IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 7954/2021

In the matters between:

ORGANISATION UNDOING TAX ABUSE NPC	Applicant
and	
SOUTH AFRICAN NATIONAL ROAD AGENCY LTD	First Respondent
SKHUMBUZO MACOZOMA N.O	Second Respondent

("The Contempt Application")

AND

SOUTH AFRICAN NATIONAL ROAD AGENCY LTD	First Applicant
SKHUMBUZO MACOZOMA N.O	Second Applicant
and	
ORGANISATION UNDOING TAX ABUSE NPC	Respondent

("The Rescission Application")

HEADS OF ARGUMENT FOR THE APPLICANTS IN THE RESCISSION APPLICATION AND RESPONDENTS IN THE CONTEMPT APPLICATION

Contents

INTRODUCTION

1. Before the Court are two applications: an application for contempt of Court, initiated by the Organisation Undoing Tax Abuse NPC ("**OUTA**"); and the application for rescission of judgment (which judgment OUTA purportedly seeks to vindicate in the contempt application), initiated by SANRAL and Mr Macozoma (who are

collectively referred to as "SANRAL" for the purposes of the rescission application)[1].

2. Two sets of heads of argument were delivered on behalf of OUTA[2]. The heads of argument in the contempt application proceed on the (erroneous) premise that the application for rescission stands to be determined first and that, upon the determination of the rescission application "*the majority of the contentions raised by both parties will have been resolved, specifically as it relates to wilful default, the defences raised by the respondents, as well as the correspondence*"[3] and that "*…SANRAL has failed to deduce sufficient evidence to create a reasonable doubt on whether its conduct was wilful or mala fide. In succeeding in the dismissal of the rescission application, wilfulness will have been proven thus satisfying the test in finding* (sic) *the applicants to be in contempt of court*"[4].

3. The above submissions betray a fundamental lack of appreciation of the legal principles and the question of onus in the contempt application. The approach also ignores the fact that entirely different facts inform the question of "wilful default" in respect of the two applications:

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[1] In the context of the contempt application, of course, Mr Macozoma and SANRAL must be differentiated as parties, not the least because OUTA seeks the committal of Mr Macozoma (who is SANRAL's erstwhile CEO) in that application. This draconian – but wholly unjustified – relief requires that Mr Macozoma's interests be considered separately.

[2] Caselines ("CL") 020-1 and 020-23 respectively

[3] CL 020-25, para 1

[4] CL 020 – 30, para 17

3.1. In the application for rescission, the “wilful default” relates to the reasons for *SANRAL’s* non – appearance at the time the default order was granted by her Ladyship Madam Justice Van Der Schyff (Van Der Schyff J”);

3.2. In the contempt application, however, “wilful default” is an enquiry about whether SANRAL and Mr Macozoma failed and / or refused to comply with the default order wilfully and “in wanton contempt”.

4. The two enquiries are obviously entirely different and depend on different facts. It is blatantly wrong to submit that the dismissal of the recission application (which is also inappropriately posited in the heads for OUTA as a *fait accompli*) automatically leads to the conclusion that the contempt order is appropriate.

5. It stands to reason that the applications should be determined in the chronological order in which they developed. Having said that, given that the applications are to be enrolled and heard together in any event, nothing turns on the sequence is which they are considered – provided, of course, that the proper test is applied in each of the applications. The “test” set out in OUTA’s heads of argument in the contempt application is grossly misstated – possibly because OUTA must be aware that the contempt application was ill-advised and abortive from the outset.

6. The default order of Van Der Schyff J (which is the subject-matter of the rescission application) is significant: it compels SANRAL to provide OUTA with certain highly confidential and commercially sensitive documents which pertain (and belong to) a concessionaire, Trans African Concession (Pty) Ltd (“TRAC”).

7. The information which the default order requires SANRAL to provide to OUTA includes, amongst others, the following:

7.1. "*Copies of TRAC's complete financial statements for each fiscal year, submitted to SANRAL in terms of the TRAC Concession contract (as from 1999/2000 financial year to present)*"[5] (sic);

7.2. "*Copies of all reconciliation of TRAC's Profit and Loss Accounts together with their proposed* budgets *for each fiscal year submitted to SANRAL, from 1999 / 2000 fiscal year to present in terms of the TRAC Concession Contract*"[6];

7.3. "*Copies of all* Annual *Reports submitted to SANRAL, pertaining to the TRAC Concession Contract (as from 1999/2000 financial year to present) issued by TRAC's appointed auditors certifying that the computation of the Highway Usage Fee for the previous year was correctly calculated*"[7];

7.4. "*Copies of the lists, submitted to SANRAL in terms of the TRAC Concession Contract (as from 1999 to present) of TRAC's lenders and creditors to which*

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[5] CL 005-22, para 1

[6] CL 005 – 22, para 2

[7] CLA 005 – 22, para 3

TRAC owes a sum in *excess of the equivalent of R10 000 000 including the amounts due to each of them*"[8].

8. Various other documents, spanning decades and which constitute sensitive commercial information belonging to TRAC – not SANRAL -- are listed in the request for information made by OUTA in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA"). The default order records simply that SANRAL is directed to provide the "requested documents"[9].

9. The default order has far – reaching effects and the rescission application raises important issues concerning the proper interpretation of PAIA.

