IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 7954/2021

In the matter between:

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	**1ST APPLICANT**
SKHUMBUZO MACOZOMA N.O	**2ND APPLICANT**

And

ORGANISATION UNDOING TAX ABUSE NPC	**RESPONDENT**

In re:

ORGANISATION UNDOING TAX ABUSE NPC	**APPLICANT**

And

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	**1ST RESPONDENT**
SKHUMBUZO MACOZOMA N.O	**2ND RESPONDENT**

OUTA'S SUPPLEMENTARY HEADS OF ARGUMENT

INTRODUCTION

1.

In light of the filing of South African National Road Agency's ("SANRAL") heads of argument, as the applicant in the rescission application, the purpose of the supplementary heads of argument is to address certain aspects raised by SANRAL in their heads of argument and to incorporate the subsequent supplementary affidavits filed in this matter. I do not wish to repeat the submissions and facts set out in the previous heads of argument as those aspects raised has been canvassed sufficiently

and remains relevant. For convenience the parties shall be referred to as in the initial heads of argument.

NO CASE FOR RELIEF MADE OUT IN THE FOUNDING AFFIDAVIT

2.

2.1. The persistence by SANRAL in its contention that the founding affidavit is nonsensical and failed to make out a case for the relief made out in the founding affidavit, seems to be the overarching repetitive basis on which its application for rescission should succeed. This stance is wholly disputed by the Organisation Undoing Tax Abuse ("OUTA"). SANRAL is familiar with OUTA and the scope and thrust of its work. SANRAL has the necessary knowledge about the purpose of the request for access to information to enable it to adopt a purposive approach to the interpretation of the request.

2.2. SANRAL impermissibly relies on a restricted and narrow interpretation of OUTA's PAIA request. All of the records identified by OUTA fall within the scope of the request. SANRAL's claims that the PAIA exemption provisions justify non- disclosure lack any evidence to support them. SANRAL makes blanket assertions in respect of the requested records and fails to provide a sufficient factual basis for its reliance on the statutory exemption. This does not meet the obligations imposed on a public body under PAIA. On this basis the recission application should be dismissed.

2.3. SANRAL's narrow and technical interpretation of OUTA's request is contrary to the values of PAIA and the Constitution, and contrary to the approach taken by the Court.[1] It is submitted that:

2.3.1. SANRAL has a duty to approach the interpretation of the scope of PAIA requests with an attitude of transparency and openness.

2.3.2. If there is any doubt as to whether the document may fall within the ambit of the request, SANRAL is required to adopt the default of disclosure and not of secrecy.

2.4. The Court adjudicating the matter duly considered the matter, despite SANRAL's attempt to create this chaotic unopposed motion reality which potentially rendered the judicial officer incapable is not only insulting to the Honourable Justice Van Der Schyff but is also disingenuous on SANRALs part. The matter was heard on 5 November 2021 and the draft order was signed and made an order of Court on 15 November 2021, indicative that the Honourable Justice Van Der Schyff had ample consideration of the papers and was satisfied that OUTAs founding affidavit disclosed a cause of action which justified the relief sought.

2.5. It made sense to the Court who granted the order. It is only if one takes the most obstructive approach, seeking technical reasons to avoid disclosure, that one could attempt to contend that these records do not fall within the request or that the request is a series of unrelated and jumbled facts.

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[1] ***Afriforum v Emadleni Municipality*** **(A286/2015)[2016] ZAGPPHC 510 (27 May 2016)**

2.6. A public body such as SANRAL is not to "play possum" with the public nor be obstructive, such stance is reflected in PAIA and in the jurisprudence. Regrettably, and consistently with its conduct throughout this matter, that is the approach which SANRAL takes. It is an approach which is unworthy of an institution such as SANRAL, and it is inconsistent with the requirements of the Constitution and PAIA. It is an approach that calls for adverse comment.

2.7. When OUTA's request is, as the law requires, interpreted in accordance with the values of openness, transparency, and with the default of disclosure in mind, then the matter cannot even be disputed.

2.8. It is submitted that in order for SANRAL to be successful in its rescission it wrongfully places the burden on OUTA when PAIA provides that the burden of establishing that the refusal of access to information complies with a provision of PAIA rests on the party refusing access.[2] The test for discharging this burden was articulated as follows by Ngcobo CJ:

> *"In order to discharge its burden under PAIA, the State must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim"*[3]

2.9. Ngcobo CJ went on to say:

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[2] Section 81(3) provides:
"The burden of establishing that-
(a) the refusal of a request for access; or
(6) any decision taken in terms of section 22, 26(1), 29(3), 54, 57(1) or 60, complies with the provisions of this Act rests on the party claiming that it so complies."
See also ***President of the RSA and others v M & G Media Ltd*** **2012 (2) SA 50 (CC) at pare 13**.

