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**

REPLYING 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. I am the applicant's attorney of record.

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

3. From the founding- and answering affidavits it is evident that the parties are in agreement that this matter consists mainly of a legal question that hinges on the interpretation of Rule 6(5)(d)(iii) and the procedure to be followed when a legal point in terms of Rule 6(5)(d)(iii) is raised.

4. Bakwena's answering affidavit primarily contains submissions of a legal nature, which will be fully dealt with in OUTA's heads of argument and at the hearing of the matter. I will therefore only reply to the allegations contained in the answering affidavit where necessary. Any specific allegations not dealt with

should be deemed to be denied insofar as it does not accord with what I have stated in my founding affidavit.

5. I point out that both Bakwena's notice of intention to oppose the application as well as its answering affidavit were filed out of time and there is no attempt anywhere in the answering affidavit to explain the late filing or to request condonation thereof. The application was served on 21 September 2022. Bakwena only delivered its notice of intention to oppose on 5 October 2022, outside the five-day period allowed, and then only delivered its answering affidavit on 8 November 2022, again outside the 15 days allowed.

6. Bakwena, however, sees fit to spend several pages of its answering affidavit on the alleged lateness of OUTA's Rule 30 and 30A Notice. Bakwena's failure to address its own lateness in filing its opposing papers while chiding OUTA for its alleged lateness demonstrates that Bakwena does not feel bound by the same standards of compliance that it applies to OUTA. I submit that such double standards should not be allowed.

Ad paragraphs 1 to 5:

7. I deny that the facts contained in the answering affidavit and Bakwena's interpretation of the procedure to be followed for filing a notice in terms of Rule 6(5)(d)(iii) are correct.

Ad paragraphs 7, 7.1 and 7.2:

8. I deny that OUTA has brought the Rule 30 application as an afterthought. The fact that the respondent launched a new separate-standing application under the guise of a Rule 6(5)(d)(iii) notice caused not only procedural difficulties with the handling of such an application but also an adverse knock-on effect on all the further steps in the process, including an unnecessary dispute that arose about the filing of an answering affidavit by SANRAL. It will continue to cause procedural obstacles until the irregularity is cured. The correspondence attached to my founding affidavit shows that I attempted repeatedly to resolve the *impasse* without the necessity of approaching the court.

9. As pointed out in my founding affidavit, if Bakwena followed the correct procedure with the Rule 6(5)(d)(iii) notice, the matter would be ready for set-down on the opposed roll and would likely already have been heard at the time of deposing to this affidavit.

10. Instead, Bakwena created a novel procedure (not provided for by the Rules) by which to file a Rule 6(5)(d)(iii) notice and is insisting that the matter be heard as a separate-standing application with a full set of affidavits completely separate from those filed in the main application. This defeats the purpose of a Rule 6(5)(d)(iii) notice.

11. I further submit that Bakwena's Rule 6(5)(d)(iii) application and the subsequent enrolment thereof on the unopposed roll should not be viewed in isolation as

Bakwena's contends for. Both these steps were irregular and the one is dependent on the other.

12. Any application allowed for by the Rules should be capable of enrolment on the unopposed roll if not opposed. If it is not capable of enrolment on the unopposed roll, it cannot be brought as a separate self-standing application. Due to the inherent opposed nature of a Rule 6(5)(d)(iii) notice, it is not capable of being enrolled on the unopposed roll.

13. The Rule 30 and 30A Notice was filed within 2 days of the irregular enrolment. If Bakwena was of the view that the Notice was irregular in any way, it had remedies to set it aside, which it failed to exercise. Out of an abundance of caution I have requested for condonation for the late filing of the Rule 30 and 30A Notice pertaining to the first irregular step (the filing of the Rule 6(5)(d)(iii) notice as a separate and self-standing application) insofar as it may be required.

14. However, I submit that given the fact that Bakwena took no steps to set aside the notice and further given the fact that the subsequent Rule 30 and 30A application was brought within the prescribed time periods, condonation of the Rule 30 and 30A Notice has become academic. The application itself was filed timeously and does not require condonation. This will be further addressed in legal argument at the hearing of the matter.

