, including, orders (a) confirming, amending or setting aside the decision which is the subject of the application concerned, or (b) requiring from the information officer or relevant authority of a public body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order.

26 In support of its case, OUTA alleges, amongst others, that:

26.1 OUTA conducted an investigation into a series of irregularities following the conclusion of the concession agreement;<sup>12</sup>

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<sup>12</sup> Paragraph 33 of the FA page 002-9 of the Bundle

- 26.2 OUTA established that the concession agreement will lapse during May 2029 and that SANRAL has continued to implement the concession agreement in the absence of justifiable extension to that effect, potentially in contravention of the Public Finance Management Act, 1999 (“PFMA”);<sup>13</sup>
- 26.3 the legality of the concession agreement can only be established upon consulting all its relevant annexures and addendums;<sup>14</sup> and
- 26.4 in order to verify the above findings, OUTA submitted the request for the records.<sup>15</sup>
- 27 OUTA further states that *“this application is brought on the basis that it is unlikely that the release of transcripts would”*.<sup>16</sup>
- 27.1 *“Constitute an unreasonable disclosure of highly personal information in terms of section 34(1) of PAIA, insofar as these records ought to be publicly available”*;<sup>17</sup>
- 27.2 *“Facilitate a contravention of the law to the extent that reputations and dignity of the individual names may be impaired thereby as contemplated*

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<sup>13</sup> Paragraph 33 of the FA page 002-9 of the Bundle

<sup>14</sup> Paragraph 35 of the FA page 002-10 of the Bundle

<sup>15</sup> Paragraph 36 of the FA page 002-10 of the Bundle

<sup>16</sup> Paragraph 55 of the FA page 002-14 of the Bundle

<sup>17</sup> Paragraph 55.1 of the FA page 002-15 of the Bundle

*by section 39(i)(b)(dd) of PAIA given that the information requested by OUT A ought to be publicly available”;<sup>18</sup>*

27.3 *“Be a breach of the first respondent’s confidentiality understanding given that the information requested by OUTA ought to be publicly available”.<sup>19</sup>*

28 Finally, OUTA relies on section 46 of PAIA which effectively provides that the information officer of a public body, as SANRAL is, must grant a request for access to records, if (a) the disclosure of the record would reveal evidence of substantial contravention or failure to comply with the law, (b) the public interest in the disclosure of the record clearly outweighs the harm to the public body.<sup>20</sup>

### **N3TC’S GROUNDS OF OPPOSITION**

29 At the outset, I record that to the best of my knowledge and belief SANRAL is not in possession of all of the documents that OUTA has requested. I have been advised that, to the extent that OUTA is entitled to receive any records at all OUTA may only receive only those records that are already in the possession of SANRAL. OUTA cannot seek disclosure of records, under a request made to SANRAL, that SANRAL does not have and thereby force SANRAL to go out and seek those records.

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<sup>18</sup> Paragraph 55.2 of the FA page 002-15 of the Bundle

<sup>19</sup> Paragraph 55.3 of the FA page 002-15 of the Bundle

<sup>20</sup> Paragraph 58 of the FA page 002-16 of the Bundle

- 30 Furthermore, this application before the Court does not concern a request made by OUTA to N3TC. In the circumstances, OUTA cannot obtain any documents from N3TC directly under the auspices of this application.
- 31 As far as I am aware, SANRAL does not have in its possession the documents referred to in sub-paragraphs 12.1.3 and 12.1.7 to 12.1.9 above, as N3TC does not provide copies of these documents in this form to SANRAL. In support of my statement that the documents have not been provided by N3TC to SANRAL, I note that there is no record in N3TC's possession reflecting that N3TC gave these documents to SANRAL. Moreover, there is no reason, be it under the concession agreement or at all, why N3TC would be required to give these documents to SANRAL.
- 32 As far as concerns the documents reflected in 12.1.4, N3TC has no knowledge of whether or not SANRAL still has these documents in its possession, in circumstances where they were originally provided to SANRAL more than 23 years ago. If SANRAL no longer has the documents in its possession, then SANRAL cannot be compelled to give the documents to OUTA. N3TC, therefore, opposes the grant of an order in respect of these documents on this ground alone.
- 33 N3TC's further opposition to OUTA's application (as set out below) is in addition to rather than in substitution of the opposition based on the fact that SANRAL is not in possession of the documents.