10. These submissions deal with the following issues:

    10.1. First, brief submissions are made concerning OUTA's application for condonation for the late delivery of its answering affidavit in the application for rescission;

    10.2. Second, the requirements for rescission of judgment under Uniform Rule 42(1)(a) are considered. Under this rubric the submissions are that:

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[8] CL 005 – 22 para 4

[9] CL 013 - 24

10.2.1. OUTA's application for compelling disclosure in terms of PAIA did not make out a case for any disclosure at all. The founding affidavit in OUTA's application is so nonsensical and dense with *non - sequiturs* that it cannot be said, on any basis, that a proper case for relief was made out in those papers. On this basis alone, the application for rescission must succeed; and

10.2.2. There was an irregularity in the granting of the default order in that it is apparent that the counsel moving the application on an unopposed basis made a fundamentally erroneous (and untrue) submission, which may have influenced the granting of the order. In addition, there are unexplained – and inexplicable – irregularities concerning the granting of the order, including the reservation of the judgment on 1 November 2021, prior to the matter even being enrolled[10]. On this basis, too, rescission of the order should be granted;

10.2.3. Given the nature of the order and its wide – reaching effect on the interests of the third party (TRAC) who was not joined in the application (this being a necessary non – joinder) the discretion of the Court ought to be exercised in favour of the rescission. Of significant importance in this inquiry is that OUTA's PAIA's application seeking TRAC's documents is identical to two other

[10] CL 014 - 59

applications (concerning the other two concessionaires) in which OUTA correctly and properly recognised that the concessionaires should be joined to the proceedings. The other two applications are opposed, are pending and will ultimately be determined on their merits. The fact that OUTA in this instance insists that TRAC does not have an interest in the wide – reaching order made by default confirms that OUTA is snatching at the proverbial bargain – because it knows that it is not entitled to the documents it seeks.

10.3. Third, the requirements for rescission under the common law are considered:

10.3.1. The common law rescission test is simple and requires the demonstration of “good cause” which in turn means that SANRAL must show that it was not in wilful default in the application and that it has a bona fide defence to the PAIA application.

10.3.2. It is submitted that under this rubric, too, both requirements are met and that on that basis also rescission of the default order should follow. The default of appearance is explained by the fully disclosed (and justifiable) confusion between the PAIA application in respect of TRAC and an identical application in respect of another concessionaire; and

10.3.3. The bona fide defences are many. SANRAL's defences to the PAIA request in certain instances raise the issue of proper interpretation of various sections of PAIA and on that basis can never be considered unmeritorious or lacking in *bona fides*.

10.4. Fourth, and finally, the contempt of court application is examined. This application has no basis in fact or in law. It is ill-advised and is pursued *in terrorem* and therefore stands to be dismissed with costs.

I: OUTA'S APPLICATION FOR CONDONATION IN THE RESCISSION APPLICATION

11. The application for rescission was delivered on 28 January 2022[11]. As is customary, the Notice of Motion required OUTA to deliver its notice of intention to oppose within 5 days and to deliver the answering affidavit within 15 days thereafter. The answering affidavit was therefore to be delivered by 25 February 2022, being 20 court days after the delivery of the application[12].

12. OUTA however delivered its answering affidavit only on 16 March 2022[13]. In its answering affidavit, OUTA explained that it delayed the delivery of its notice of intention to oppose "once the complete application was served on 31 January 2022"[14] by 11 days, during which the deponent called for and obtained a legal

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[11] CL 014-3

[12] CL 019-6

[13] CL 016-2

[14] CL016 – 29 para 71

opinion, considered it, discussed it, consulted “about the way forward” and only then was the notice of intention to oppose delivered[15].

13. OUTA then seeks condonation for the delay in the delivery of its notice of intention to oppose[16]. But this is not the delay that is relevant in the application. The delay which requires an explanation is the delay in the delivery of the answering affidavit, which is not explained by OUTA at all.

14. Although attention was drawn to this fact in the replying affidavit[17], OUTA has done nothing to remedy the problem. In this regard, OUTA does not explain to the Court:

    14.1. Why it took 11 days between 7 and 18 February 2022 to consult;

    14.2. Why a further four days were required to file a notice of intention to oppose; and

    14.3. Why it then took a full 23 days after the delivery of the notice of intention to oppose to finally deliver the answering affidavit (which contains barely any fact in respect of which instructions would be required; and is wholly argumentative in its content)[18].

15. OUTA’s explanation for the delay does not, in the circumstances, encompass the relevant period. Despite being forewarned of this fact, OUTA has done nothing to

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[15] CL 016 – 30 para 72

[16] CL 016-30 para 73

[17] CL 019-6, para 10

[18] CL 019-6, para 11

correct the issue and does not as much canvass the matter in its heads of argument.

16. It is trite that condonation is not there for the taking[19] and it is properly a matter between the applicant for condonation and the Court whose condonation is sought. The fact that SANRAL does not oppose the condonation did not excuse OUTA *qua* applicant for condonation from taking the Court into its confidence and properly and fully explaining the reasons for its delay. This is a minimum requirement an applicant for condonation is required to meet:

> *"Two principal requirements for the favourable exercise of the court's discretion have crystallized out. The first is that the applicant should file an affidavit satisfactorily explaining the delay. In this regard it has been held that the defendant must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about, and to assess his conduct and motives. A full and reasonable explanation, which covers the entire period of delay, must be given. If there has been a long delay, the court should require the party in default to satisfy the court that the relief sought should be granted, especially in a case where the applicant is the dominus litis. It is not sufficient for the applicant to show that condonation will not result*

[19] *Pikwane Diamonds (Pty) Ltd v Anro Plant Hire* 2019 JDR 1861 (GP) at [55]

in prejudice to the other party. An applicant for relief under this rule must show good cause; the question of prejudice does not arise if it is unable to do so."[20]

17. The fact that OUTA has failed to satisfy the Court regarding the reasons for the delay in the delivery of its answering affidavit and provide a full account of period of delay means that the answering affidavit in the rescission application is not (yet) properly before Court and demonstrates OUTA's lack of diligence.