15. Any further allegations that do not correspond with what I have stated above are denied.

Ad paragraph 7.3 (to include sub-paragraphs):

16. I deny the content of these paragraphs.

17. It is incorrect to state that Bakwena's Rule 6(5)(d) application deals with a *"crisp in limine legal point"*. As pointed out in my founding affidavit, the application is 79 pages in length with annexures that contain *inter alia* copies of press releases and governmental reports. This shows a complete disregard for the fact that it is impermissible for a party who raises a point in terms of Rule 6(5)(d)(iii) to plead facts or produce evidence of the legal points raised.

18. OUTA is not obfuscating the issues. Both the manner in which the Rule 6(5)(d)(iii) application was brought as well as the subsequent enrolment for the hearing of the legal points raised in terms of Rule 6(5)(d)(iii) are procedural issues.

19. I specifically deny that the Rule 6(5)(d)(iii) application is *"appropriate"* and *"procedurally correct"* as contended for by Bakwena. Raising a legal point in terms of Rule 6(5)(d)(iii) by way of a separate-standing affidavit is irregular and an abuse of the process.

20. In the main application OUTA requests certain documents from SANRAL, a public body, in terms of PAIA pertaining to concession contracts that relate to the upgrade of certain national roads. Bakwena's view on whether or not OUTA discloses a cause of action or makes out a *prima facie* case for the relief sought in the main application is irrelevant for purposes of the present application. However, insofar as it may be relevant, I deny that OUTA does not disclose a cause of action or make out a *prima facie* case in the main application, and further deny that the Rule 6(5)(d)(iii) application will dispose of the main application.

Ad paragraphs 7.4, 7.5 and 7.6 (to include sub-paragraphs):

21. I deny the allegations contained in these paragraphs, as well as the correctness of Bakwena's interpretation of Rule 30A and the 26 May Court Order.

22. I point out that OUTA does not wish to deprive Bakwena of the remedies it may have, but when such remedies (of which a notice in terms of Rule 6(5)(d)(iii) is one) is exercised, they must be exercised in a manner that is procedurally correct.

23. If Bakwena wished to oppose the main application (which was obviously the purpose of their application for intervention and the 26 May Court Order that was drafted by Bakwena), it had one of three options:

(i) file an answering affidavit within the 20 days provided for by the court order; or

(ii) file a notice in terms of Rule 6(5)(d)(iii) *in lieu* of an answering affidavit to raise a legal point within the 20 days provided for by the court order; or

(iii) file a notice in terms of Rule 6(5)(d)(iii) together with the answering affidavit within the 20 days provided for by the court order.

23.1 The above are the three options that the Rules allow for when an application is opposed by a respondent in order to put such opposition before a court.

24. Bakwena has instead chosen to create a novel procedure to "oppose" the main application by filing a new separate-standing application. This is akin to a defendant in action proceedings who, instead of filing a plea or an exception (in *lieu* of a plea) in answer to the particulars of claim, files a new separate-standing action wherein it asks for the first action to be dismissed. No such procedure exists.

Ad paragraph 8 (to include sub-paragraphs):

25. I take note of the structure but deny the correctness of the allegations made in these paragraphs insofar as it pertains to the merits of the application.

Ad paragraphs 9 to 12:

26. I have already referred above to the fact that the Rule 6(5)(d)(iii) application and the subsequent set-down thereof on the unopposed roll are inextricably linked and should not be viewed in isolation. Unless these two irregular steps are both set aside, the deadlock will continue. It is on this basis that OUTA requested the Honourable Court in the founding affidavit to consider the Rule 6(5)(d)(iii) application and the subsequent enrolment thereof together. Any allegations to the contrary are denied.

Ad paragraph 13 (to include sub-paragraphs):

27. I reiterate that there were two irregular steps: the Rule 6(5)(d)(iii) application and the subsequent enrolment thereof on the unopposed roll. The Rule 30 and 30A Notice pertaining to both these steps was served 2 (two) days after the second irregular step.

