

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

CASE NO: 32095/2020

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC

APPLICANT

And

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD

FIRST RESPONDENT

THE MINISTER OF TRANSPORT

SECOND RESPONDENT

NAZIR ALLI

THIRD RESPONDENT

DANIEL MOTAUNG

FOURTH RESPONDENT

SKHUMBUZO MACOZOMA N.O

FIFTH RESPONDENT

N3 TOLL CONCESSION (RF) (PTY) LTD

SIXTH RESPONDENT

APPLICANT'S REPLYING AFFIDAVIT

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 Applicant and am duly authorised to depose to this affidavit and to bring this application for and on behalf of the Applicant, especially if regard is had to my position at the Applicant. Furthermore, a resolution confirming same is annexed as "SF1" to the founding 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. Where I make legal submissions, I do so based on the advice of the applicant's legal representatives, which advice I accept. Where I rely upon the advice of others, I believe such advice to be true and correct.
4. I have considered the sixth respondents answering affidavit and reply thereto below. I will only deal with and answer to those allegations contained in the answering affidavit that are material to the application in question. Unless an allegation contained in the answering affidavit is specifically admitted, it should be deemed to be denied.
5. 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 sixth respondent's ("N3TC") answering affidavit.



PRELIMINARY COMMENTS

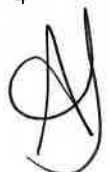
6. N3TC have sought to shift the proverbial goal posts away from the factual issues by utilising portions of OUTA's founding affidavit out of context to create a false narrative and arguments orbiting meritless defences in an attempt to discredit the applicant's application.

7. N3TC's argument rests on the following, in respect that the disclosure of the requested records will:
 - 7.1 Amount to pre-litigation discovery;
 - 7.2 Likely cause harm to the commercial and/or financial interests of N3TC;
 - 7.3 Constitute an action for breach of a duty of confidence owed to third parties under agreements concluded by N3TC with such third parties.

8. The aforementioned, collectively and once broken down and scrutinised by the Honourable Court, can be construed as red herring-defences. It is extremely unfortunate and unbecoming for a major concessionaire knowingly conducting business with an independent statutory public company such as SANRAL to mistake the proverbial wood for the trees. N3TC have attempted to discover harm where objectively, nothing exists. The allegations of harm in respect of financial and confidence are, with respect, without merit and vehemently denied.



9. Furthermore, the applicant approaches this Honourable Court, to exercise rights enshrined in legislation to obtain the disclosure of information held by the State.
10. N3TC have failed to appreciate the relief sought and have come to the incorrect conclusions. This will be set out in detail below and further dealt with to the extent necessary in argument.
11. I am advised that as, an organisation acting in the best interest of civil society in undoing tax abuse, the aspect of public interest has been clearly set out in the applicants founding affidavit from paragraphs 56-70 and further in reply to the first, fourth and fifth respondents answering affidavit from paragraphs 35-39.
12. Within the confines of section 11 of the Promotion of Access to Information Act 2 of 2000 ("PAIA") the applicant has a right as the requester to be given access to public records without giving a reason for seeking access to information. OUTA's right of access is not affected by any reasons OUTA gives for requesting access or by SANRAL's and/or N3TC's belief as to what OUTA's reasons are for requesting access.
13. I submit that the presumption of N3TC that the application is collating



information since its record request 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, is an assumption and therefore put to N3TC to prove.

14. To this end, the nefarious reasons advanced by N3TC that OUTA's application amounts to pre-trial litigation is misplaced and wrong to say the least. The request for information underpins the requirement for government entities to operate in a transparent manner as envisaged by section 217 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution").
15. The ultimate goal of PAIA is to promote transparency, accountability and effective governance of all public and private bodies, to assist members of the public to effectively scrutinize and participate in decisions made by public bodies, to ensure that the state promotes a human rights culture and social justice, to encourage openness, to establish voluntary and mandatory mechanisms or procedures which gives effect to the right of access to information in a speedy, inexpensive and effortless manner.

PURPOSE OF THE AFFIDAVIT

16. Having read the answering affidavit deposed to by Mr Cornelis Janse Tolmie,



OUTA does not intend to deal with or traverse each and every allegation contained in the answering affidavit and any allegation of fact in the answering affidavit which is inconsistent with the facts alleged by OUTA and not specifically dealt with in the replying affidavit is denied.

17. Any submission made by N3TC which is not addressed by OUTA in the replying affidavit should not be construed as an acceptance thereof.

