IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 7955/21

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC	**Applicant**
and	
BAKWENA PLATINUM CORRIDOR CONCESSIONAIRE (PTY) LTD	**Respondent**

In re: the *In Limine* application between:

BAKWENA PLATINUM CORRIDOR CONCESSIONAIRE (PTY) LTD	**Applicant**
and	
ORGANISATION UNDOING TAX ABUSE NPC	**First Respondent**
SOUTH AFRICAN NATIONAL ROAD AGENCY SOC LIMITED	**Second Respondent**
THE MINISTER OF TRANSPORT N.O.	**Third Respondent**
SKHUMBUZO MACOZOMA N.O. (In his capacity as Information Officer)	**Fourth Respondent**

Brought in re: the Main PAIA Application between:

ORGANISATION UNDOING TAX ABUSE NPC	**Applicant**
and	
SOUTH AFRICAN NATIONAL ROAD AGENCY SOC LIMITED	**First Respondent**
THE MINISTER OF TRANSPORT N.O.	**Second Respondent**
SKHUMBUZO MACOZOMA N.O. (In his capacity as Information Officer)	**Third Respondent**

BAKWENA PLATINUM CORRIDOR CONCESSIONAIRE (PTY) LTD **Fourth Respondent**

FOUNDING AFFIDAVIT

I, the undersigned,

ANDRI JENNINGS

do hereby make oath and say:

1. I am an adult female attorney of this Honourable Court and director at Jennings Incorporated Attorneys with offices at 149 Anderson Street, Brooklyn, Pretoria.

2. I am the applicant's attorney of record in this application and have acted in this capacity throughout since the applicant first launched its main application for access to information in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA) under the above case number in February 2021 (hereinafter referred to as "the main application").

3. As a result of my involvement, the facts contained herein fall within my personal knowledge and are to the best of my belief true and correct.

4. Submissions of a legal nature are made with reference to the available commentaries and authorities applicable to the relevant Rules of Court referred to herein. Where I underline parts of quoted texts or correspondences for emphasis, such emphases are my own.

PARTIES:

5. The applicant is the **ORGANISATION AGAINST TAX ABUSE NPC**, a non-profit company duly incorporated and registered in accordance with the company laws of South Africa and registered address at Unit 4, Boskruin Village Office Park, Cnr President Fouche and Hawken Road, Bromhof, Gauteng.

6. The respondent is **BAKWENA PLATINUM CORRIDOR CONCESSIONAIRE (PTY) LTD**, a private company duly incorporated and registered in accordance with the company laws of South Africa and principal place of business at Southdowns Ridge Office Park, 2nd Floor Unit 1A, Cnr John Vorster and Nellmapius Drive, Irene, Centurion.

7. For the sake of convenience, I shall refer to the applicant interchangeably as "OUTA" and to the respondent as "Bakwena". The other major role player to whom I shall refer to herein below (but against whom no relief is sought in this interlocutory application) is the first respondent in the main application, the South African National Road Agency SOC Limited ("SANRAL").

PURPOSE OF THE APPLICATION:

8. This is an application in terms of Rule 30 and 30A of the Uniform Rules of Court to set aside Bakwena's "*In Limine Application*" purporting to be a Rule 6(5)(d)(iii) notice and served on 1 July 2022, together with the enrolment thereof on 29 August 2022 for hearing on the unopposed roll. I shall refer to this

application as "the Rule 6(5)(d)(iii) application". The Rule 6(5)(d)(iii) application as well as the subsequent enrolment thereof on the unopposed roll constitute an irregular step.

9. Bakwena has also failed to comply with a court order granted by the Honourable Potterill J on 26 May 2022 in this Honourable Court under the above case number in terms whereof it (Bakwena) was ordered to file an answering affidavit in the main application within 20 days of that order. It has not been done. A copy of the order is attached as annexure **"FA1"** and I shall refer to it herein after as "the 26 May Court Order". Bakwena is accordingly also in non-compliance of a court order as contemplated by Rule 30A.

10. It will be shown below that Bakwena has, by following a procedure for which the Rules of Court make no provision and is contrary to what is provided for in the 26 May Court Order, caused a predicament which led to a procedural deadlock and a delay in the proceedings. This happened in circumstances where the deadlock and delay would not have occurred if the Rules of Court and the May 26 Court Order had been complied with.

11. Rule 30 deals with **Irregular Proceedings** and reads:

"(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.