28. Bakwena failed to take any further steps when the Rule 30 and 30A Notice (to which it now seems to take strong exception) was filed. Subsequently, the present application was filed within the prescribed time period. I repeat my earlier submission that condonation for the preceding Notice has become academic.

29. However, I have requested condonation for the late filing of the Rule 30 Notice pertaining to the Rule 6(5)(d)(iii) application (the first irregular step) in my

founding affidavit out of an abundance of caution and insofar as the Honourable Court determines that the application itself and the subsequent enrolment thereof be viewed separately and further insofar as the issue of condonation of the Notice may at all be relevant. I will therefore persist with this request should the Honourable Court be of the view that condonation for the Rule 30 and 30A Notice is necessary.

30. I submit that if the creation of this new procedure by Bakwena is allowed to stand, it will have far-reaching adverse consequences not only for OUTA, but potentially for all future applicants in motion proceedings. Should a respondent wish to delay proceedings, it will simply file a new application under the guise of a Rule 6(5)(d)(iii) notice (as has been done here) and demand that such an application first be heard before the main application can proceed. This will lead to highly undesirable results.

31. In addition to the above, if Bakwena's Rule 6(5)(d)(iii) application is allowed to stand as a separate application and it is permitted for extensive background and facts to be pleaded (together with many pages of annexures), it will overturn established precedent that it is impermissible for facts to be pleaded or evidence to be produced in support of the law points raised.

32. In the premises I submit that will be in the interest of justice to allow for the procedure followed by Bakwena to be challenged by way of a Rule 30 application. It is in the interest of all parties (including Bakwena) to have clarity

regarding the correct procedure to follow when it raises points of law in application proceedings.

33. I further take note of the correspondences attached but deny the correctness of the contentions advanced by Bakwena's attorneys in these correspondences. It is evident from the correspondence that OUTA has throughout taken issue with the procedure that was followed by Bakwena in raising a point in terms of Rule 6(5)(d)(iii).

34. Bakwena enrolled the matter on the unopposed roll on 29 August 2022. The Rule 30 and 30A Notice was filed two days later, on 31 August 2022. I deny that there is anything sinister about the time period or that there were any intentional delays on OUTA's side.

Ad paragraphs 14, 15 and 16:

35. It is correct that the Rule 30 and 30A Notice was delivered on 31 August 2022, almost two months after delivery of the Rule 6(5)(d)(iii) application but only two days after the irregular enrolment of the Rule 6(5)(d)(iii) application on the unopposed roll. No steps were taken by Bakwena after the Rule 30 and 30A Notice was filed, and OUTA subsequently proceeded to file the present application within the prescribed time period.

36. I accordingly deny that the relief as requested in prayer 1 cannot succeed. The above Honourable Court has to protect the integrity of its processes by which

litigation is conducted. If parties are attempting to introduce new processes (as Bakwena is doing here) for which the Rules of Court do not make provision and which will have far-reaching consequences for all litigants in application proceedings, I submit that the intervention of the Court is not only desirable but inevitable.

Ad paragraphs 17 and 18 (to include sub-paragraphs):

37. It is noteworthy that Bakwena spent several pages of its answering affidavit opposing the request for condonation of the Rule 30 and 30A Notice, thereby attempting to muddy the proverbial waters to allow for the irregular manner in which the Rule 6(5)(d)(iii) application was brought to stand.

38. As pointed out in my founding affidavit, if the Rule 6(5)(d)(iii) application is allowed to stand, the deadlock will continue. This will result in the matter not reaching finality. This could have been avoided if Bakwena followed the correct procedure by filing a Rule 6(5)(d)(iii) notice as envisaged by the Rule.

39. It is therefore denied that OUTA proffers no substantive reason for the late delivery of the Rule 30 and 30A Notice as alleged and further denied that condonation of the filing of the Notice is still relevant in circumstances where Bakwena failed to exercise its remedies pertaining to the Notice when it had an opportunity to do so.