18. At the very least, OUTA cannot in those circumstances be heard to complain of any delay in the launching of the rescission application.

II: RESCISSION IN TERMS OF RULE 42(1)(a): ERRONEOUSLY SOUGHT AND GRANTED

19. The Rule provides that the Court may rescind "an order or judgment erroneously sought and granted in absence of any party affected thereby". It is now settled that the granting of rescission under this Rule is discretionary[21], but the question of whether an order has been erroneously granted is not a discretionary matter: it is a legal question capable of only one answer[22].

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[20] Erasmus: Superior Court Practice, commentary on Uniform Rule 27, D1-323 to 324, emphasis added; See cases collated therein: *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at 477E–G; *Santa Fe Sectional Title Scheme No 61/1994 Body Corporate v Bassonia Four Zero Seven CC* 2018 (3) SA 451 (GJ) at 454G–H; *Kanivest 3146 CC v Petatype CC* (unreported, GP case no 62487/16 dated 26 February 2021) at paragraph [26]; *Junkeeparsad v Solomon* (unreported, GJ case nos 37003/2019 and 37456/2019 dated 7 May 2021) at paragraph [6]; *Ingosstrakh v Global Aviation Investments (Pty) Ltd* 2021 (6) SA 352 (SCA) at paragraph [21]; *Lancaster 101 (RF) (Pty) Limited v Steinhoff International Holding NV* [2021] 4 All SA 810 (WCC) at paragraph [26].

[21] *Tshivahase Royal Council v Tshivhase* 1994 (2) SA 852 (A) at 862J-863A; *Theron v United Democratic Front* 1984 (2) SA 532 (C) at 536G; *Colyn v Tiger Food Industries* 2003 (6) SA (1) SCA at [5]

[22] *Ellis v Eden* [2022] ZAWCHC 112; per Rogers J at [65]

20. For this reason, it is trite that if it is demonstrated that the order was erroneously sought and granted, the order ought to be rescinded without more and "good cause" need not be demonstrated by the applicant for rescission under this Rule[23].

21. It is accepted that where an order is granted on the basis of summons which do not disclose a cause of action (and therefore do not provide a justiciable basis for the order sought) this qualifies as the type of "error" in respect of which Rule 42(1)(a) can be invoked[24]. The error is not one of substance concerned with the nature of the defence subsequently raised – the error lies simply in granting an order on the basis of papers which fail to make out a case for such an order.

No case for relief made out in the founding affidavit

22. A close interrogation of the founding affidavit (which serves as both pleadings and evidence in the motion proceedings) reveals that this is precisely the type of case which fails to make out any case. The Court ought not to have granted any order on the basis of the founding affidavit because it is inchoate in its approach and fails to make averments necessary to make out a case[25].

23. In this regard, the relevant allegations in the founding affidavit are the following:

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[23] *Ellis v Eden* supra at [64], see the exposition set out by Dodson J in *Kgomo v Standard Bank of South Africa* 2016 (2) SA 184 (GP) at 187F regarding the application of Unfirm Rule 42(1)(a)

[24] *Marais v Standard Credit Corp* 2002 (4) 892; *Silver Falcon Trading 333 v Nedbank Ltd* 2012 (3) SA 371 (KZP) at [3] to [6]

[25] CL 014 – 32, paras 59 to 62

23.1. SANRAL received a loan of R7 billion from the BRICS Bank[26];

23.2. The purpose of the loan is unclear[27];

23.3. OUTA intends to establish whether the loan was used to "further fund" concessionaire agreements[28], and should this be the case SANRAL "*may potentially be in contravention of the Public Finance Management Act 1999 ("PFMA") in its persistence in keeping the agreement "alive*"";

23.4. In addition, OUTA intends to establish whether the BRICS Bank loan is "*going towards the GFIP bonds (e tolled roads) or other SANRAL's managed tolled roads which are supposed to be self funding" (sic)*[29] and OUTA will only be in the position to do once the requested information is furnished.

24. Presumably in reliance on the provisions of section 11 of PAIA (which is not specified in the founding affidavit), OUTA contends that it need not explain why the record in question is required or which rights OUTA seeks to protect. OUTA's understanding is that, in the present circumstances, it need only aver that the "records fall with the public interest"[30].

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[26] CL 005 -5 para 14

[27] CL 005-5 para 14

[28] CL 005 – 5

[29] CL 005 – 6 para 17

[30] CL 005 – 6

25. With respect, these allegations are wholly inchoate and the Court ought not to have granted the far – reaching order on the basis of these allegations.

26. In the first instance, the allegations do not explain what the public interest in the disclosure of the various documents is. It is indeed impossible to decipher from the contents of the founding affidavit why the public would have an interest in TRAC's lenders and creditors; or in TRAC's profit and loss accounts and budgets for each fiscal year, or in TRAC's auditor's reports; or in the contract concluded between TRAC and the Independent Engineers.

27. Even less clear is any connection between these documents and the BRICS Bank loan allegedly extended to SANRAL (it is not alleged in the founding affidavit when the loan was purportedly extended).

28. It is also indiscernible from the founding affidavit what kind of violation of the PFMA can be demonstrated through obtaining this information, which is an averment required in order to engage section 46 of PAIA - which OUTA appears to invoke, despite the fact that it does not explicitly make reference to it[31].

29. Section 46 of PAIA requires disclosure where such disclosure "would reveal evidence of a substantial contravention or failure to comply with the law". The high-water mark in OUTA's affidavit is that "*should it be the case that the* concessionaire *generates revenue that disproportionately exceeds the actual costs related to*

[31] This is of itself problematic, since it is trite that an applicant wishing to rely on a legislative provision out to set out the specific section on which it relies – see *Yannakou v Appollo Club* 1974 (1) SA 614 (A) at 623G-H.

maintaining toll roads" then "*SANRAL may potentially be in contravention of the [PFMA]*"[32].

