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**

RESPONDENTS HEADS OF ARGUMENT TO RESCISSION APPLICATION

INTRODUCTION

1. In light of the applicants not having filed their heads of argument, upon delivery thereof should the need arise these heads of argument will be supplemented in reply to the applicants' heads of argument.

2. The applicants seek the rescission of a court order of this court, granted by the Honourable Justice Van Der Schyff on 15 November 2021.[1]

3. For purposes of the rescission application regard should only be had to broad details. The applicants conceded that with regard to the service of the application itself, there is clear evidence of the application having been served on Ms Letsholo of South African National Roads Agency Ltd ("SANRAL") on 22 February 2021 and SANRALs head of legal was furnished with a copy of the papers.[2]

4. On 5 November 2021, an application was brought in order to set aside the first and/or second applicants of Organisation Undoing Tax Abuse ("OUTA") request for access to records as set out in the application requesting information in terms of the Promotion of Access to Information Act, 200 (hereafter "PAIA").[3]

5. 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

[1] Caselines 0002-1
[2] Caselines 014-24
[3] Caselines 013-19

same legal coordinator, Ms Letsholo, wholly confirming receiving the notice of set down for 5 November 2021.

6. It is common cause that 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 and was again sent to SANRAL's head of legal via SANRALs internal mail on the same day. It is then settled that the applicants became aware of the order on 19 November 2021.

7. In terms of the court order the period to furnish the requested records expired on 10 December 2021. OUTA then launched contempt of court proceedings as a result of the applicants deliberate, intentional, refusal or failure to comply with the order.

RELEVANT BACKGROUND

8. SANRAL in its replying affidavit confirms that it was served with the PAIA application however notes that since an identical application with a similar case number was served simultaneously, all staff at SANRAL was under the mistaken belief that they were dealing with a single application. SANRAL presents this to the court as an honest human error which is not so inexplicable in the circumstances of the daily duties and very high volume of documents SANRAL deals with.[4]

[4] Caselines 019- PARA 17

9. I pause to mention that if the court has consideration to the first correspondence sent by SANRALS attorney[5] right after they came on record, if one has regard to the paragraphs in respect of what their investigations revealed, at 8 December 2021 there is no mention of this human error. Such explanation is clearly a farfetched after thought intended to do nothing more but delay the disclosure of the requested records by OUTA.

10. In respect of the notice of set down for 5 November 2021 it was delivered and signed for by Ms Gantse Mothobi, however SANRAL contends there is no knowledge of what she did with the notice of set down. The version SANRAL expects this Court to believe is that through its governing minds it was not aware that the application was being brought, there was no deliberate refraining from entering an appearance to oppose and that there is no mental attitude of disregard or contempt for the consequence of the default.

11. It is to be believed that despite the numerous correspondence and OUTA following the rules of the Court, validly obtaining the order, all while SANRAL laboured under the impression that the matter was being attended to by its attorney of record in the other application being Werksmans Attorney. The falsehood to such a claim is clear.

12. SANRAL contends that an incorrect submission being contrary to the contents of the affidavit unintentionally misled the court, such an incorrect submission placed

[5] Caselines 014-35

the wrong hue on the position of SANRAL and amounts to an irregularity and on that basis alone the order stands to be rescinded.

13. Such contention is incorrect, the court was not misled, the context of the practice note was clearly explained in OUTAs answering affidavit[6]. SANRALs contention fails on all possible interpretation that it seeks to make a case out that the order was erroneously granted if regard is had to OUTAs founding affidavit, 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."

14. That is the point and correct 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.

15. Harms[7] states that: An order is erroneously granted if it was legally incompetent for the court to have made such an order, if there was an irregularity in the proceedings or if the court was unaware of facts, if known to it, would have precluded it from a procedural point of view from making the order. When a simple summons lacked averments to support the cause of action the judgment based on it is without foundation and consequently erroneously granted. The error need not appear ex facie the record. But this does not mean that if a party is procedurally

[6] Caseline 016-20 PARA 48-50
[7] Civil Procedure in the Superior Courts at B42.4

entitled to judgment, it could be said that the judgment had been granted erroneously because the court was unaware of a defence which the defendant could have raised but did not. Consequently, a iustus error, even if induced by a non-fraudulent misrepresentation by the successful litigant, does not entitle a party to have the judgment set aside.