40. Moreover, there is no prejudice for Bakwena if the Rule 6(5)(d)(iii) application is set aside and it is afforded an opportunity to file a Rule 6(5)(d)(iii) notice in accordance with the Rules as provided for in prayer 2 of the notice of motion. On the other hand, OUTA will be prejudiced if it is required to participate in this irregular process and file two affidavits - an answering affidavit in the Rule 6(5)(d)(iii) application and a replying affidavit in the main application - on substantially the same issues.

Ad paragraphs 19 and 20:

41. I deny the allegations contained in these paragraphs. A matter must first be capable of enrolment on the unopposed roll before the practice directive pertaining to unopposed motions becomes applicable.

42. As stated in my founding affidavit, a Rule 6(5)(d)(iii) notice is by its very nature opposed. It is therefore not capable of being set down on the unopposed roll, as a judge will never be able to hear it on an unopposed basis.

43. Setting the matter down on the unopposed roll and using the practice directive as a justification, whilst Bakwena knew or should have known that the application by its very nature is opposed and can never be adjudicated upon on an unopposed basis, will not only cause a delay in the process but also clog the court rolls on the unopposed roll.

44. I therefore deny that the practice directive *"envisages and precisely addresses instances of the present nature arising"* as alleged. The practice directive pertaining to unopposed motions does not envision a Rule 6(5)(d)(iii) legal point to be set down or argued on the unopposed roll, or for a judge in the unopposed court to give directions as to the future conduct of the matter.

45. The Rules of Court together with the applicable authorities already provide for the procedure to be followed, i.e., for it to be set down on the opposed roll without further affidavits being filed. Full legal argument with reference to the applicable authorities will be advanced on behalf of OUTA in this regard at the hearing of the matter.

Ad paragraphs 21 to 24:

46. I deny the allegations contained in these paragraphs insofar as it does not correspond with what I have already stated. These paragraphs are merely an expansion of Bakwena's argument against condonation for the Rule 30 and 30A Notice, with which I have already dealt above.

47. OUTA delivered its Rule 30 and 30A Notice within 2 days after the matter was irregularly enrolled on the unopposed roll. Prior to the irregular enrolment, Bawkena could still cure the irregularity by withdrawing the Rule 6(5)(d)(iii) application in its current form and filing it in the correct form with minimal costs involved, as no further affidavits had been filed at the time. At the time I had

hoped that the realisation would prevail that the matter could not be heard on the unopposed roll without further unnecessary cost and delay to the parties.

48. Notably, Bakwena does not address the fact that it did not take any steps to set aside the Rule 30 and 30A Notice when it was filed, neither does it take issue with the time periods within which this application was filed subsequent to the Rule 30 and 30A Notice.

Ad paragraphs 28 to 32:

49. I deny the allegations contained herein. As is evident from the correspondence quoted in paragraph 27 of the answering affidavit, I alerted Bakwena to the fact that OUTA regarded the process followed by Bakwena as inappropriate and I was attempting to resolve the matter, also taking into account that SANRAL still must file its answering affidavit in the main application.

50. I further deny that my letters indicate any specific approach adopted other than the fact that OUTA viewed the Rule 6(5)(d)(iii) as irregular and problematic from the outset and was attempting to resolve the matter. At no point did OUTA waive its right to file a Rule 30 and 30A Notice.

51. Following Bakwena's refusal to cure the problem despite all the correspondences exchanged, the irregular enrolment of the matter on the unopposed roll was the point of no return and made the Rule 30 and 30A Notice

and application that followed inevitable. OUTA does not have another available remedy.

52. The subjective and incorrect analysis that Bakwena offers on the correspondences that were exchanged and its speculation on what OUTA's intention was, is of no relevance to the question of whether the Rule 6(5)(d)(iii) application is irregular or not. I confirm that I wrote the letters that preceded the Rule 30 and 30A Notice with the view and hope of resolving the *impasse* between the parties without the need for further costly litigation. Any interpretations and analysis to the contrary as to OUTA's intentions are denied.