[3] ***President of the RSA and others v M and G Media Ltd*** **2012 (2) SA 50 (CC) at para 23.**

> *"[24] The recitation of the statutory language of the exemptions claimed is not sufficient for the State to show that the record in question falls within the exemptions claimed. Nor are mere ipse dixit affidavits proffered by the State. The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government.*
>
> *[25] Ultimately, the question whether the information put forward is sufficient to place the record within the ambit of the exemption claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it does, then the State has discharged its burden under s 81(3). If it does not, and the State has not given any indication that it is unable to discharge its burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the State has only itself to blame."*[4]

2.10. At rescission stage, it is clear that SANRAL has failed to meet such a threshold and only has itself to blame.

CONDONATION APPLICATION:

3.

[4] ***President of the RSA and others v M and G Media Ltd*** **2012 (2) SA 50 (CC) at para 24-25**

3.1. SANRAL takes issue with the condonation sought by OUTA in respect of its answering affidavit. SANRAL states that it is not opposing the condonation thus it is submitted that SANRAL only included this aspect in its heads of argument in an attempt to shine away the glaring spotlight from its own perpetual and unexplained lateness. It must be noted that SANRAL failed to serve and file its rescission application before its self-elected deadline. OUTA in its answering affidavit, served on 16 March 2022, explained the delay to the Court.

3.2. Same cannot be said in respect of SANRALs replying affidavit which was due on 31 March 2022 but a signed and thus commissioned affidavit was only served on 6 April 2022. From SANRALs argument it is clear that the applicant is aware of the principals of condonation which it strictly holds OUTA to yet failed to address same in its replying affidavit nor in its heads of argument.

3.3. In an attempt to circumvent its lateness an unsigned replying affidavit still reflects on Caselines,[5] similarly SANRAL has failed to request condonation from this Court for the delay in the delivery of its replying affidavit and provide any account thereto means that the replying affidavit in the rescission application is not (yet) properly before Court and demonstrates SANRALS continued lack of diligence.

3.4. Lastly to demonstrate SANRAL's lack of diligence and disregard for Court rules and directive, at the case management meeting held on 26 October 2022, SANRAL was directed to file its answer to OUTAs supplementary

[5] Caselines page 018-1 (filing sheet)

affidavit already served on 15 July 2022 to which SANRAL required a case management meeting to move a reply hereto. The deadline provided by the Deputy Judge President was 4 November 2022 and again an unsigned affidavit was uploaded to caselines on 7 November 2022 and the signed affidavit on 14 November 2022. No explanation has been tendered in respect of what took 7 days for an attorney to sign the affidavit.

3.5. In the event of such lack of diligence and SANRALs inability to adhere to any time frame it is then disingenuous for SANRAL to spare numerous pages of its argument questioning OUTAs diligence.

EXPLANATION FOR DEFAULT:

4.

4.1. In amplification of the test to determine good cause SANRAL must present a reasonable and acceptable explanation for their default, and it is submitted that SANRAL has failed to provide such an explanation consequently there is then no need for the Court to consider SANRALS prospect of success. The foundation to the submission that SANRALs explanation for default is far-fetched and must be outrightly rejected by the Court, rests in a letter dated 19 November 2020. The relevant portion of that letter reads:

> "*5. It is therefore open to OUTA to institute a review application in terms of section 78 of PAIA against the decision(s).*
>
> 6. *We do not anticipate that SANRAL will oppose any relief OUTA seeks*

reviewing and setting aside its decision(s), however SANRAL will consider its position once it receives OUTA's application."[6]

4.2. From such correspondence it is clear that SANRAL was not only aware of the pending application but express no intention of opposing the application. Despite numerous confirmation in respect of this matter being set down and proceeding, SANRAL acted in accordance with that intention and did not oppose the matter.

4.3. In reply to the affidavit, the attorney who drafted the letter stated due to the confusion within the internal ranks at SANRAL, they were under the impression that Werksmans was dealing with both Court applications, whereas Werkmans was in fact briefed to oppose only the application under case number 32055/2020.[7] This supports OUTA's submission that SANRAL never intended to oppose this application and only after the reality of that decision sunk did SANRAL after the fact spring into action.