(2) *An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —*

(a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;

(b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) *If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.*

(4) *Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order."*

12. Rule 30A is titled with **Non-compliance with Rules and Court Orders** and reads:

"(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claim or defence be struck out."

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."

FACTS LEADING TO THE APPLICATION:

13. The main application was launched in February 2021 by OUTA under the above case number, wherein OUTA sought certain information from SANRAL pertaining to concession contracts entered into with Bakwena (as Concessionaire) and relates to the upgrade of certain national roads. I do not attach any annexures or extracts from the main application hereto, as I do not believe it bears relevance to the present interlocutory application. However, the papers in the main application have been filed under the same case number on Caselines and the papers will be made available to the Honourable Court if so required.

14. In June 2021, Bakwena filed an application to intervene as fourth respondent in the main application. This application was not opposed and on 26 May 2022 the Honourable Potterill J granted the order attached as **"FA1"** in terms whereof Bakwena was granted leave to intervene as fourth respondent in the main application. Notably, prayers 2 and 3 of the order read:

"2. *The Applicant is granted leave to file its Notice of Intention to Oppose the Main Application within 5 (five) days of the granting of this order in the application for leave to intervene.*

3. *The Applicant is granted leave to file its Answering Affidavit in the main application within 20 days of the granting of this order in the application for leave to intervene."*

15. Although out of time, Bakwena filed a notice of intention to oppose the main application in terms of prayer 2 of the 26 May Court Order on 6 June 2022, but then failed to file an answering affidavit within the 20 days as directed by prayer 3 of the order.

16. Instead, on 1 July 2022, Bakwena served an interlocutory application termed "*Notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court*". Despite the heading to the application purporting to be a mere notice in terms of Rule 6(5)(d)(iii), it is a new application brought by way of Notice of Motion supported by a founding affidavit, the latter consisting of 74 pages – the affidavit itself being 28 pages in length plus 46 pages in annexures containing *inter alia* copies of press releases and extracts from governmental reports. The application (inclusive of the Notice of Motion) is 79 pages in length.

17. The founding affidavit filed by Bakwena in support of its Rule 6(5)(d)(iii) application is a "founding affidavit" in name only but is in fact a comprehensive answering affidavit to OUTA's founding affidavit filed in the main application which deals with the matter (including the merits) in detail. The filing of a new

application supported by a founding affidavit under the guise of a *"Rule 6(5)(d)(iii) notice"* will inappropriately give Bakwena an opportunity to file a replying affidavit, which it would not have been entitled to do as a respondent in the main application if the correct procedure had been followed. Affording such an opportunity to Bakwena, would prejudice OUTA as applicant in the main application.

18. Rule 6(5)(d)(iii) states:

> *"(d) Any person opposing the grant of an order sought in the notice of motion must –*
>
> *(iii) if such person intends to raise any question of law only, such person must deliver notice of intention to do so, within the time stated in the preceding paragraph, setting forth such question."*

19. The founding affidavit deposed to by Bakwena in the Rule 6(5)(d)(iii) application clearly deals with aspects pertaining to the merits of the main application and far exceeds the boundaries of what can be regarded as *"a question of law only".* It is further submitted that a 79-page application makes a mockery of the "*notice of intention to raise a question of law only"* as envisaged by the Rule.

20. To further illustrate the gross violation of the provisions of Rule 6(5)(d)(iii) and the abuse of the process by Bakwena, I list the headings contained in Bakwena's founding affidavit in the Rule 6(5)(d)(iii) application. Bakwena deals with each of these headings over several pages of its purported founding affidavit:

(i) Introduction and Purpose

(ii) The Relevant Background to the Main Application

(iii) Methods of Funding/Financing Government Infrastructure Projects

(iv) The Basis upon which the Relief is Sought and the BRICS Loan

(v) Abuse of the Process

21. Under the last heading, for example, there are 8 paragraphs in the affidavit dedicated to accusing OUTA of allegedly abusing the process (paragraphs 92 – 99 thereof), where the allegations contained therein are completely unrelated to questions of law only. It is further evident from only looking at the paragraph headings that the Rule 6(5)(d)(iii) application is a far cry from a notice that is supposed to raise a point of law only.

22. My office filed a notice of intention to oppose the Rule 6(5)(d)(iii) application on behalf of OUTA on 15 July 2015, but thereafter upon further perusal of the application and consultation with counsel, realised that the procedure followed by Bakwena is irregular to such an extend that any further steps taken would only amplify the irregularity and cause further confusion. OUTA has accordingly taken no further steps in the proceedings.