53. I submit that this weighty issue with far-reaching consequences is worthy of consideration and the provision of clarity by the above Honourable Court. I accordingly deny that prayer 1 falls to be dismissed on a preliminary basis without the need to consider the merits of the application.

Ad paragraphs 33 to 43:

54. I take note of the general background provided in these paragraphs by Bakwena but deny that the Rule 6(5)(d)(iii) application seeks to deal with a *"very crisp issue"*. To the contrary, and as pointed out in my founding affidavit and in the correspondence attached thereto, the lengthy Rule 6(5)(d)(iii) application goes far beyond raising a point of law only and deals with aspects pertaining to the merits that should have been raised in an answering affidavit.

55. It further goes without saying that OUTA disputes the allegations by Bakwena that no cause of action is disclosed in the main application. This, however, will be argued at the hearing of the main application and is not relevant for purposes of the present application.

Ad paragraph 44:

56. I deny that the Rule 30 and 30A Notice was delivered merely as some sort of sinister reactive measure as Bakwena seems to suggest. The Rule 30 and 30A Notice was delivered because Bakwena refused to file its Rule 6(5)(d)(iii) notice in the correct manner, and then doubled down on the irregularity by enrolling it on the unopposed roll.

57. The Rule 30 and 30A Notice was delivered 2 (two) days after enrolment of the Rule 6(5)(d)(iii) notice on the unopposed roll. I therefore deny that the Rule 30 and 30A Notice was outside the prescribed time if these two irregular steps are viewed together and as inextricably linked, and refer the Honourable Court to what I have already stated in this regard. Moreover, Bakwena failed to take any steps in response to the Rule 30 and 30A Notice, and the present application was subsequently filed within the prescribed time period.

Ad paragraphs 45 to 54:

58. It is irrelevant for purposes of this application whether Bakwena demonstrated the need for case management, but I point out that it is common cause that a

case manager was not allocated by the Honourable Ledwaba DJP as was requested by Bakwena. Insofar as it may be necessary, I deny the correctness of the views expressed by Bakwena.

59. Bakwena attaches the lengthy agenda that it prepared for the meeting before the Honourable Ledwaba DJP as annexure "AA3" to its answering affidavit but omits to state that it was only sent to the parties at 14:13 pm on 11 October 2022, the day before the case management meeting, giving the parties less than 2 hours until 16:00 to respond. The email is attached as annexure **"RA1"**. However, as the Honourable Ledwaba DJP directed at the meeting of 12 October 2022 that the present application should proceed first before Bakwena's Rule 6(5)(d)(iii) application can be heard, I submit there is no further relevance to these events that took place after the present application was filed.

60. I further point out that, had Bakwena followed the correct procedure by bringing a Rule 6(5)(d)(iii) notice in the correct manner, the matter would simply proceed on the opposed roll as intended by the Rule, and all the time wasted with lengthy correspondences and waiting for a date to meet with the DJP would have been completely unnecessary.

61. The main application is (or at the very least should be) a normal, straight-forward opposed application for which the Rules of Court make provision and set time periods. Through the novel procedure of filing a Rule 6(5)(d)(iii) separate-standing application with an envisaged new set of affidavits, Bakwena

has introduced procedural chaos into what should have been standard opposed motion proceedings in accordance with the provisions of Rule 6.

Ad paragraphs 57 to 70:

62. I deny that Bakwena's *In Limine* application is brought *"pursuant"* to Rule 6(5)(d)(iii). The Rule does not make provision for a point of law to be raised by way of a new separate-standing application consisting of several pages of supporting facts and evidence.

63. I deny the correctness of contentions advanced in these paragraphs and Bakwena's interpretation of the authorities insofar as it does not accord with what I have already stated. If it was only a crisp legal issue that was raised in accordance with Rule 6(5)(d)(iii), no further affidavits would be required.

64. The remainder of these paragraphs turns on the question of whether Rule 6(5)(d)(iii) notice can be brought by way of a separate-standing application and is a matter for legal argument which will be addressed at the hearing of the matter.