34 N3TC does not oppose the disclosure to OUTA, of the following requested records:

34.1 the concession agreement records;

34.2 the contracts entered into with the independent engineer/s related to the concession agreement; and

34.3 all the independent engineer/s reports submitted to SANRAL related to the concession agreement, to the extent that such reports do not contain financial, commercial, scientific or technical information, the disclosure of which would likely to cause harm to the financial, commercial or technical interests of N3TC, as a third party.

35 OUTA's application thus falls to be determined on the basis that it has access to, amongst others, the concession agreement records and these will enable OUTA to determine the validity of the concession agreement as well as the validity of any amendments to the concession agreement or renewals or extensions of the concession agreement. OUTA does not require any of the other records for those purposes.

36 N3TC opposes the disclosure to OUTA, of the following requested records:

36.1 all operation and maintenance contracts entered into between N3TC and the O&M contractors, relating to the concession agreement;

- 36.2 the operational and maintenance manual pertaining to the concession agreement;
- 36.3 all construction work contracts entered into by N3TC relating to the concession agreement;
- 36.4 all Performance Certificates issued, relating to the construction works contracts entered into by N3TC;
- 36.5 all Taking Over Certificates that have been issued in terms of the concession agreement,
- (*“commercial records”*);
- 36.6 N3TC's complete financial statements for each fiscal year, submitted to SANRAL in terms of the concession agreement;
- 36.7 all reconciliations of N3TC's profit and loss accounts, together with proposed budgets for each fiscal year, submitted to SANRAL, from the 1999/2000 fiscal year to present, in terms of the concession agreement;
- 36.8 all annual reports submitted to SANRAL pertaining to the concession agreement, issued by N3TC's appointed auditors, certifying that the computation of the Highway Usage Fee for the previous year was correctly calculated; and

36.9 the lists, submitted to SANRAL in terms of the concession agreement, of N3TC's lenders and creditors to which N3TC owes a sum in excess of the equivalent of R10 000 000, including the amounts due to each of any such lender and/or creditors,

(*"financial records"*).

37 The disclosure of the commercial records and financial records, is opposed on the grounds that:

37.1 these records are not required by OUTA for any of the stated purposes for which they seek access to the records of N3TC held by SANRAL, something which will be dealt with to the extent necessary in argument;

37.2 the disclosure of the records will:

37.2.1 amount to pre-litigation discovery;

37.2.2 likely cause harm to the commercial and/or financial interests of N3TC and/or could reasonably be expected to put N3TC at a disadvantage in contractual or other negotiations and/or prejudice N3TC in commercial competition; and

37.2.3 constitute an action for breach of a duty of confidence owed to third parties under agreements concluded by N3TC with such third parties.

37.3 OUTA's allegation that the public interest outweighs the harm that N3TC will suffer, is a bare allegation lacking in reasons and substantiation, particularly in relation to these remaining records.

38 I now turn to deal with each of N3TC's grounds of opposition.

**The disclosure of the records will amount to pre-litigation discovery**

39 I am advised that if OUTA is permitted access to N3TC's commercial records and financial records, this would have the effect of pre-litigation discovery which is not permissible under PAIA.

40 The following statements in OUTA's founding affidavit are pertinent to the above:

40.1 *"OUTA conducted an investigation into a series of irregularities following a concessionaire agreement entered into between SANRAL and N3TC. Such agreement provides for the design, construction, finance, operation and maintenance of a portion of the N3 highway between Cedara in Kwa-Zulu Natal and the Heidelberg South Interchange in Gauteng."*<sup>21</sup>

40.2 *"Without elaborating on the merits of the above-mentioned agreement, OUTA established that the agreement will lapse during the course of May 2029. Notwithstanding, SANRAL has continued to implement the concession agreement, in the absence of justifiable extension to that*