16. As pointed out in the passage from Harms above, a nonfraudulent misrepresentation of fact – what would qualify as an incorrect averment in the papers – which induces an error (on the part of the judge granting the order) does not entitle the party to obtain rescission of the judgment. In this situation there is no legal foundation to the judgment being erroneously granted.[8]

17. Similarly, the principal remains considering the realities of the unopposed court are known to all practitioners, OUTA could not have served a notice of set down for 15 November 2021 as it had no knowledge that the Judge would sign and upload the draft order on that day. If SANRALs perpetual human error version is to be believed then even if OUTA was obligated to inform SANRAL of the notes engaged on Caselines, which on an unopposed basis OUTA was under no such obligation, such notification would have fallen on deaf ears in light of the human error only being revealed after service of the order. There was accordingly no error on this score, in the seeking or granting of the order.

[8] Marais v Standard Credit Corporation Ltd 2002 (4) SA 892 (W) at 897A-B

18. In terms of rule 42(1) the applicants will have to show that the order was erroneously sought or granted in their absence or as the result of an error between the parties or that the order contains a patent error or omission or an ambiguity. Should the applicant for rescission not be in a position to place before court the facts, which show that the judgment was granted in error, it will not succeed in making out a case in terms of rule 41 and the application will fail.[9]

19. It is trite that the applicants have to show good cause- being a reasonable explanation for the delay (and which would naturally exclude willful default), a bona fide defence to OUTA's PAIA application that prima facie carries some prospects of success, and that the application is made bona fide.[10]

20. In *Chetty v Law Society of Transvaal 1985 (2) SA 756 (A)* at 756 Miller JA defined the test for determining good cause thus:

"*The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See Cairn's Executors v Gaarn 1912 AD 181 at 186 per Innes JA.) But it is clear that in principle and in the long-standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:*

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

[9] Deery v Deery 1971 (1) SA 227 (C) 230H-231A

[10] Erasmus: Superior Court Practice, Volume 2, Part D, Rules, Uniform Rule 42 and Commentary-Common Las-Default judgment, D1-561 and 655

(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. (De Wet's case supra at 1042; PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 794 (A); Smith NO v Brummer NO and Another; Smith NO v Brummer 1954 (3) SA 352 (O) at 357 - 8.) It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, *or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule nisi issued on 22 April 1980."*

21. At 767J–769D: the learned Judge expounded further as follows in relation to the application of this test:

"*As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission (cf Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532). But this is not to say that the stronger the prospects of success the more*

indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success."

22. The rescission is opposed on multiple grounds as set out concisely in the answering affidavit, mainly that the applicants are in willful default, and that there is no bona fide defence made out by the applicants.

WILFUL DEFAULT

23. 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. 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 willful default, SANRAL simply chose to ignore the proceedings. It is clear that SANRAL was aware of the notice of set down[11].

[11] Service Affidavit: Caselines 009-1 to 009-11 and 010-1 to 010-5

24. 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 from SANRAL dealing with the matter was also called to confirm receiving the notice of set down electronically. SANRAL's circumstances did not justify the applicants showing a total disregard for the legal proceedings.

25. 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 and unreasonable. 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 realizing the consequences thereto is unacceptable. Such default by SANRAL is deliberate.[12]

26. SANRAL's persistence with the stance that all its personnel suffered from this human error until the delivery of the order is manufactured in order to attempt to escape the realities of the validly obtained order because even 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.

[12] Neuman (Pvt) Ltd v Marks 1960 (2) SA 170

27. In Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd 1994 (3) SA 801 (C) at 803 King J followed this approach and held as follows:

"More specifically in the context of a default judgment 'wilful' connotes deliberateness in the sense of knowledge of the action and of the consequences, its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be."

28. Applying the above principles, it is clear that the order was properly granted in accordance with the prescribed procedure. Taking into account what can only be seen as a deliberate decision by the applicants not to attend court; this Court should not find that the approach of the court granting the order was not a proper exercise of its judicial function.

29. The applicants denial in this regard in respect of the various communications are inherently improbable and should be rejected by this Court. The perpetual human error does not explain the wholesale disregard of the multiple communications before the order was granted. The explanation of the default is inadequate and clearly such default can only be seen as wilful. On this basis alone the application should be dismissed. Further this lays a clear foundation to OUTAs contempt of court proceedings. If OUTA succeeds on this point, SANRAL is then in contempt of Court as willfulness was been established.