18. OUTA views N3TC's answering affidavit as merely an amplification of the first, fourth and fifth respondents' answering affidavit. SANRAL defaulted to the defences raised by N3TC which in its affidavit now substantiates those defences. OUTA then re-emphasises the following headings contained in its replying affidavit to the first, fourth and fifth respondents answering affidavit:

18.1 The relevance of the PFMA and the applicability of section 195 and 217 of the Constitution;

18.2 Mandatory disclosure in the Public Interest;

18.3 Disclosure would reveal evidence of non-compliance with or contravention of section 195 and 217 of the Constitution.

19. Without detracting of the importance and relevance in reply to N3TC's allegation I wish to emphasize the following:

19.1 Although the PFMA does not find application to the concessionaire contract there can be no debate that SANRAL is an organ of state and that the



provisions of section 195, 216 and 217 of the Constitution find application to SANRAL and to the concessionaire contract which wholly impacts N3TC. Such submission cannot be disputed by N3TC as the contracting party to the concessionaire contract.

19.2 Section 217 of the Constitution which deals with procurement provides, inter alia, that when an organ of state contracts for goods and services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective. This places an obligation in respect of the disclosure of the requested information.

19.3 Again, I repeat paragraphs 40-49 of OUTA's replying affidavit to the first, fourth and fifth respondents answering affidavit, the referred to Sunday Times article is important because it reflects the public interest and further casts grave doubt on the authoritative structures within SANRAL and the CEO of N3TC in respect of Mr Neil Tolmie.

19.4 The lack of recent public financial statements of N3TC within the projects as stated in that article are concerning and require investigation since SANRAL has a duty in terms of section 195 of the Constitution to ensure that services are provided impartially, fairly, equitably and without bias. The disclosure of the records will bring such to light and foster transparency by providing the public with timely and accurate information which its impact



on the society funding such profits is entitled to scrutinize.

19.5 The astronomical profit potentially made by N3TC cannot be said to be cost-effective. The disclosure of the records will reflect if South African toll payers are expected to fund such astronomical profits, being out the scope and purpose of the agreement between SANRAL and N3TC.

20. In light of the above I now wish to respond to the N3TC's answering affidavit in as far as were not dealt with in my preliminary comments or already addressed in OUTA's replying affidavit to the first, fourth and fifth respondents answering affidavit.

AD SERIATIM REPLY TO THE N3TC ANSWERING AFFIDAVIT

AD PARAGRPH 12 AND 29-33

21. OUTA accepts the records no longer opposed by N3TC and in consideration of such tenders in both answering affidavits on behalf of SANRAL and N3TC the following breakdown is provided in respect of the current standing on each requested record, since OUTA sought access to copies of the following records, as related to the upgrade of the N3 route from Durban to Pietermaritzburg:

21.1 in terms of Part A of the request for information —

21.1.1 the concession agreement; (no longer opposed)

- 21.1.2 all annexures, amendments, and addenda to the concession agreement (no longer opposed);
- 21.1.3 all operation and maintenance contracts entered into between N3TC and the O&M contractors, relating to the concession agreement (N3TC submits that SANRAL does not have these records in its possession and thus opposes its disclosure);
- 21.1.4 the operational and maintenance manual pertaining to the concession agreement (N3TC is unsure if SANRAL still has this record in its possession and thus opposes its disclosure);
- 21.1.5 the contracts entered into with the independent engineer/s related to the concession agreement (no longer opposed);
- 21.1.6 all the independent engineer/s reports submitted to SANRAL related to the concession agreement (no longer opposed);

21.1.7 all construction work contracts entered into by N3TC relating to the concession agreement; (N3TC submits that SANRAL does not have these records in its possession and thus opposes its disclosure)

21.1.8 all Performance Certificates issued, relating to the construction works contracts entered into by N3TC (opposed);

21.1.9 all Taking Over Certificates that have been issued in terms of the concession agreement (N3TC submits that SANRAL does not have these records in its possession and thus opposes its disclosure).

21.2 in terms of Part B of the request for information –

21.2.1 N3TC's complete financial statements for each fiscal year, submitted to SANRAL in terms of the concession agreement; (opposed)

21.2.2 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;
(opposed)

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; (opposed) and

21.2.3 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. (opposed)

22. In respect of the records which N3TC states that SANRAL does not have such records in its possession and thus opposes its disclosure, OUTA is alarmed by such submission because on N3TC's version such conduct is a clear irregularity. N3TC expects the Court to believe that contracts and manuals which regulate the concessionaire agreement between SANRAL and N3TC, an agreement which has been extended and is still enforced between the parties, yet certain contracts and manuals are no longer in possession of SANRAL.