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<sup>21</sup> Paragraph 33 of the FA page 002-9 of the Bundle

*effect, potentially in contravention of the Public Finance Management Act, 1999 ("PFMA").*<sup>22</sup>

40.3 *"I submit, however, that the legality of the agreement entered into between SANRAL and N3TC can only be established upon consulting all relevant annexures and addendums to such agreement."*<sup>23</sup>

40.4 *"OUTA wishes to evaluate the legality of an agreement that is of public interest, however, OUTA will only be in a position to do so upon the production of the records referred to in its request. Should OUTA determine that SANRAL had acted unlawfully in the implementation of its agreement with N3TC, OUTA ultimately wishes to institute the relevant proceedings in a court of law."*<sup>24</sup>

40.5 *"This matter falls rightfully under the provisions of section 46, as the production of the records in question would reveal whether or not SANRAL complied with the provisions of the PFMA and essentially, sections 181 and 182 of the Constitution."*<sup>25</sup>

40.6 *"As SANRAL is a public company, it is subject to, inter alia, the provisions set out in Chapter 5 of the PFMA, non-compliance of which potentially*

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<sup>22</sup> Paragraph 34 of the FA page 002-9 of the Bundle

<sup>23</sup> Paragraph 35 of the FA page 002-10 of the Bundle

<sup>24</sup> Paragraph 59 of the FA page 002-16 of the Bundle

<sup>25</sup> Paragraph 60 of the FA page 002-16 of the Bundle

*amount to financial misconduct as contemplated in section 81 of the PFMA.*<sup>26</sup>

41 From the above and as explicitly stated by OUTA, it is evident that there will be proceedings (civil and/or criminal) that will be instituted by OUTA against N3TC, more especially because of OUTA's allegations that:

41.1 there is a series of irregularities;

41.2 there are potential contraventions of the PFMA;

41.3 the legality of the concession agreement is in question;

41.4 there is possible non-compliance with the Constitution of the Republic of South Africa, 1996 ("the Constitution"); and

41.5 there is potential financial misconduct under section 81 of the PFMA.

42 At the hearing of the application, argument will be addressed to the Court hearing the matter regarding the relevant legal principles. I have been advised that, as a matter of established law, our Courts do not tolerate fishing expeditions and do not allow pre-litigation discovery. Pre-litigation

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<sup>26</sup> Paragraph 61 of the FA page 002-16 of the Bundle

discovery is the exception and a proper case must be made out before it is allowed.

43 OUTA's request for access to the requested records is no more than a fishing expedition intended to force SANRAL and N3TC, as potential defendants, to disclose their respective cases before any action is launched. OUTA has not, however, disclosed exceptional circumstances justifying the grant of any such relief.

44 In the premises, OUTA's application must be dismissed on this ground alone.

**The disclosure will likely cause harm to the commercial and/or financial interests of N3TC and could reasonably be expected to put N3TC at a disadvantage in contractual or other negotiations and/or prejudice N3TC in commercial competition**

45 Section 36 of PAIA reads, *inter alia*, as follows –

*“(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains-*

*(b) financial, commercial, scientific or technical information other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or*

(c) *information supplied in confidence by a third party the disclosure of which could reasonably be expected to put that third party at a disadvantage in contractual or other negotiations, or to prejudice that third party in commercial competition."*

46 In short, in terms of section 36(1) of PAIA, the information officer of SANRAL is obliged to refuse a request for access to the requested records if the requested records contain financial, commercial, scientific or technical information, the disclosure of which would likely to cause harm to the financial, commercial or technical interests of N3TC, as a third party, or the information supplied in confidence by N3TC, the disclosure of which would be reasonably expected to place N3TC at a commercial disadvantage in contractual or other negotiations.

47 It must be noted that, in addition to N3TC being a third party to the request for records, there are also contractors whose confidentiality and interests must be protected. OUTA's request expressly embraces a request for information of the contractors.