30. These vague assertions do not engage section 46 of PAIA, which appears to be the pivot on which OUTA's entire application hinges. The allegations are insufficient and do not make any sense at all. No nexus is drawn between the alleged BRICS Bank loan and what relation it has to PFMA. The allegations certainly do not make out a case that "*the disclosure of the record <u>would</u> reveal evidence of a substantial contravention or failure to comply with the law".*

31. A further allegation which does not make any sense is how SANRAL is (or would be) supposedly breaching the MPRDA by "keeping the agreement alive". It is not explained on what basis SANRAL can elect not to keep agreement alive, or how it is keeping it alive. It is anyone's guess as to how any of this relates to the BRICS Bank loan allegation. The allegation about keeping the agreement alive is simply incomprehensible.

32. What is more, the entire application (and the prior request made by OUTA)[33] was made on the basis that the record in question is being sought from a 'public body'. However, if regard is had to the nature of the documents sought, those are obviously owned and relate to a *private body,* TRAC[34] and OUTA does not as much

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[32] CL 005 – 6 para 16

[33] CL 005-13

[34] In terms of section 1 of PAIA, a private body is "*any former or existing juristic person"* and there is no allegation whatsoever that TRAC constitutes a public body in that it is "exercising a public power or performing a function in terms of any legislation" (per the definition of "public body"). On the contrary, it is clear from OUTA's allegations alone that TRAC performs its functions vis-à-vis SANRAL in terms of a contractual arrangement.

as attempt to deal with the fact that PAIA explicitly contemplates (in section 8) that a public body may be either a private body or a public body in relation to the record of that body[35] and that the same body may in one instance be a private body and in another a public body, depending on whether the record relates to the exercise of power or performance of a function as a public body or as a private body[36].

33. A Court interrogating the founding affidavit and the nature of the records requested by OUTA from SANRAL ought to have been alive to this fact. No allegations are made in the affidavit that the record sought is the record pertaining to a public body exercising a power or performance of a function as a public body. The records in question clearly belong to a private body (not SANRAL) and on this basis OUTA's entitlement to the records ought to have been closely interrogated.

34. In the context of a pleading in trials, it has been held that:

> "*the plaintiff is certainly not entitled to plead a jumble of facts and force the second defendant to sort them judiciously and fit them together in an attempt to determine the real basis of the claim"*[37]*.*

35. The fact is that the averments in the founding affidavit amount to little other than a series of unrelated and jumbled "facts", not tying up to any provisions of PAIA and which make no sense.

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[35] See section 8(1)(a)

[36] See section 8(1)(b)

[37] *Roberts v Construction Co Ltd v Dominion Earth Works* 1958 (3) SA 255 (A) at 263A-B

36. To a person unfamiliar with OUTA's long – standing adversarial disposition towards SANRAL and its particular gripe about road tolls, the affidavit is completely incomprehensible. Orders should not be granted on the basis of such vague and incoherent averments.

37. It is, with the greatest of respect, difficult for a busy motion court to interrogate these aspects of a claim under PAIA, which is a specialised area of the law. If the Court was assured that a proper case had been made out, the Court would (rightfully) take this at face value. However, in this case, as in many others where there has simply been no justiciable basis for the order, the affidavit does not make out a case for the relief sought.

38. If anything, it raises questions as to why an application was not more appropriately made under section 50 of PAIA, given the nature of the records concerned[38]. The Court ought not to have been left to surmise the case sought to be made out by OUTA.

Necessary and Material Non - Joinder

39. There is a further basis for rescinding the order on the basis of lack of justiciability. This is the fact that a party with an obvious interest in the outcome of the default order was not joined and had no knowledge of the existence of the application and

[38] Section 50 of PAIA deals with requests for records of private bodies

was not served with any notice of set-down. This is a classic instance of a necessary non – joinder (and not merely one of convenience). As the SCA stated in *Amalgamated Engineering:*

> *"Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests"*[39]*.*

40. This Court has the benefit of knowledge of TRAC's attitude to the application and the default order, in the form of correspondence addressed by TRAC's attorneys to OUTA's attorneys (which OUTA does not even bother to canvass in its heads of argument).

41. TRAC's attorneys unequivocally assert the fundamental interest held by TRAC in the application and the default order[40]. There cannot be any argument about the fact that TRAC is an interested party who ought to be have been cited in the PAIA application in the first place.

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[39] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659.

[40] CL 014 – 39, para 4: "*It is extremely concerning to our client that the effect of the Court Order would be the disclosure of documents specifically relating to and / or belonging solely to our client"*; see also para 5: "*…our client has a clear and direct substantial interest in the matter, and the effect of the Court Order… Your client was clearly aware of such direct and substantial interest, given that your client has delivered similar applications against SANRAL, relating to the seeking of information in respect of other concessionaires who we are aware have raised the direct and substantial interest of such concessionaires in the various applications".*

42. In this regard the Constitutional Court recently held (in comparable circumstances where parties not given an audience by the Court sought the rescission of the order which affected them:

> *"I have sought to demonstrate that here there was a risk of the applicants' rights being prejudicially affected by an order issued in the main application. This and the authority of Amalgamated Engineering notwithstanding, the High Court determined the main application without any regard to possible prejudice to the applicants' rights. On the contrary, it held that they were not entitled to be given audience as the company – in withdrawing its opposition – had spoken on their behalf. On the authority of Amalgamated Engineering and Cape Bar Council, the High Court could not validly grant an order in the main application without the applicants having been joined or ensuring that they would not be prejudiced. It was incumbent upon that Court mero motu to insist on their joinder.*
>
> *…*
>
> *It must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity.*
>
> *…*
>
> *The irregularity committed by the High Court satisfies the requirement of an error in rule 42(1)(a). The second and third respondents – with the support of the company – pushed for the granting of the order and the High Court granted it. In the circumstances, the order was erroneously sought and erroneously granted as envisaged in rule 42(1)(a)".*[41]

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[41] *Morudi and Others v NC Housing Services and Development Co Limited and Others* (CCT270/17) [2018] ZACC 32; 2019 (2) BCLR 261 (CC) at [31] to [34], emphasis added

43. The Constitutional Court has therefore confirmed that the material and necessary non – joinder constitutes an irregularity for the purposes of Rule 42(1)(a). It was incumbent on the Court hearing the application for a default order on an unopposed basis to mero motu consider the issue of non-joinder. This irregularity (like the lack of any case being made out in the founding affidavit) is insurmountable.

Irregularities in relation to the incorrect submissions in the Practice Note and the order of 1 November 2021

44. In addition to not comprehensibly making out any case for the relief sought, and the failure to join TRAC, it is clear from the practice note filed by the counsel for OUTA that the Court was informed that Mr Macozoma responded to the PAIA request directed by OUTA to SANRAL and that *he refused to comply with the request"*[42].

45. That submission was made in the context of analysis of section 25 of PAIA. The counsel stated unequivocally in the practice note that "in terms of the aforementioned letter, the Second Respondent, in effect, refused to comply with the request"[43].

[42] CL 1-5

[43] CL 1-5 , para 8.11

46. This contention was incorrect and directly at odds with what was contained in the founding affidavit[44].

47. The irregularity is patent: the Court heard and was guided by a submission which was incorrect. The Court did not (and OUTA does not allege that it did) query the irreconcilable positions in the affidavit and the submission. The submission was obviously not corrected. Had the Court been made aware of the fact this submission was incorrect, it might not have granted the default order because, obviously, circumstances are very different when:

    47.1. A body receives a request and declines to comply without the provisions of any reasons; and

    47.2. A body simply fails to respond to the request within a 30 day period, which is then in terms of PAIA considered to be a deemed refusal of the request.

48. The second (correct) scenario would have suggested to the Court that there may be reasons why a body failed to respond to the request in its totality. The first (incorrect) scenario suggests that the request has been received, considered and rejected, and that the recipient of the request did not even as much as bother to explain its reasons for refusal. This places the application in an entirely different light and is sufficient basis and irregularity to rescind under Uniform Rule 42(1)(a).

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[44] CL 005-8, para [29]

49. In addition, there is a further irregularity, this being the "order" dated 1 November 2021, in which it is recorded that "*Having Heard Counsel(s) for the party(ies) and having read the documents filed of record it is ordered that JUDGMENT RESERVED" (sic)*[45]. The order bears a signature above the recordal "Registrar" and states that the matter was called before Van Der Schyff J on 1 November 2021, and in circumstances where the Notice of Set Down stated that the matter was to be called and heard some four days later, on 5 November 2021[46].

50. The attorneys listed as responsible for this order are OUTA's attorneys, Jennings Inc, as is apparent ex facie the order. When an explanation was sought as to the circumstances in which this order came into being[47], Jennings Inc responded by stating:

> "*As I did not upload the Court order and it is not endorsed, I cannot comment on the reason why it was uploaded and the origin thereof. I suggest that you make contact with the court / registrar that uploaded the order to find out regarding the circumstances and clarification".*[48]

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[45] CL 003-1

[46] CL 003-8

[47] CL 014 – 29, para [49.8]

[48] CL 014 - 94

51. SANRAL has no reason to seek to go behind Ms Jennings' affidavit and her explanation[49], but the fact is that Courts are not in the habit of issuing orders when they are not moved by a party to do so. If the Court of its own accord issued an order reserving judgment and recording that it had "heard counsel" and "considered the papers" before the matter was set down to be heard on 5 November 2021, then that irregularity is in and of itself sufficient to grant rescission under Rule 42(1)(a).

52. The irregularity is significant and brings into question the conduct of the Court officials and the confidence of the public in the Court process. If it is so that the registrar issued this order without any prompting on the part of OUTA or its attorneys, then the Court officials acted irregularly and outside of the scope of their duties. A registrar is not empowered to issue orders in absence of a Judge presiding over the matter.

53. If Ms Jennings is correct, and the registrar issued the order without the supervision of a judge (despite the order recording that the matter served before Van Der Schyff J on 1 November 2021) then that irregularity taints all subsequent proceedings relating to the issue of the default order. Justice must be seen to be done and an order issued in these circumstances does not inspire any confidence in justice

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[49] It is to be noted that the same courtesy is not afforded by OUTA to Ms Linda: the affidavits and the heads of argument are peppered with allegations that the contents of her affidavit are "manufactured" (CL 020-12, para 26), that the "*falsehood of [her claim] is clear*" (CL 020-6, para 11) and that her explanation of the confusion is a "farfetched afterthought intended to do nothing more but delay the disclosure of the requested records" (CL 020-6, para 9). These contentions (in heads of argument) are induce a sense of shock. They accuse the deponent (who holds legal qualifications and is an officer of the Court) of lying under oath without laying any factual basis for such a statement. It is trite that where a party intends to "go behind" an affidavit, it is required to lay the factual basis for so doing. It is submitted that the contents of the heads of argument are in this regard inappropriate and unprofessional.

being done by the Court. If the Court officials act on the frolic of their own in issuing orders, the irregularity is obvious.