Ad paragraph 71:

65. I deny that *"...it is axiomatic, in order for Bakwena to advance its challenge against OUTA's founding papers, it is required to plead material facts followed*

by conclusions of law as it has done, albeit on a limited crisp legal point." (Emphasis added)

66. A crisp legal point would not require *"material facts followed by conclusions of law"* to be pleaded. The fact that Bakwena had to file a 74-page affidavit in support of its contentions is in itself proof that the Rule 6(5)(d)(iii) application does not only raise a legal point. Material facts are only pleaded when merits are dealt with.

67. Moreover, the fact that Bakwena in its answering affidavit persists with the view that it is *"required to plead material facts"* where a notice in terms of Rule 6(5)(d)(iii) is filed, where such further facts are in fact impermissible, amplifies OUTA's argument that the process that was followed by Bakwena amounts to an abuse of the process.

Ad paragraphs 72 and 73:

68. I reiterate that OUTA does not wish to deprive Bakwena (or any other party) from the opportunity to raise a point of law only in the main application. OUTA's case is merely that it must be done in the correct way.

69. The way in which Bakwena has raised its Rule 6(5)(d)(iii) legal point as a separate-standing application, would provide it with an opportunity to test the proverbial waters first by obtaining OUTA's version under oath in an answering affidavit, and then having an opportunity to reply thereto.

70. The rules don't allow for a respondent in motion proceedings to file a replying affidavit, and the Rule 6(5)(d)(iii) application is clearly an attempt to circumvent this established principle and obtain a tactical advantage.

71. From the correspondence by Bakwena's attorneys referred to in paragraph 25 of my founding affidavit, it is further clear that Bakwena holds the view (albeit not in line with the applicable authorities), that should the Rule 6(5)(d)(iii) application not be successful, Bakwena would have an automatic right to file an answering affidavit in the main application. If this approach is adopted, it would not only prejudicial to OUTA but will cause great delays and frustration with motion proceedings in general.

Ad paragraphs 74 to 76:

72. I deny that the only question is whether it is unfair to the applicant. Although prejudice is a material factor, the further questions are:

(i) whether Bakwena (or any respondent in motion proceedings) should be allowed to introduce a new procedure for which the Rules of Court do not make provision; and

(ii) whether the procedure introduced by Bakwena of bringing a separate self-standing application in terms of Rule 6(5)(d)(iii) with supporting facts and documents is irregular and contrary to what the Rule envisages.

73. I further deny that Bakwena's Rule 6(5)(d)(iii) application *"effectively amounts to an exception"*. Where an exception is pleaded, a defendant is not allowed to plead supporting facts in support of the exception. Here Bakwena has filed a 74-page affidavit in support of its alleged legal point.

Ad paragraphs 77 to 81:

74. A point taken in terms of Rule 6(5)(d)(iii) is by its very nature opposed and not capable of being heard on the unopposed roll. Enrolling it as such is therefore irregular.

75. The content of these paragraphs again emphasises the fact that the Rule 6(5)(d)(iii) application and the subsequent enrolment thereof on the unopposed roll are inextricably linked and cannot be viewed in isolation. The fact that the matter can never be capable of being heard in the unopposed roll is indicative that a Rule 6(5)(d)(iii) legal point cannot be raised by way of a separate self-standing application.

76. I accordingly deny that Bakwena was entitled to set the matter down in accordance with the practice directive pertaining to unopposed applications. A Rule 6(5)(d)(iii) notice should be set down in accordance with the practice directive pertaining to opposed motions, read with the Rule and the relevant authorities. The unopposed motion practice directive finds no applicability.

77. Setting the matter down on the unopposed roll is accordingly irregular and merely serves to cause delay and frustrate the process. Any allegations to the contrary are denied.