48 The contractors have not been joined as respondents to this application. As far as N3TC is aware, the contractors were not called upon by SANRAL, under the third party procedures provided for in PAIA, to comment on OUTA's request for access to their information and records. For these

reasons alone, the application falls to be dismissed insofar as it concerns the information of the contractors.

49 I now turn to elaborate on why the commercial records and financial records should not be disclosed to OUTA.

50 Commercial records

50.1 As a start, it is pertinent to record that the concession agreement contains and has attached to it, forms of the operations and maintenance contracts and construction works contracts ("*OMC contracts*"). As I have stated above, N3TC consented to the disclosure of the concession agreement on 22 October 2019.

50.2 The concession period under the concession agreement is 30 years and as such the concession agreement will expire in 2029.

50.3 In terms of the concession agreement, N3TC is required to undertake and perform a competitive tender process on an arm's length basis, when procuring services and/or goods for, amongst others, the OCM contracts.

50.4 To date, N3TC has concluded several contracts and will conclude many more contracts prior to the expiry of the concession agreement in 2029.

50.5 The competitive tender process and the contracts still to be concluded by N3TC must be understood in the context of South Africa's small and

competitive construction and toll operation sectors, particularly so when having regard to the recent demise of a number of participants such as Group 5 and Basil Read.

50.6 The information submitted by the contractors as part of their tender bids, includes, the contractor's:

- (i) bid strategies;
- (ii) bills quantities;
- (iii) pricing information;
- (iv) personal information, bank details and other information of the like;
- (v) schedules of current projects and financial commitments;
- (vi) schedules of estimated monthly expenditures,

*("commercially sensitive and proprietary information").*

50.7 This information is not in the public domain, is confidential to N3TC, and has not been disclosed even to SANRAL in its native or complete form.

50.8 In light of the above, should N3TC be required to disclose the commercial records, that will likely cause harm to not only N3TC but inevitably to the contractors.

50.9 The disclosure of the commercial records could also reasonably be expected to put N3TC at a disadvantage in contractual or other negotiations and prejudice N3TC in commercial competition. This will be so because:

50.9.1 the disclosure of the contractor's commercially sensitive and proprietary information will make the information available to the contractor's competitors and will thus prejudice the contractors in their future tender bids;

50.9.2 when tenderers believe that their contracts will be made public, N3TC will be harmed as contractors are likely to be unwilling to submit tenders for N3TC's contracts;

50.9.3 the competitiveness of N3TC's tender process will be harmed as bidders will be aware of the contractors' rates, bills of summary and tender strategies;

50.9.4 the disclosure of the commercial records may further impact N3TC's ability to ensure fair competition and low prices; and

50.9.5 N3TC is not the only entity procuring services from the contractors and as such, a competitive arm's length process is fundamental to the procurement of services and goods.

- 51.1 N3TC finances its operations under the concession agreement by way of project finance. In this case, project finance is the borrowing by N3TC, as a special purpose entity, for the long-term financing of the infrastructure project under the concession agreement ("*N3 project*"), and which borrowing is based on the complete life-cycle cash flows of the N3 project. Lenders and equity investors rely on N3TC's cash flows rather than its balance sheet.
- 51.2 Project finance matters require a sophisticated financial model which is similar to a business plan and as such contains all revenues, operational costs and overheads, upgrades and rehabilitation costs, debt servicing, debt and/or equity raised, capital redeemed and dividends paid out ("*financial model*").
- 51.3 N3TC has a fully developed financial model which it uses for determining financing related to the concession agreement. A substantial amount of resources and research has gone into developing and continually updating the financial model including traffic projections. The financial model is thus N3TC's intellectual property.
- 52 Sharing N3TC's financial statements would be tantamount to sharing the financial model. This is so because, a competitor of N3TC with access to the financial model, through the financial statements, will have in their possession, a financial history of 21 years which will make it easy for the

competitor to re-compute N3TC's business case and to take advantage of the intellectual property that has been developed over two decades.

53 Access to N3TC's financial statements will give to competitors N3TC's business case and the way in which N3TC addresses its finances.