23. I have, however, since the launching of the application and prior to the filing of OUTA's Rule 30 and 30A Notice on 31 August 2022, repeatedly attempted to resolve the deadlock through correspondence and without the need for a formal

application that will further increase costs and delay the main application. I attach hereto as annexures **"FA2(a) – (g)"** the correspondences that were exchanged between my offices, Messrs. Fasken (on behalf of Bakwena) and the office of the Honourable Deputy Judge President.

24. The first letter dated 25 July 2022 (see annexure **"FA2(a)"**) relates to a request from SANRAL where an indulgence was sought by Werksmans Attorneys (on behalf of SANRAL) for an extension of the time period within which SANRAL had to file its answering affidavit in the main application. SANRAL requested such an extension to 19 August 2022 but despite the request and the fact that the answering affidavit would already have been substantially out of time on this date, SANRAL did not file its answering affidavit in the main application. My offices proceeded to serve an application to compel SANRAL to do so on 1 September 2022. At the time of deposing to this affidavit, SANRAL has not opposed the application and the application to compel has been set down for hearing on 2 December 2022.

25. Bakwena's unyielding attitude and unilateral and irregular decision to "suspend" the working of Rule 6(5)(d) as well as the 26 May Court Order, can best be gleaned from the response my offices received from Messrs. Fasken on 2 August 2022 (attached as **"FA2(b)"**), specifically paragraphs 2, 5, 12, 13 and 15 thereof that read:

> *"2. It is our view that any discussions in respect of the agreeing of time periods for the filing of Answering Affidavits in respect of merits in the Main Application, are entirely premature at this stage.*

.....

5. *It is trite that Rule 6(5)(d)(iii) envisages the raising of a legal point, where the party raising the legal point has reserved the right to file an answering affidavit in the event that the point of law fails. Bakwena, has done so in this particular instance, and Bakwena would only be required to file an answering affidavit in the Main Application in due course, and if the point of law is not successful.*

.....

12. *Simply stated, the entire basis for the continuation of the Main Application is dependent on the outcome of our client's in limine Application. Consequently, it would not be appropriate or legally and procedurally correct that the time periods for the Main Application should continue to run, requiring SANRAL to deliver answering papers, until such time as the in limine application has been finally determined.*

13. *The time periods for the filing of any further affidavits in the Main Application, whether it be in respect of OUTA, SANRAL or Bakwena, should be suspended until such time as the in limine Application has been finally determined.*

.....

15. *Under these circumstances, and although the filing of our client's in limine Application automatically suspends the delivery of further affidavits in the Main Application, we propose, in order to avoid any confusion, that agreement be reached between the parties until such time as Bakwena's in limine Application has been finally determined, the filing of affidavits in the Main Application is suspended."*

26. The position described as "trite" by Messrs. Fasken in paragraph 5 of the letter quoted above, is in fact clearly indicated by the authorities *not* to be the position.

A party raising a legal point in terms of Rule 6(5)(d)(iii) does not have an automatic right to later file an answering affidavit if it chooses only to raise a point of law in terms of Rule 6(5)(d)(iii), and no right exists for a party to "reserve" its right to file an answering affidavit in the event that the point of law fails (as contended for by Bakwena). Full legal argument will be advanced on behalf of OUTA on this point at the hearing of the matter, but I point out at this juncture already that the assertion of legal positions that are without foundation and presenting it as *"trite"* or *"automatic"* in correspondence contributed to the *impasse* between the parties.

27. I further respectfully submit that Bakwena cannot unilaterally decide that its Rule 6(5)(d)(iii) application automatically suspends the time periods provided for in the 26 May Court Order as well as the time periods contained in Rule 6(5)(d) in circumstances where the Rules of Court do not make provision for such automatic suspension. This is the case, especially in circumstances where SANRAL is also still to file an answering affidavit. Bakwena is in no position to dictate who should file affidavits in the main application and when – that is what the Rules of Court are for. It is submitted that only a court can extend, condone, or suspend time periods for the filing of affidavits.