Ad paragraphs 82 to 85:

78. Bakwena misconstrues OUTA's challenge to the unopposed enrolment in these paragraphs and further seems to take the position that it is entitled to enrol a matter (which by its very nature is opposed) on the unopposed roll simply for the judge in the unopposed court to give direction that it must be heard on the opposed roll. This will not only waste valuable court resources but is also not in accordance with what is envisaged by Rule 6(5)(d)(iii).

79. Bakwena's hiding behind the practice directive pertaining to unopposed motions is rather disingenuous where it fails to address the real issue first: whether a point raised in terms of Rule 6(5)(d)(iii) is capable of being heard on the unopposed roll. A judge cannot direct OUTA to file an answering affidavit in the Rule 6(5)(d)(iii) application in circumstances where Bakwena was not entitled to bring the application in the first instance.

80. If Bakwena does not seek to have the Rule 6(5)(d)(iii) application heard on an unopposed basis as alluded to in paragraph 85 of the answering affidavit, it follows that it should not have enrolled it on the unopposed roll. Bakwena knew that the matter was by its very nature opposed.

81. The remaining contents pertain to legal argument which will be expanded upon at the hearing of the matter. Suffice it to say, the correctness of Bakwena's position regarding its entitlement to enrol the Rule 6(5)(d)(iii) application on the unopposed roll is denied, and its reliance on the provisions of the practice directive pertaining to unopposed motions is misplaced.

Ad paragraphs 87 to 92:

82. The allegations contained in these paragraphs amount to legal argument and are largely a repetition of what has already been alleged by Bakwena and dealt with herein above. I accordingly deny the content of these paragraphs insofar as it does not correspond with what I have already stated in my founding affidavit, read with what is set out herein above.

83. I point out that, the fact that OUTA filed a notice of intention to oppose the Rule 6(5)(d)(iii) application does not alter the position that the matter is by its very nature opposed (with or without the filing of an answering affidavit). OUTA is under no obligation to file an answering affidavit in the Rule 6(5)(d)(iii) application as this will only amplify the irregularity.

84. Moreover, according to *Minister of Finance v Public Protector* referred to in paragraph 24 of my founding affidavit, there is no need for OUTA to file anything further, as OUTA's founding affidavit filed in the main application is already before the court in opposition to the Rule 6(5)(d)(iii) point taken. The facts

deposed to therein must, for purposes of hearing the legal point raised in terms of Rule 6(5)(d)(iii), be taken as established fact.

85. Accordingly, where two competing versions are already before a court, the matter cannot be enrolled on the unopposed roll, and the provisions of the practice directive pertaining to unopposed motions do not find applicability.

Ad paragraphs 93 to 99:

86. I admit Bakwena was granted leave to file an answering affidavit within 20 days by the 26 May Court Order, and further that it could opt not to file an opposition if it elected not to oppose the main application as alluded to in paragraph 96. It is, however, common cause that Bakwena's intention was to oppose the main application and that it intervened for this very purpose. Prayer 3 of the 26 May Court Order where leave was granted to file an answering affidavit within 20 days should therefore be read in this context.

87. Moreover, in its notice of motion in the intervention application, prayer 3 thereof read: *"Bakwena is to file its Answering Affidavit in the Main Application within 20 days of the granting of the Order"*. The first two pages of the notice of motion in the intervention application (which was also filed under the above case number and form part of the Caselines bundle at 010-2 – 010-1) are attached as annexure **"RA2"**.

88. Bakwena appears to have changed the wording in the draft order that was presented to the court at the hearing of the intervention application, but this does not alter the context in which the order was made or its purpose. Since the purpose of the 26 May Court Order was to allow Bakwena to oppose the main application, there is no difference here between being *"granted leave"* or being *"ordered"* to file opposing papers within a specified time. To suggest that the 26 May Court Order could have any other meaning or intention is, with respect, opportunistic and without merit.

89. Bakwena should accordingly have filed either its answering affidavit or its Rule 6(5)(d)(iii) notice in the prescribed way within the 20 days afforded to do so.