54 The above is information which is ordinarily unavailable to the public, including N3TC's competitors, and if supplied to OUTA, will cause harm to N3TC's financial interests as it will inform its competitors and other industry participants how N3TC finances its operations under the concession agreement, in so far as the design, construction, finance, operation and maintenance are concerned.

55 OUTA has no need for this information in relation to its stated purposes of challenging the concession agreement on the basis of the PFMA. This information can have no relevance whatsoever to that intended purpose.

56 Finally, the likelihood of harm is especially present, should SANRAL invite bidders to tender for services when the concession agreement expires in 2029, in which case the disclosure of the commercial records and the financial records will likely cause harm and prejudice to N3TC and its shareholders. This is because N3TC will have made all its information, proprietary information, and intellectual property (in relation to how it deals with finances) public. Any person having regard to the information will certainly be in a position to ascertain N3TC's strategy and approach to the

types of concessions in the concession agreement. This is especially so in the context of tender bids submitted by the contractors.

- 57 In the premises, SANRAL has correctly refused to grant OUTA access to the commercial records and financial records and as such, OUTA's application must be dismissed on this ground too.

**Disclosure will constitute an action for breach of a duty of confidence owed to third parties**

- 58 Section 37 of PAIA provides that the information officer of a public body must refuse a request for access to a record of the body if the disclosure of the record would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement.
- 59 In terms of section 37 of PAIA, SANRAL is well within its rights to refuse to grant OUTA's request for access to the requested records where such disclosure would constitute a breach of a duty of confidence owed to a third party in terms of an agreement.
- 60 N3TC objects to the disclosure of the requested records on the basis that their disclosure would constitute a breach of a duty of confidence owed to the respective third parties to those documents. This is so because N3TC and the counterparties, at all times, unanimously and continuously accepted that they owed duties of confidentiality not to disclose any commercial,

technical or financially sensitive or confidential information arising from the requested records.

61 In light of the above, N3TC objects to the disclosure of its documents as outlined above and SANRAL is, thus, entitled to and has correctly refused to grant OUTA access to the requested. OUTA's application is, thus, without legal basis and falls to be dismissed.

62 Furthermore, clause 22.2 of the concession agreement requires each party to keep in confidence all information, data or other records provided in terms of the concession agreement. The commercial records and the financial records were thus provided by N3TC to SANRAL on the understanding that confidentiality of such information is protected in terms of clause 22.2 of the concession agreement in order to preserve, maintain and facilitate an open and transparent relationship between SANRAL and N3TC.

**Lack of reasons advanced by OUTA that disclosure of the requested records would be in the public interest**

63 I have been advised that the reasons why records must be disclosed in the public interest must be made out in the founding affidavit. These reasons must extend to the whole of the record requested.

64 Section 46 of PAIA provides that access to the records listed in, *inter alia*, sections 36(1), 37(1)(a) or (b), 38(a) or (b) of PAIA must be granted if the disclosure of any such record would reveal evidence of, *inter alia*, a

substantial contravention of, or failure to comply with, the law and the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

- 65 OUTA makes a bold allegation that the records OUTA has requested from SANRAL fall within the ambit of section 46 of PAIA in so far as the requested records would reveal whether or not SANRAL complied with the provisions of the PFMA. It does so, however, without providing any detail or credible facts to substantiate this allegation.
- 66 It is not clear on what basis OUTA can contend this, because the PFMA can have no bearing on the conclusion of the concession agreement in 1999 or the decision taken by SANRAL even earlier than 1999 to award the concession agreement to N3TC. Legal argument in this regard will be addressed to the Court at the hearing of the application, but if this is so, then OUTA has not been forthright with the Court in its application. This lack of probity, in and of itself, justifies the dismissal of the application.
- 67 Furthermore, OUTA points out that any contravention of Chapter 5 of the PFMA may potentially amount to financial misconduct as contemplated in section 81 of the PFMA of but fails to advance facts or allege any reasons as to how SANRAL—or, for that matter, N3TC by association—is in contravention of its obligations as alleged, or is reasonably suspected of being in contravention of the PFMA. It doesn't even identify which provisions of the PFMA it contends might have been breached.