54. Of course, if the application *in fact* served before the judge on 1 November and counsel was heard on that date; while the Notice of Set Down indicated that the matter would be called and heard on a subsequent date, *caedit questio* – the irregularity offends the very principle and purpose of serving the notice of set down, strikes at the heart of the *audi* rule and recission should in those circumstances follow.

55. In either instance, the irregularity and the lack of any explanation for it is insurmountable. Ms Jennings' contention that SANRAL was obliged to investigate the provenance of this order (which, by her own admission, Ms Jennings uploaded to Caselines, being is the electronic version of the Court file) betrays the lack of appreciation that OUTA's attorneys were complicit in the irregularity and therefore bear the onus of explaining it, if they wish to defend the default order which followed in this irregular process.

III: RESCISSION UNDER THE COMMON LAW – GOOD CAUSE

56. Rescission under the common law is sought and becomes necessary to interrogate only in the event that rescission under Rule 42(1)(a) is for some reason refused. It is submitted that a proper case is made out under Rule 42(1)(a) and that this should

be the end of this Court's inquiry, with the rescission application being granted with costs.

57. However, for the sake of completeness, the requirements under the common law are canvassed in order to demonstrate that these, too, are satisfied.

58. In order to rescind a judgment (or order) made by default (in absence of an interested party) an applicant must demonstrate good (or sufficient) cause.

59. The Constitutional Court has explained in *Zuma*[50] that the test is two – pronged:

> *"The requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind".*

Explanation for default

60. In respect of the first requirement, the explanation provided by SANRAL and Mr Macozoma for being in default is the following:

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[50] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) at [71]

60.1. The original request for information under PAIA was sent to a variety of dysfunctional email addresses, as well as to Mr Macozoma's email address[51]. Mr Macozoma did not receive the request – had he received it, he would have responded to it, as he responded to the same request concerning the Bakwena concessionaire where the information requested was identical;[52]

60.2. When the application seeking to compel the disclosure of the information was served on one Ms Letsholo on 22 February 2021, Ms Letsholo furnished the head of legal (Ms Linda) with a copy of the papers. However, the application (concerning TRAC's information) was served under case number 7954/2021 on the same day as the application concerning Bakwena's information, under case number 7955/2021[53]. This (the similarity of case numbers and the similarity of relief) caused confusion in the mind of the deponent (Ms Linda).

60.3. Although Ms Linda instructed attorneys to deal with the application, that instruction was provided in respect of the matter concerning Bakwena's records, and not in respect of this application[54].

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[51] CL 014 – 24 para 39.5. The fact that the other email addresses to which the request was sent were not functional is not challenged by OUTA – see 016-15 paras 37 and 38

[52] CL 014 – 24 para 39.4. There is no sensible response to this provided in the replying affidavit. OUTA's deponent simply ignores the position that contends that Mr Macozoma "could have responded" as he did in respect of Bakwena. There appears to be a lack of appreciation that he did not respond as he had in respect of Bakwena only because the request was not received.

[53] CL 014 – 25, para 39.7

[54] CL 014 – 25, para 39.8

61. OUTA has no basis on which to gainsay this *bona fide* human error and its general denial in this regard[55] is without any basis. Later OUTA appears to accept the error when it states "*it explains the failure to respond to the application within a reasonable time being unintentional, it certainly does not explain the lack of response to the notice of set down which would have further highlighted this administrative error but inspired no reaction by SANRAL".*

62. It seems to be accepted, therefore, that the service of the application was mistakenly confused with the service of the other application. Ms Linda thought that attorneys were instructed to defend the application, but in fact there were two applications and the second – the present application concerning TRAC's information – was in consequence not defended. As indicated, this appears to have been accepted as "human error".

63. In respect of the service of the notice of set down, Ms Linda explains that Ms Gantse Mothobi who accepted the service of the notice of set-down was an intern who sat at SANRAL's front desk. Ms Linda then states that she has no knowledge what Ms Mothobi did with the notice of set down, but that it did not come to Ms Linda's knowledge[56].

64. In all the circumstances and despite all of OUTA's indignation, the reason for the default of appearance was not that SANRAL wantonly ignored the existence of the

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[55] CL 016 – 17 para 41

[56] CL 019 – 8 para 18

application – it is the result of a genuine human error, a mistake which is easy to make and one which ought to be taken into account by the Court.

65. There is absolutely nothing to suggest that Ms Linda was not genuine and truthful when deposing to these facts on oath and, as pointed out above[57] any suggestion to the contrary is without any factual basis and therefore completely without merit.

66. The contentions – in both the affidavit[58] and the heads of argument - that SANRAL ought to have applied for a postponement are nonsensical, as they totally ignore the fact that SANRAL's directing minds were not aware of the existence of the application or the set-down. OUTA's deponent insists that "*if circumstances did not allow SANRAL to oppose the application at that stage as it expects the Court to believe…"* where that is not the version presented by SANRAL at all. It does not state that circumstances did not allow it to oppose or that that is what it wants the Court to believe – it says that it did not know of the application; or the set-down.

67. This attempt to place words into the mouth of the deponent and entirely ignore the facts contained in SANRAL's affidavit is, again, inappropriate but also demonstrates that SANRAL's version is so baseless that it can comfortably be rejected by the Court on application of *Plascon Evans.*

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[57] Supra fn 49

[58] CL 016 – 9, para 19

68. The explanation for default is reasonable and satisfactory. OUTA's repeated contentions that SANRAL was aware of the pending application and "chose to ignore it" have no basis in fact. Ms Linda for SANRAL has frankly and honestly explained the cause of the confusion and that the confusion is not so inexplicable considering the circumstances of her daily duties and the very high volumes she deals with[59].