28. Moreover, if OUTA is expected to file an answering affidavit in the Rule 6(5)(d)(iii) application in answer to Bakwena's extensive application (which, as indicated above contains far more than *"a question of law only"* and in actual fact is a comprehensive answer to OUTA's founding affidavit in the main application), before SANRAL files an answering affidavit in the main

application, SANRAL will have the undue benefit of first obtaining's OUTA's reply to Bakwena's allegations before even having to file its answering affidavit. The effect will be the same as for an applicant having to file a replying affidavit to the answering affidavit of one respondent in an application whilst still waiting for another respondent in the same application to file its answering affidavit. This too, will be prejudicial to OUTA.

29. My offices replied on 5 August 2022 with the letter attached as annexure **"FA2(c)"** wherein OUTA's position is set out in paragraphs 3 – 8 thereof:

> *"3. We are of the view that the manner in which your client's application in terms of Rule 6(5)(d)(iii) was brought is contrary to what the Rule envisages and amounts to an abuse of the process. The intention of the Rule is not to have an in limine point heard as a completely separate and new application wherein our client is expected to file an answering affidavit and your client is then given an opportunity to reply. According to our interpretation of the authorities, a Rule 6(5)(d)(iii) notice wherein a point in limine is raised takes the place of an answering affidavit.*
>
> *4. If only a Rule 6(5)(d)(iii) notice is filed, all allegations in our client's founding affidavit must be taken as established facts by the court. The allegations contained in our client's founding affidavit in the main application therefore stand uncontested at this time. The authorities are clear that should your client have wished to answer to the merits as well, it should have done so together with any in limine points it raised.*

5. *Your client does not obtain an automatic right to later file an answering affidavit on the merits where it opted only to raise an in limine point and not answer to the merits within the prescribed time periods. Moreover, in terms of the court order that was granted by the Honourable Potterill J on 26 May 2022, your client was ordered to file its answering affidavit to the main application within 20 days. Your client therefore has no further entitlement to later file an answering affidavit as contended for in your letter.*

6. *SANRAL, as a respondent, is also not excused from filing its answering affidavit in accordance with the prescribed time periods merely because your client is raising a purported in limine point.*

7. *In the premises, we disagree with your contention that the filing of your client's Rule 6(5)(d)(iii) application suspends the delivery of further affidavits, and further do not agree that the main application should be held in abeyance pending the final determination of your client's Rule 6(5)(d)(iii) application.*

8. *It appears in any event that the affidavit filed in support of your client's Rule 6(5)(d)(iii) notice goes beyond only raising a point of law and raises issues on the merits that require an answer from our client. These issues should have been raised in an answering affidavit: raising it by way of a separate application to afford your client an opportunity to then file a replying affidavit (which it would normally not be afforded), further evidences the inappropriateness of the process followed by your client. This will be fully dealt with in our client's affidavit filed in answer to your client's Rule 6(5)(d)(iii) application and in subsequent legal argument."*

9. The above remains OUTA's position. I quote from the letters to illustrate that my offices have repeatedly attempted to persuade Bakwena to reconsider their position on the procedure that was used for raising a legal question in terms of Rule 6(5)(d)(iii). My letters have, however, been met by Bakwena's attorneys with an aggressive doubling down on their position and a refusal to consider that the raising of a point of law only in terms of Rule 6(5)(d)(iii) through an entirely new application was procedurally incorrect and is the cause of the deadlock and delay.

10. On 17 August 2022 Messrs. Fasken replied (see annexure **"FA2(d)"**) to inform my offices that they would apply for a hearing of the Rule 6(5)(d)(iii) application on the unopposed roll and would proceed to approach the offices of the Deputy Judge President for the application to be placed under case management.

11. On 29 August 2022 Messrs. Fasken on behalf of Bakwena indeed applied for a date on the unopposed roll for the hearing of the Rule 6(5)(d)(iii) application. The matter was subsequently enrolled on the unopposed roll for 2 December 2022.

12. On 30 August 2022 Messrs. Fasken wrote to the offices of the DJP requesting case management regarding the dispute that has arisen on the procedural aspect (see annexure **"FA2(e)"**). I quote from paragraphs 22 – 24 of the letter:

> "22. *Despite attempting to reach agreement on how to deal with the matter in a practical manner, OUTA remains unwilling to proceed on the basis that Bakwena has proposed. As such, an impasse has arisen between the parties.*

23. *It is on this basis that Bakwena has, in the interim, sought enrolment of the matter on the matter on the unopposed roll in terms of 13.10 of the Practice Manual, as amended, in light of OUTA failing to deliver its Answering Affidavit despite having delivered its Notice of Intention to Oppose the Rule 6(5)(d)(iii) Application.*