23. SANRAL is not only mandated to keep in its possession such contracts and manuals since it regulates an existing agreement with N3TC but in line with legislation SANRAL must retain its agreements. Once OUTA is in possession of the tendered records it will then be in a position to determine, if necessary, the weight attached to the records which N3TC contends is not in SANRAL's possession, such conduct further illustrates the need for the disclosure of the records requested by OUTA to flush out the extent to and further irregularities which SANRAL is wrongly at ease with not being in possession.
24. OUTA denies any allegation that it is using this application to obtain documents from N3TC under the auspices of an application against SANRAL. The agreement is between SANRAL and N3TC and as such the records must be in the possession of SANRAL in its capacity as the principal contractor to the agreement.
25. In amplification of such denial, nowhere in SANRAL's affidavit does it allege that it is not in possession of the records as requested by OUTA. The only defences raised relates to the financial and technical information sought which would impact on N3TC and renders such records confidential. SANRAL does not allege that it is not in possession of the records and N3TC version is that it is unsure, SANRAL has not stated that it not is not in possession of the records.
26. OUTA continues on the premise that SANRAL is then in possession of the records and should be since such contracts and manuals are relevant to the continued agreement between SANRAL and N3TC. If such records are within the scope of




the agreement, then N3TC is incorrect in its stance that there is no reason, be it under the concession agreement, then N3TC would not be required to give these documents to SANRAL. OUTA submits that under the concession agreement N3TC is required to give those documents to SANRAL and SANRAL should accordingly be in possession of such documents. It is concerning if it is not.

AD PARAGRPH 39-44

27. The contents of these paragraphs are denied for reasons already set out in this affidavit. OUTA cannot form a basis and confirm any contraventions or irregularities without having regard to the requested records.

AD PARAGRPH 45-49

28. The contents of these paragraphs are denied. In amplification of such denial, 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. N3TC cannot dictate the limitations and extend to which it is comfortable to disclose.



29. N3TC have failed to show that it is probable that the disclosure, even of the confidential information would cause harm to N3TC's commercial interest. A party relying on such a provision must show that harm is not simply possible but probable.

AD PARAGRPH 50

30. The content of this paragraph and its sub-sections are noted. OUTA only submits that where documents fall outside the scope of the concessionaire agreement and does not form part of the agreement and has and should never be disclosed to SANRAL, OUTA does not require disclosure of such documentation as it relates to tender bids. I pause to mention that this in no form detracts from the alarming submission that certain records which form part of the agreement but aren't in SANRAL's possession when such records should be in possession is of the same position. OUTA only seeks the disclosure of records as it relates to the concession agreement.

AD PARAGRPH 51-57

31. The contents of these paragraphs are noted. OUTA does not seek the disclosure of N3TC financial model, OUTA seeks the data which that model produces which is required as it relates to the concession agreement. The concession agreement must bear certain obligations to N3TC in respect of the information sought in line with the agreement. Thus, it is not the model OUTA requires, but the data it

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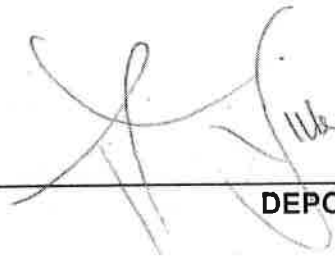

provides which ought to be provided to SANRAL in their continued engagement. N3TC cannot expect OUTA or the Court to believe that due to the intellectual property N3TC has provided SANRAL with no data, despite its obligation to do so.

32. Further, only three concessionaires conduct business in the Republic, this limits N3TC stance in respect of competitiveness and the disclosure exposing it to harm then since there are only three competitors in the market. N3TC argument is this respect has no foundation.

AD PARAGRPH 58-62

33. The contents of these paragraphs are denied and have been dealt with in this affidavit. OUTA denies that its application has no legal basis, such legal basis has been clearly set out.
34. The information requested, OUTA submits, would reveal evidence of either substantial contravention of, or failure to comply with section 195 and 217 of the Constitution. SANRAL and N3TC should seek to be of assistance in rectifying such noncompliance instead of seeking to oppose it.
35. In the premise, OUTA persists with the relief sought in the disclosure of the remaining opposed disclosure.





DEPONENT

The Deponent has acknowledged that he/she knows and understands the contents of this affidavit which was signed and sworn to before me at Pretoria on this the 11 day of April 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.



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