90. Instead, Bakwena opted to file neither an answering affidavit nor a notice in terms of Rule 6(5)(d)(iii) within the 20 days provided for in the court order. It opted to file a new and separate self-standing application. Bakwena contends that the main application is now opposed, yet no opposing papers (either by way of an answering affidavit or a Rule 6(5)(d)(iii) notice) were filed within the 20 days afforded to it by the 26 May Court Order.

91. I deny the remaining content of these paragraphs and specifically Bakwena's interpretation of OUTA's reading of the court order. Bakwena cannot have its proverbial cake and eat it. If it wanted to oppose the application (which clearly is the intention), it either had to file an answering affidavit or a Rule 6(5)(d)(iii) notice within 20 days. Instead, it is attempting to oppose the main application with a procedure not provided for in the Rules and which clearly was not the

intention of the 26 May Court Order. As such, there is non-compliance with the order.

Ad paragraphs 100 to 111:

92. These paragraphs contain legal argument that will be addressed on behalf of OUTA in full at the hearing of the matter.

93. For the avoidance of doubt, I deny Bakwena's interpretation of the applicability of Rule 30A and submit that OUTA is not precluded from utilising the provisions of Rule 30A in the present circumstances.

Ad paragraphs 112 to 220:

94. The *ad seriatim* responses by Bakwena contained in these paragraphs are largely a repetition of what has already been stated in the preceding paragraphs of the answering affidavit and to which I have already replied, and further substantially comprise of legal argument.

95. I will therefore not burden the Honourable Court by again replying to allegations and legal contentions that have already been dealt with. There are, however, a few points that need further clarification:

95.1 I deny that Bakwena's Rule 6(5)(d)(iii) application will bring the matter to finality or closer to finality as alleged in paragraph 128. This would

only have been true if the Rule 6(5)(d)(iii) notice was filed in the correct manner. If this had been done, the matter would have been ready for set-down on the opposed roll.

95.2 OUTA has never contended that *in limine* applications cannot be brought under certain circumstances in motion proceedings. OUTA does, however, contend that a Rule 6(5)(d)(iii) notice cannot be brought by way of a separate self-standing application which would require a complete set of affidavits separate from those filed in the main application.

95.3 The facts alleged in support of Bakwena's Rule 6(5)(d)(iii) should have been raised in an answering affidavit so that OUTA could file a replying affidavit in response thereto. This was pointed out to Bakwena in my letter of 5 August 2022 (annexure "FA2(c)" to the founding affidavit).

95.4 The application to compel SANRAL to deliver its answering affidavit was merely removed with costs reserved as a practical step and as a result of the procedural chaos caused by Bakwena's irregular Rule 6(5)(d)(iii) application. This is evident from the wording of paragraphs 5 and 6 of my letter to SANRAL's attorney dated 13 October 2022 and attached as annexure "AA4" to the answering affidavit:

> *"5. Our client will therefore not withdraw its application to compel, but for practical reasons and in an attempt to move the matter forward without causing unnecessary further disputes, our client is willing*

to have the matter removed from the unopposed roll of 2 December 2022 with the costs to be reserved.

6. *Our client will then proceed first with the Rule 30 and 30A application against Bakwena as directed by the Honourable Ledwaba DJP. Should it at a later stage become necessary to compel your client to file its answering affidavit, our client will re-enroll its application to compel with the papers amplified as necessary."*

96. It remains OUTA's position that SANRAL is not excused from filing an answering affidavit merely because Bakwena has filed a Rule 6(5)(d)(iii) application. SANRAL is a separate party with separate representation from Bakwena. This, however, does not impact on the present application and will be argued in the appropriate forum in future should it become necessary.

97. The remaining content of these paragraphs is denied insofar as it does not correspond with what I have already stated herein above read with what I have stated in my founding affidavit.

Ad paragraphs 221 and 222:

98. I deny the correctness of the conclusions drawn by Bakwena in these paragraphs.

In the premises I will persist on behalf of OUTA with the relief as requested in the notice of motion.

DEPONENT

Signed and sworn before me at PRETORIA this 17th day of NOVEMBER 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

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