24. *It is also on this basis that Bakwena has approached the Honourable Deputy Judge President to seek case management of the matter as we anticipate that any enrolment of the matter on the unopposed roll will be opposed by OUTA on the day, leading to a delay and a waste of costs. It is in the interest of the parties to have a structured and managed approach given the nature of the matter and to avoid the risks of further unnecessary costs being occurred and prejudice to a parties (sic) rights."*

13. As a practitioner who regularly is involved in litigation in the above Honourable Court, I believe that the request from Bakwena where they in effect ask the Deputy Judge President to step into the shoes of the unopposed court and decide the matter (after they had enrolled the matter on the unopposed roll) is inappropriate. If all parties litigating in this Court would request a case manager to make decisions on applications already enrolled simply because they fear that their opponents may turn up at court on the day to oppose the matter, it will lead to utmost chaos and a mockery of the court system and the Rules. This is not the purpose of case management as I understand it.

14. Bakwena further fails to acknowledge that the *impasse* that is referred to in their letter, was solely caused by its irregular Rule 6(5)(d)(iii) notice. Had the correct procedure been followed and a proper Rule 6(5)(d)(iii) notice as envisaged by the Rule been delivered, this *impasse* would not have occurred.

15. On 31 August 2022, my offices served OUTA's Notice in terms of Rule 30 and 30A, attached as annexure **"FA3"**, affording Bakwena 10 days to remove the cause of complaint and comply with prayer 3 of the 26 May Court Order granted by the Honourable Potterill J.

16. On 1 September 2022, I wrote to the offices of the Honourable DJP (see annexure **"FA2(f)"**) whereby I informed him that a Rule 30 and 30A notice was served and that it was OUTA's view that non-compliance with this notice would lead to a formal application which will require a judgment. It remains OUTA's position that this application should be heard in open court and that a formal judgment will be required to resolve the dispute.

17. In my letter referred to above I further contended on behalf of OUTA that this matter was not capable of being resolved through case management and that it is our belief that it is not the purpose of case management to serve as substitution for formal court processes as provided for by the Rules.

18. Messrs. Fasken replied to the offices of the DJP on 2 September 2022 (see annexure **"FA2(g)"**) repeating the request for case management and again

insinuating that OUTA has acted somewhat improperly and is trying to avoid the application being heard. Paragraph 6 of the letter states:

"The only inference that can be drawn from OUTA's conduct is that this is an attempt by OUTA to avoid the hearing of Bakwena's In Limine Application, which is a self-standing application, and is material to the entire basis of OUTA's Main Application."

19. The allegation that OUTA is trying to avoid having the matter heard is far from the truth. OUTA is very eager to have the main application heard where it is the applicant. Bakwena's point taken in terms of Rule 6(5)(d)(iii) should be heard as part of the main application (as *in limine* points raised would normally be heard at the hearing of an opposed application prior to proceeding on the merits) and not as a separate *"self-standing"* application with a new full set of affidavits as contended for by Bakwena.

20. On 19 September 2022 the offices of the Honourable DJP informed the parties that a case management meeting has been scheduled for 12 October 2022. In order to comply with the time periods set out in Rules 30 and 30A, this application is brought prior to the scheduled case management meeting.

21. Regardless of the scheduling and outcome of the case management meeting, OUTA is entitled to bring this application in terms of the Rules of Court and at this stage remains of the view that a judgment in open court will be required in order for the matter to move forward. OUTA reserves its right to file a short supplementary affidavit for purposes of setting out what transpired at the case

management meeting scheduled for 12 October 2022 should it become necessary.

RULE 6(5)(d) AND THE PURPOSE OF THE RULE:

22. Rule 6(5)(d) of the Uniform Rules of Court in its entirety deals with the process to be followed where a person or party opposes an application. A notice of motion filed in an application also directs a party to file its notice of intention to oppose and an answering affidavit (if any) within the prescribed time periods. The Rule does not allow for opposition to what is stated in a founding affidavit in one application through what is stated in a founding affidavit in another application.

23. In the present case the procedure that Bakwena had to follow is not only regulated by the provisions of Rule 6(5)(d) but also by the 26 May Court Order. It bears mentioning that the order that was granted was premised on a draft order suggested and prepared by Bakwena. It was not an order that was forced upon it by the Court.