RESCISSION UNDER COMMON LAW:

30. To obtain a rescission in terms of the common law, the applicant bears the onus–

"to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide*; and (c) by showing that he has a* bona fide *defence to the plaintiff's claim which* prima facie *has some prospect of success."*[13]

31. On the assumption that the court had considered the merits of the case prior to granting a judgment that judgment can be rescinded only in terms of rule 42(1) and in exceptional circumstances where new documents came to the fore. In the absence of consideration of the merits and the defendant having been in default the grounds for rescission are virtually unlimited and the only requirement be that of good cause to be shown for the rescission. Good cause means reasonable and acceptable explanation for the default together with the disclosure of a *bona fide* defence which is *prima facie* tenable or *prima facie* carries some prospects of success.[14]

32. The grounds upon which a rescission application is based must have existed at the time of the judgment.[15]

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[13] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)

[14] Nyingwa v Moolman NO 1993 (2) SA 511-512A

[15] Swadif (Pty) Ltd v Van Dyke NO 1979 (1) SA 928 (A) at 939

33. An application for rescission of judgment must show good cause and prove that at no time the applicant renounces its defence and has a serious intention of proceeding with his case.[16]

NO BONA FIDE DEFENCES

34. In Lodhi[17], Streicher JA said the following about a subsequently disclosed defence (at para [27]):

> "[W]here an applicant is procedurally entitled to judgment in the absence of the respondent the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. …
>
> The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment."

35. Further the perpetual human error scenario put forward by the applicants, for OUTA to rebut, because any defence or even a reasonable explanation at this point offered by the applicant would be far-fetched and clearly untenable or palpably implausible, that the Court would be justified in rejecting it outright.[18]

36. SANRAL wishes to engage with the PAIA request and would have raised defences provided by it in PAIA. Most of the defences and paragraphs in the applicants founding affidavit attempts to paint a false and distorted picture in reliance on PAIA

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[16] Van Aswegen v McDonald Foreman & Company Ltd 1963 (3) SA 197 (O)
[17] Lodhi 2 Properties Investment CC and Another v Bondev Developments (Pty) Ltd 2007 (6) 87 (SCA)
[18] South African Veterinary Council and Another v Szymanski 2003 (4) SA 42 (SCA) at para [23] to [24]

and mislead the Court that there exist some bona fide defence which prima facie carries some prospect of success.

37. Regarding these “bona fide” defences SANRAL, a public entity, wants the court to believe that its contracts and annexures thereto belong to a private entity[19] it conducts business with and thus cannot be expected to be in possession of the contracts which regulates its business transactions and relationships. There cannot be any merit to such an argument.

38. SANRAL contends that section 36 of PAIA provides a complete defence to the application in that SANRAL has an obligation to refuse the request for access in these circumstances.[20]

39. Section 36 of PAIA provides: “(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 –

(a) trade secrets of a third party;

(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 –

(i) to put that third party at a disadvantage in contractual or other negotiations; or

[19] Founding Affidavit para 53 (Caselines 014-30)
[20] Founding Affidavit para 56 (Caselines 014-31)

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

(2) A record may not be refused in terms of subsection (1) insofar as it consists of information –

(a) already publicly available;

(b) about a third party, who has consented in terms of section 48 or otherwise in writing to its disclosure to the requester concerned".

40. OUTA contends that as SANRAL is an organ of state and a public body, it is obliged in terms of section 11 of PAIA[21] to provide OUTA with the records unless it is able to prove that a valid ground for refusal in terms of PAIA exists. Section 32 of the Constitution[22] confers a right on every person to "*any information held by the State*". Section 11 of PAIA gives effect to the right in section 32 of the Constitution by providing that a requester must be given access to a record of a public body if the requester complies with the procedural requirements in PAIA for access and no ground for refusal of access under PAIA exists.[23]

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[21]Section 11 of PAIA deals with right of access to records of public bodies and provides that**:**
"(1) A requester must be given access to a record of a public body if -
(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and
(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part".

[22] Section 32 of The Constitution of The Republic of South Africa Act 108 of 1996 provides:
1 Everyone has the right of access to-
(a) any information held by the state; and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.

[23] In Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) at [59] it was held that: "…Once a requester has complied with the procedural requirements for access and overcome the refusal grounds in ch 4, he or she must be given access. Section 11 makes that clear. Not only that, s 11(3) makes it equally plain that the requester's reasons are not relevant". As was stated in President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC) at [9]: "The disclosure of information is the rule and exemption from disclosure is the exception".

41. Section 32 of the Constitution makes a decisive break with the past, entitling everyone to information held by the State. Various authorities and our higher courts have consistently held that the purpose of the right of access to information is to subordinate the organs of the state to a new regimen of openness and fair dealing with the public.

See: -*Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 850C.

-*MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) at para [21].