- 68 Such contraventions, as there might be (and I don't admit that there are any at all), can only relate to the conclusion of the concession agreement. The conclusion of that agreement followed an open tender process, in which N3TC participated. The documents relating to the conclusion of the concession agreement are the concession agreement records, referred to above, which are to be disclosed to OUTA.
- 69 Additionally, OUTA fails consider SANRAL's reporting obligations in terms of sections 40 and 41 of the PFMA and the checks and balances provided for in the provisions of the PFMA to ensure that SANRAL complies with its obligations in terms of the PFMA, and the consequences of such non-compliance. Further submissions will be made in court in this regard.
- 70 OUTA provides no basis, under section 46 of PAIA, for why the disclosure of the balance of the records would be in the public interest. It cannot do so, because these other records, which bear on N3TC and its operations, including its interactions with the counterparties, have no bearing on SANRAL's compliance with the PFMA.
- 71 Hence, OUTA advances no bases for why it would be in the public interest to grant OUTA access to the requested records that are otherwise afforded protection in terms of the provisions of PAIA and how such public interest

outweighs the harm to be suffered by N3TC and the counterparties, should this information be made public.

72 The provisions of section 46 of PAIA do not find application in relation to the requested records. There is no reason to unreasonably expose the financial, commercial and/or confidential information of N3TC and/or the counterparties to OUTA or the general public, which will compromise the financial and/or commercial interests of N3TC and/or the counterparties, in the absence justifiable reasons for doing so.

73 I now turn to deal with the averments made in the founding and supplementary affidavits *ad seriatim*. Where I do not specifically deal with a specific allegation and where appears from the context, such allegation must be considered as denied.

### **AD SERIATIM RESPONSES**

74 In responding on a paragraph-by-paragraph basis to the allegations in the founding and supplementary affidavits, I will not repeat what I have already stated but ask that it be read as if specifically incorporated below. Where I do not deal with a particular allegation, it should be taken to be denied to the extent that it is inconsistent with what I have stated above.

#### **Founding Affidavit**

#### **Ad paragraphs 1 to 14**

75 The contents of these paragraphs are noted.

**Ad paragraphs 15 to 17**

76 The contents of this paragraph are admitted.

**Ad paragraph 25**

77 It is specifically denied that OUTA is entitled to the relief which it seeks in terms of the notice of motion.

**Ad paragraphs 26 to 29**

78 The contents of these paragraphs are admitted in so far as they correctly reflect the provisions of the Constitution and the provisions of PAIA.

**Ad paragraphs 33 and 34**

79 It is denied that there were any irregularities in the conclusion of the concession agreement. No evidence has been put up in support of or explaining this averment.

80 It is specifically denied that SANRAL has contravened the provisions of the PFMA in relation to the concession agreement between SANRAL and N3TC. It is specifically denied, on the part of N3TC that there was any contravention of the PFMA at the time of the conclusion of the concession

agreement or at any time thereafter during the operation of the concession agreement.

81 Furthermore, it is unclear why OUTA seeks to raise an issue with the continued operation of the concession agreement while it acknowledges that the initial term of the N3TC concession agreement will lapse in May 2029.

**Ad paragraphs 35 and 36**

82 The contents of these paragraphs are denied for reasons advanced above.

**Ad paragraphs 56 to 70**

83 The contents of these paragraphs have specifically been dealt with above.

**Ad paragraphs 71 to 73**

84 N3TC has clearly outlined the basis upon which it objects to the disclosure of its records, which are afforded protection in terms of the provisions of PAIA. SANRAL is, thus, well within its rights to refuse OUTA's request for access to the requested records.

85 I deny that OUTA has set out a basis for the above Honourable Court to grant an order as prayed for in the notice of motion.


## Supplementary Affidavit

86 Save to deny that OUTA is entitled to the relief it seeks in terms of the notice of motion, N3TC has no knowledge of the contents contained in the supplementary founding affidavit.