24. In order to further illustrate the irregularity of, firstly, the launching of a *"self-standing"* Rule 6(5)(d)(iii) application and, secondly, enrolling it for hearing on the unopposed roll, I refer the Honourable Court to the position taken by this Division in the matter of **Minister of Finance v Public Protector and Others 2022 (1) SA 244 (GP)** in circumstances where only a point of law in terms of

Rule 6(5)(d)(iii) is taken. The court set out the position at p 250 of the judgment as follows:

"In the absence of an answering affidavit dealing with the merits of the dispute, the court has a discretion to simply deal with the matter on the points of law raised and the evidence in the founding affidavit. If the respondent relies exclusively on the notice in terms of rule 6(5)(d)(iii), as the Public Protector does in this case, the allegations in the founding affidavit must be taken as established facts by the courts."

25. The above shows that the court hearing the point raised in terms of Rule 6(5)(d)(iii) by Bakwena will, as of necessity, also must consider the founding affidavit filed by OUTA in the main application and will have to accept the allegations contained in the latter as established fact.

26. This creates two insurmountable problems for both Bakwena and the presiding officer if the matter is allowed to proceed on the unopposed roll:

a. the Judge hearing the application will automatically have to consider OUTA's founding affidavit filed in the main application together with Bakwena's Rule 6(5)(d) notice, which is in the form of a notice of motion and founding affidavit. By implication the application is therefore opposed as affidavits from both sides will have to be considered. This will be the position regardless of whether OUTA physically appears in court on the day to "oppose" the matter or not (as allegedly feared by Bakwena).

i. The very essence of the unopposed court is that the presiding officer only considers the affidavit of one party (with the limited exception of Rule 43 applications and applications for summary judgment).

ii. By enrolling the matter on the unopposed roll Bakwena will place the presiding Judge in the untenable position of having to consider affidavits filed by opposing parties and reaching a decision thereon. This will of necessity cause a postponement to the opposed roll, as the matter is by its very nature opposed.

iii. It is therefore not OUTA that will cause a delay on the day of the hearing of the matter on the unopposed roll, as such a delay is already pre-determined by Bakwena's insistence on enrolling it on the unopposed roll. As such the enrolment on the unopposed roll is irregular.

b. OUTA is under no obligation to file an answering affidavit in the Rule 6(5)(d)(iii) application, as its founding affidavit filed in the main application will automatically have to be considered by the Judge hearing the matter, and the allegations contained therein will have to be accepted as established fact for purposes of hearing the application.

i. The above means that any Judge hearing the matter will have to consider two founding affidavits in coming to a decision. The Rules do not make provision for such a procedure where one founding affidavit can be used to refute another in circumstances where no further affidavits have been filed in either application.

ii. This renders the Rule 6(5)(d)(iii) application irregular. The difficulty is amplified by the fact that Bakwena prays in prayer 1 of its Notice of Motion in the Rule 6(5)(d)(iii) application that OUTA main application be dismissed with costs, thereby attempting to invoke one application to dismiss another.

27. The solution, it is respectfully submitted, is a straightforward one: Bakwena must file its Rule 6(5)(d)(iii) notice in accordance with the provisions of the Rule, read with the 26 May Court Order. Bakwena, however, refuses to acknowledge the problem it created and ironically accused OUTA in its letter to the DJP of 30 August 2022 of remaining *"unwilling to proceed on the basis that Bakwena has proposed."*

28. Bakwena should not be allowed to set the rules and procedure as it sees fit and then expect the other parties to proceed unquestioningly on the proposed basis, regardless of whether such action is in accordance with the Rules of Court and the applicable authorities.

29. Of further importance is the fact that OUTA's main application remains unopposed by Bakwena, as it has failed to file an answering affidavit or a Rule 6(5)(d)(iii) notice *in lieu* thereof. A founding affidavit filed in a new interlocutory application does not amount to opposition in the main application.

30. SANRAL is also opposing the main application but as indicated earlier, has to date not filed an answering affidavit. Bakwena therefore wants the main application dismissed in circumstances where answering- and replying affidavits are yet to be filed in the main application by other parties. Rule 6(5)(d)(iii) does not make provision for one party to "suspend" the time periods prescribed by the Rule, especially insofar as it pertains to other parties. This also renders the procedure followed by Bakwena irregular.

31. SANRAL is a separate respondent with separate legal representation. If SANRAL does not file an answering affidavit, OUTA will be entitled to set the matter down on the unopposed roll and obtain the relief requested against SANRAL on an unopposed basis. Bakwena's Rule 6(5)(d)(iii) application cannot shield SANRAL from this.