-*The President of RSA v M&G Media* 2011 (2) SA 1 (SCA).

42. PAIA deals with information held by public bodies differently from information held by private bodies. For public bodies, which includes SANRAL, the requester does not need to explain why it seeks the information, let alone why it requires it for the exercise of its rights. In terms of section 11(1) of PAIA a requester of information is entitled to the information requested from a public body as long as it has complied with the procedural requirements set in that Act and as long as none of the grounds of refusal are applicable.

43. Consequently, the importance of access to information held by the state or public or state entity as a means to secure accountability and transparency justifies the approach adopted in section 32(1)(a) of the Bill of Rights and in PAIA, namely, that unless one of the specially enumerated grounds of refusal obtains, citizens are entitled to information held by the state or state or public entity as a matter of right.

This is so regardless of the reasons for which access is sought and regardless of what the organ of state believes those reasons to be.

44. The overriding principle in relation to this "disclosure" clause is that a public body is obliged to conduct its operations transparently and accountably. In *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at [55], it was held that "Once it enters into a commercial agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to State security or the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails … Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause[24]".

45. SANRAL has not shown that it is probable that the disclosure even of confidential information would cause harm to TRAC's commercial interests. A party relying on this provision must show that harm is not simply possible, but probable. In the circumstances, the applicants have not put up any reasons that justify the refusal of access to the records. Furthermore, TRAC will not, therefore, suffer any damages should there be such disclosure, as it is bound by its decision not to oppose this application. Merely because the agreement contains a confidentiality clause cannot shield the agreement from disclosure.[25] If all public bodies were

[24] *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at [55]-[56].

[25] SA Airlink (Pty) Ltd v Mpumalanga Tourism and Parks Agency and Others 2013 (3) SA 112 (GSJ) (22 August 2012)

allowed to hide behind confidentiality agreements or clauses in their agreements to avoid disclosure, that would be a negation of the spirit and purpose of PAIA.

PUBLIC INTEREST OVERRIDE

46. Section 46 of PAIA has been promulgated specifically to serve or act as a mandatory public interest override provision where one or more grounds of refusal have been established. The section's requirements are mandatory:

where access to a record is denied under section 36(1)(b) or (c) or section 37(1)(a), an information officer must nonetheless grant access to the record if it is in the public interest to do so.

47. For elucidatory purposes I repeat the wording of the section:

"*Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1) or 37(1) […] if –*

(a) the disclosure of the record would reveal evidence of –

(i) a substantial contravention of, or failure to comply with, the law;

or

(ii) an imminent and serious public safety or environmental risk;

and

(b) *the public interest in the disclosure of the record clearly outweighs the harm contemplated in question.*"

48. The requirements for the granting of access under section 46 are the following:

1. If the disclosure of the record would reveal evidence of a substantial breach of the law or an imminent and serious public safety or environmental risk; and

2. Where the public interest in the disclosure clearly outweighs the harm contemplated in the section.[26]

49. It is the law that if one or more of the requirements set out in section 46 are present, then despite the fact that disclosure could be validly refused in terms of sections 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45 of PAIA, the information officer of a public body must still grant a request for access to a record of the body contemplated. Accordingly, OUTA has made out a case for access to the information sought in terms of the above principles. The defences raised by the applicants have no prospect of success.

50. In light of all the facts above, it cannot be said that the applicants raised a bona fide defence which prima facie carries some prospect of success. The application should be dismissed on this ground.

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[26] De Lange and Another v Eskom Holdings Ltd and Others 2012 (1) SA 280 (GSJ)

CONCLUSION

51. The applicants have not discharged the onus of showing that the order was sought or granted erroneously. The failure to appear by the applicant's is no error at all because there had been proper service and further communication in relation to the set-down of the matter on the applicants.

52. What matters, with respect, is that the order was not sought or granted erroneously on any imaginable basis because there was evidence of proper service before the Court when the order was sought and granted. Such allegation is demonstrably false from a factual perspective.

53. In the premises it is submitted that the applicants have not complied with the provisions of rule 42(1)(a) to rescind the order nor by common law. The applicants brought this application merely to delay the disclosure of the requested records, to the detriment of the road users.

54. The applicants have failed to show good cause and have failed to make out a case for all the elements necessary for a rescission of the order to be granted. The application for rescission of court order should therefore be dismissed with costs, the applicants to pay the costs of the application.

DATED AT PRETORIA ON 3 MAY 2022

ADV E PROPHY (COUNSEL FOR THE RESPONDENT)

GROENKLOOF CHAMBERS