**WHEREFORE** N3TC prays for an order dismissing the application with costs, including the costs of two counsel.

  
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**CORNELIS JANSE TOLMIE**

I certify that this affidavit was signed and sworn to before me at Centurion on this the 28 day of March 2022, by the deponent after he declared that he knew and understood the contents of this declaration, that he had no objection to taking the prescribed oath and has taken the prescribed oath which he considered binding on his conscience, having complied with regulations contained in Government Notice R1258 of 21 July 1972, as amended.

  
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**COMMISSIONER OF OATHS**  
Name: Rizta Fouché  
Address: 450 Mimosa Avenue, Lynnwood  
Pretoria  
Capacity: Financial Manager

|   |                   |
|---|-------------------|
| <b>COMMISSIONER OF OATHS</b>  |                   |
|  |                   |
| <b>Rizta Fouché</b>   |                   |
| Chartered Accountant (CA) SA – 08109562   |                   |
| 1st Floor, Block D<br>Southdowns Office Park<br>22 Karee Street<br>0157, Irene        |                   |
| Date:   | <u>28/03/2022</u> |

22 October 2019

The Chief Executive Officer  
The South African National Roads Agency (Soc) Limited  
48 Tambotie Avenue  
Val de Grace  
Pretoria



**ATTENTION: Mr Skhumbuzo Macozoma**

**REQUEST FOR ACCESS TO INFORMATION: ORGANISATION UNDOING TAX ABUSE NPC**

- 1 We refer to the above matter.
- 2 We have been provided with a copy of a request in terms of section 18(1) of the Promotion of Access to Information Act No. 2 of 2000 ("PAIA") by the Organisation Undoing Tax Abuse NPC ("OUTA"), dated 30 July 2019 ("the request").
- 3 We note that the request relates to the Concession of Contract No. SAPR N0304102/1 granted to us as well as various accounting and financial documents pertaining to us as set out in Part B of the request.
- 4 We confirm that we have been requested to provide our views on the request pursuant to section 47 of the PAIA.
- 5 This letter constitutes representations contemplated in section 48 of the PAIA in respect of the request.
- 6 The reasons for and rationale underlying the request are unknown. However, the request, ultimately, pertains to the records of a private body in so far as we are not a public body pursuant to the provisions of the PAIA. Therefore, information pertaining to our financial standing and status is confidential to us as well as yourselves in so far as we have provided that information to you. Therefore, we object to the furnishing of the following information –
  - 6.1 the contracts referred to in clauses 4 to 8 of Part A of the request on the basis that the disclosure of such contracts would constitute an action for breach of a duty of confidence owed to a third party in terms of those agreements, as contemplated in section 37(1)(a) of the PAIA read together with the provisions of section 37(1)(b)(i) of the PAIA;
  - 6.2 the documents referred to in clauses 9 and 10 of Part A on the basis of section 38(b) of the PAIA, in so far as the disclosure of those documents may have the effects of prejudicing or impairing the security of a national road as a means of transport or as a structure or system as contemplated in the PAIA;
  - 6.3 the documents referred to in Part B of the request on the basis of section 36(1)(b) of the PAIA, in so far as the documents consist of financial and commercial information and the disclosure of which would be likely to cause harm to our commercial or financial interests.

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- 7 In so far as the documents referred to in clauses 1, 2 and 3 of Part A of the request are concerned, whilst those documents are subject to various confidentiality undertakings as between the parties and in respect of which the parties' rights remain reserved, the documents concerned have previously been made available in terms of PAIA to a requester and we do not see, subject to your agreement as a party thereto, any basis on which to refuse such a request now in the context of the request.
- 8 In light of what is set out above, we are of the view, that as a third party to the request, that the request for information, other than for the documents referred to in clauses 1, 2 and 3 of Part A of the request, should be refused.
- 9 We trust the above is in order and await your decision in respect of the request.
- 10 Our rights remain reserved.

Yours faithfully

N3 Toll Concession (RF) Proprietary Limited

  
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P. C.J. TOLMIE: CEO  
N3 TOLL CONCESSION (RF) PROPRIETARY LIMITED

cc. Mr C Roux SANRAL Eastern Region  
Mr L van Eeden Aurecon - Independent Engineer