69. This cannot be gainsaid by OUTA on any sensible basis. It is submitted therefore that the first requirement (reasonable and satisfactory explanation for default) is satisfied.

Bona fide defence with prima facie prospects of success

70. SANRAL explains in some detail the defences which it wishes to raise in the PAIA application. In the first instance, SANRAL demonstrated its bona fides as long ago as 8 December 2021, when it offered OUTA the option of simply responding to the PAIA request (as it has done in the Baqwena and N3TC cases)[60]. OUTA refused this reasonable proposal. This demonstrates that it (OUTA) is the party disinterested in proper and transparent engagement, rather than SANRAL.

71. SANRAL's *bona fides* are also illustrated by its consistency in approach: this is one of the three matters relating to concessionaires and their affairs. The information

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[59] CL 019 – 8, para 17

[60] CL 014-11 para 12

sought in each instance is not the record of SANRAL, but rather the record belonging to those concessionaires. SANRAL wishes to have all three applications ventilated on their merits, which is appropriate in the circumstances[61].

72. SANRAL has explained that, given the opportunity to defend the PAIA application, it intends to raise the following matters in its defence:

72.1. First, the request for information relates to documents which contain financial, commercial and technical information pertaining to TRAC and information supplied to SANRAL in confidence, as contemplated in section 36 of PAIA. The disclosure of such documents would result in prejudice to TRAC. OUTA contends that neither SANRAL nor TRAC have a basis to resist the information sought because of the "importance of transparency and accountability". OUTA's thesis appears to be that these considerations somehow trump the need to protect TRAC's interests in terms of section 36(b) and (c) of PAIA. OUTA's thesis is squarely contrary to the language of the relevant section and must on that basis (and approach to interpretation as set out in *Endumeni*) be rejected. A bona fide defence with very good prospects of success exists in terms of section 36.

72.2. Second, SANRAL asserts that disclosure of the information sought would amount to a breach of confidence as contemplated in section 37 of PAIA.

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[61] CL 019-24 para 67, CL 019-12, para 32

OUTA does not explicitly and intelligibly challenge this point and this, too, potentially constitutes a complete defence to OUTA's claim[62];

72.3. Third, SANRAL is protected by the provisions of section 42 of PAIA[63]. It asserts that the disclosure of requested information might potentially prejudice SANRAL in terms of section 42(3)(b) and (c). OUTA does not even bother to engage with this bona fide defence[64].

72.4. There is evidence of the fact that OUTA previously sought the information from TRAC itself[65]. This request was made on the basis of TRAC being a private body for the purposes of PAIA. The request was subsequently abandoned and the information was then sought from SANRAL on the basis that SANRAL as a "public body". This volte face on the part of OUTA is not explained. Either OUTA considers the record to pertain to a private or a public body – it cannot straddle two proverbial horses simultaneously, given the provisions of Section 8 of PAIA;

72.5. Finally, section 47(2) provides a complete defence to the claim and OUTA's contentions that TRAC should be precluded from making its submissions is nothing short of irrational, especially given its consents to intervention in the N3TC and Bakwena cases.

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[62] CL 014-31 para 57

[63] CL 014-32 para 58

[64] With the consequence that the averment is deemed admitted: see 016-26 and 016 – 27 where the response to paragraph 58 is avoided / neglected.

[65] CL 014- 31, para 54

73. Since the defences raised by SANRAL concern the proper interpretation of PAIA, the defences cannot be said to be without merit and without prospects of success[66]. They must be properly assessed by a Court, on their merits.

74. In all the circumstances, the default order stands to be rescinded. Costs of the rescission application were sought against OUTA only in the event of opposition[67]. It was not reasonable, in all the circumstances, for OUTA to oppose the rescission, since it was informed of the basis of the defences to be raised (and the inherent problems with the judgment) first in the correspondence of 8 December 2021 and thereafter.

75. SANRAL accordingly seeks the rescission of the default order, with costs.

IV: CONTEMPT APPLICATION

76. The test for contempt of Court is as set out in *Fakie:*

> *"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith). These requirements – that the refusal to obey should be both wilful and mala fide, and*

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[66] *Paulsen And Another V Slip Knot Investments* 777 (Pty) Ltd 2015 (3) SA 479 (CC) at [24]

[67] CL 014-2

that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent"[68].

77. As is apparent from the chronology set out above, the present application for contempt was launched on 24 January 2022, after the attorneys for OUTA knew (or at the very least ought to have appreciated) the following facts:

77.1. SANRAL was represented by attorneys, who came on record on 29 November 2021[69] and was in the circumstances from that point acting on legal advice provided by that reputable firm of attorneys;

77.2. SANRAL's attorneys had written to the attorneys of OUTA as early as 8 December 2021 and in that correspondence disclosed a number of plausible defences to the application and at least one irregularity relating to the granting of the default order[70];

77.3. The letter also recorded the following:

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[68] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at [9] and [10]

[69] CL 013 - 7

[70] CL 014-36

> *"For avoidance of any doubt, we record that our client does not intend to avoid the Order and its conduct is neither wilful nor mala fide, our client only seeks to be given the opportunity to respond to the request for information and conduct the matter properly going forward".*

78. Although some slight delays were experienced, SANRAL promptly delivered its application for rescission[71]. This notwithstanding, OUTA persists with its application for contempt.

79. The application ambitiously seeks the committal of SANRAL's erstwhile CEO, despite the fact that it is common cause that his term of office ended even prior to the launching of the contempt application. In this regard, OUTA glibly states that "*it is the position as CEO which finds relevance in these proceedings"*[72]*.* It is wholly incomprehensible how OUTA proposes to hold a person who is no longer the CEO in contempt of Court, in an application for contempt which succeeded the erstwhile CEO's termination of office.