32. Through its conduct and persistence to proceed with the Rule 6(5)(d)(iii) in the irregular form in which it was brought, rather than just rectifying the problem and filing the notice in accordance with the provisions of the Rule, Bakwena is severely delaying the hearing of the main application. Had Bakwena followed the correct procedure, papers in the main application could have been finalised by now and it could have been enrolled for hearing on the unopposed roll.

33. Instead, Bakwena's conduct and insistence on case management (in circumstances where the Rule of Court make adequate provision for the procedure to be followed) forces OUTA, which unlike Bakwena is a non-profit organisation, to incur unnecessary expenses and endure delay in the hearing of the main application. This causes great prejudice to OUTA and to the public interest (and specifically the interest of South African taxpayers), the protection of which is a material aspect of OUTA's mission and the litigation it conducts against organs of State.

RULE 30 AND 30A TIME PERIODS:

34. Rule 30 makes provision for a notice in terms of Irregular Proceedings to be filed by an applicant within 10 days of becoming aware of the step, affording its opponent 10 days to remove the cause of complaint. Within 15 days after expiry of the second 10-day period, the application in terms of Rule 30 must be delivered.

35. Insofar as OUTA relies on Rule 30 in its contention that the Rule 6(5)(d)(iii) application is irregular, the Rule 30 notice filed by OUTA was out of time. It is, however, submitted that the later enrolment of the Rule 6(5)(d)(iii) application on the unopposed roll by Bakwena on 29 August 2022 constitutes a further irregular step, and OUTA's Rule 30 notice insofar as it pertains to the irregular enrolment of the Rule 6(5)(d)(iii) application was delivered within the prescribed 10 (ten) days. I will accordingly request the Honourable Court to consider the

irregular application and subsequent irregular set-down together for purposes of determining whether the Rule 30 Notice was out of time.

36. However, insofar as it may be necessary, I humbly request that the late filing of the Rule 30 notice be condoned insofar as it pertains only to the Rule 6(5)(d)(iii) notice. If the irregularity is allowed to stand, the deadlock between the parties will continue.

37. As referred to above, prior to the filing of OUTA's Rule 30 and 30A notice, my offices have made several attempts to resolve the matter without the need for such notice and this subsequent application. I can further confirm that Bakwena has not formally responded to the Rule 30 notice. Reference was only made thereto in its letter addressed to the offices of the DJP on 2 September 2022. This present application will be filed within the prescribed time period of 15 days after the 10-day period to remove the cause of complaint has expired.

38. I further request that the Honourable Court take into consideration that the notice pertaining to the Rule 6(5)(d)(iii) application was based in the alternative on the provisions of Rule 30A, which makes provision for such a notice to be filed *inter alia* in circumstances where a party fails to comply with an order of court or direction made by a court.

39. Bakwena has failed to comply with prayer 3 of the order granted by the Honourable Potterill J on 26 May 2022 in terms whereof it was ordered to file an answering affidavit within 20 (twenty) days of the date of that order. Rule

30A does not impose the same time limits that Rule 30 imposes, and the notice in terms of Rule 30A informing Bakwena of the non-compliance was filed within a reasonable time.

CONCLUSION:

40. Bakwena's intransigent attitude, its attempts to dictate the Rules and procedures and its unreasonable expectation that all parties bend to its will, have led to unnecessary delays and costs in the proceedings.

41. Following what I have set out above, I will ask the Honourable Court to show its displeasure with the way in which Bakwena has brought the Rule 6(5)(d)(iii) application and enrolled it for hearing on the unopposed roll, as well as its subsequent refusal to remove the cause of complaint and follow the correct procedure. Following the correct procedure would have held no prejudice for Bakwena, whilst OUTA is greatly prejudiced by the manner in which the provisions of Rule 6(5)(d)(iii) were abused and the Notice was delivered in the form of a 79-page long *"In limine application".*

42. In the premises I will ask for the relief as set out in the Notice of Motion, such relief to include ordering Bakwena to pay the costs of this application on the scale as between attorney and client.

DEPONENT

Signed and sworn before me at PRETORIA this 20th day of SEPTEMBER 2022 after the deponent declared that she is familiar with the contents of this statement, regards the prescribed oath as binding on her conscience and has no objection against taking the said prescribed oath. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).

COMMISSIONER OF OATHS

FULL NAMES:

CAPACITY:

ADDRESS:

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