80. The concession that the application concerns "the office of the CEO" means that the entire application (and the citation of Mr Macozoma - who is repeatedly referred

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[71] The practical reality of the intervening December holidays being taken into account

[72] CL 017-14, para 29

to as "Macomoza"[73]) is premised on a misconception and an erroneous premise. For this reason alone the application is still born and must be dismissed.

81. In any event, our Courts have repeatedly explained that applications for committal (even those subject to suspension) are draconian and ought to be made as a matter of last resort only:

> *"Given the extraordinary nature of contempt proceedings, and due to the serious consequences of incarceration, our Courts have held that committal for contempt for non-compliance with Court orders should only be engaged as a matter of last resort. This position is consistent with the position taken on the issue by Lord Omrod, in Ansah v Ansah:*
>
> > *"Such a breach or breaches of an injunction in the circumstances of such a case as this do not justify the making of a committal order, suspended or otherwise. Breach of such an order is, perhaps unfortunately, called contempt of court, the conventional remedy for which is a summons for committal. But the real purpose of bringing the matter back to the court, in most cases, is not so much to punish the disobedience, as to secure compliance with the order in the future. It will often be wiser to bring the matter before the court again for further direction before applying for committal order. Committal orders are remedies of last resort."*[74]

82. The application for contempt, inasmuch as it engages the prospect of committal, is therefore entirely inappropriate and ill-advised and can only have been made *in terrorem.*

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[73] CL 013-6 para 2.4. One would expect an application for committal of an individual to gaol to, at the very least, properly identify that individual

[74] *Moyo v Old Mutual and Others* 2022-JOL-53386-GJ (16 May 2022) at [118] footnotes omitted

83. More importantly, the application for contempt could not have been made in good faith and for a proper purpose in circumstances where the attorney for OUTA knew (and was advised) that SANRAL would not give effect to the order because it objected to producing the documents in absence of TRAC's submission and had raised various issues of irregularities with the granting of the default order.

84. It was in this context that Ms Linda stated on affidavit that no qualified attorney could genuinely hold the view that SANRAL was acting in wanton disregard of the order and in a mala fide fashion[75]. Neither Ms Jennings nor OUTA could genuinely believe that SANRAL was acting *mala fide* (when this was explicitly denied in correspondence) and that a reputable firm of attorneys was advising it to advance the position that a rescission application would be pursued, although there was no genuine intention to pursue it, and that all of this was a scheme for the purposes of "delay".

85. Ms Jennings' contention that "she could genuinely hold the view" that the rescission application would not be "forthcoming"[76] is not an answer to the question whether OUTA could be said to have genuinely held the view that SANRAL was acting *mala fide* at the time when the application for contempt was launched. The simple answer must be no because for that to be true OUTA would have to show that

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[75] CL 014-15, para 21 and 24

[76] CL 017-13, para 27

SANRAL was (on advice of its attorneys) playing games and advancing fanciful positions without any intention to follow through, solely with the intention of delay.

86. Such a conspiracy is not only improbable, it is also not supported by the common cause facts, including the receipt of the letter of 8 December 2021. The contention regarding delay is plainly incompatible with reasonable proposals set out in that correspondence.

87. The fact that Ms Jennings considers SANRAL to have missed "deadlines" is irrelevant (since the "deadline" was set by Ms Jennings in any event in circumstances where Ms Jennings had no entitlement to set any deadlines[77]).

88. In *Fakie* the SCA held:

> *"To sum up:*
>
> 1. *The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*
>
> 2. *The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.*

[77] CL 014-13, para 17 – this allegation is not denied – see CL 017 – 10

3. *In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*

4. *But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.*

5. *A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."*[78]

89. The dictum in *Fakie* was endorsed in *Zuma (Contempt)*[79] although in that instance with the emphasis on the matter concerning the evidentiary burden. It appears that the better view must be that the wilfulness and mala fides must be proved beyond reasonable doubt or that, at the very least, the applicant for contempt must genuinely hold the view that defiance of the order is wilful and mala fide.

90. Whether the strict approach applied by Cameron J in *Fakie* or the more relaxed approach in *Zuma (contempt)* is adopted, it is impossible to come to the conclusion, on the present facts, that OUTA held a genuine belief that wilfulness and mala fides characterised SANRAL's actions.

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[78] Fakie supra, at [42] , emphasis added.

[79] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC) at [37]

91. In the event, the application is not genuine, it is clearly pursued for an ulterior motive (which is to terrorise SANRAL and its erstwhile CEO and embarrass them) and for that reason constitutes an abuse of process.

92. Astonishingly, OUTA (or its attorney) contends the application is not an abuse because SANRAL has elected not to pursue a punitive costs order against OUTA[80]. This is yet another non – sequitur. Whether or not punitive costs are sought cannot characterise or determine whether an application is abusive.

93. SANRAL has elected not to pursue such an order because it does not wish to descend into the unmeritorious argument to the effect that SANRAL attempting to "silence" OUTA with a significant costs order. This too speaks to SANRAL's good faith and reasonable approach – but it should not be mistaken by OUTA to be a concession that the contempt application ever had any merit. It was abortive from the start.

Adv A Milovanovic-Bitter

Counsel for SANRAL and Mr Macozoma N.O.
Chambers, Sandton
8 June 2022

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[80] CL 017-12 para 25: "*Further, this application is not an abuse of process and the respondents in this paragraph state that the application should be dismissed with costs, yet in the conclusion of its answering affidavit, they state that the applicants do not seek a punitive costs order".*