4.4. In Wightman t/a JW Construction v Headfour (Pty) Ltd and Another[8] Heher JA stated; "recognising the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so farfetched clearly untenable that the court is justified in rejecting them merely on the papers;

[6] Caselines 023-7.
[7] Caselines 030-5
[8] **2008 (3) SA 371 (SCA)**

Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd **[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 that E – 635 C…**".

4.5. The humor error explanation tendered by SANRAL in light of this correspondence is then wholly inadequate and should not be accepted by this Court.

PUBLIC INTEREST OVERRIDE:

5.

5.1. To the extent that SANRAL can show that certain of the records fall within the ambit of the exemptions-which OUTA disputes, the submission is elaborated that the public interest in disclosure of the documents manifestly outweighs the harm contemplated in any of the exemptions. In the circumstances, the records must be disclosed under section 46 of PAIA.

5.2. Section 46 provides that an information officer must grant a request for access to a record, despite the fact that it falls within the ambit of one of the exemptions, if:

5.2.1. the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law; and

5.2.2. the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.

5.3. The final leg of the enquiry in response to a request is thus to consider whether, despite the existence of grounds prohibiting disclosure, the records must nevertheless be disclosed on public interest grounds.[9]

5.4. Section 46 contemplates a two-part test, involving consideration of whether disclosure of the requested information would:

5.4.1. reveal evidence of "a substantial contravention of, or failure to comply with, the law; and

5.4.2. the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.[10]

5.5. The provisions are mandatory. If these conditions are met, the court will order SANRAL to disclosure.[11] This principle has been stated as follows:

> *"The override is an exception to the operation of the grounds of refusal to which it is applicable. The override is only operative once it has been determined that one or more of the grounds for refusal applies to a particular record. If none of the grounds is applicable, the requested information must be disclosed. The effect of the override is that, notwithstanding the applicability of a ground of refusal, the record must nonetheless be disclosed. Where it does apply, the public-interest override equals disclosure, i.e. the release of the requested record is mandatory."*[12]

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[9] ***Ooboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others*** **2013 (3) SA 315 (SCA) at para 10.**

[10] ***De Lange and Another v Eskom Holdings Limited and Others*** **2012 (1) SA 280 (GSJ) at pare 135.**

[11] **Qoboshiyane at para 10. See also De Lange at para 133, which was upheld on appeal in *BHP Billiton Plc Inc and Another v De Lange and Others* 2013 (3) SA 571 (SCA).**

[12] ***De Lange*** at para 137.

5.6. OUTA contends that the contents of the records are of public interest and importance. It provides a series of considerations that demonstrate that the public interest in disclosure outweighs the harm contemplated in any of the exemption provisions. The importance of the disclosure on the road users is self-evident.

5.7. Even if there was a plausible basis to refuse disclosure, the statutory exemptions are subject to the public interest override in section 46 of PAIA. On the facts, section 46 trumps SANRAL's refusal grounds, and disclosure of the records must follow.

5.8. The blanket claims made by SANRAL, without any factual underpinning, is simply far-fetched and untenable and ought to be disregarded by the Court. SANRAL seeks to justify non-disclosure by asserting that disclosure may result in "speculative" and "unsubstantiated" commentary, alternatively requires a reason to its satisfaction to disclose. This is the classic defence of the censor: the truth should not be disclosed, because some people may make "speculative" or "unsubstantiated" comments on it. This approach is fundamentally inconsistent with a democratic society in which there is a right of access to information. SANRAL has demonstrated that it is out of touch with the spirit that animates the democratic order. It is, regrettably, still wedded to the culture of secrecy.

5.9. The public has the right to know the facts in this regard, and to know what the records of public bodies reveal in that regard. There is no justifiable reason for

limiting the public's right to receive and impart information with regard to the records sought by OUTA.

5.10. For all these reasons, it is submitted that notwithstanding the existence of any valid ground of refusal relied on by SANRAL, the records ought to be disclosed in the public interest and as contemplated by section 46 of PAIA.

NON-JOINDER

6.

6.1. SANRAL seems to present the argument that it is entitled to rescission due to concessionaire known as TRAC not being joined to these proceedings because OUTA knows that it is not entitled to the documents it seeks. In respect of the entitlement, it has already been canvassed in the initial set of heads of argument the procedural fulfilment entitles OUTA to the records. The position in law under PAIA is clear. Everyone is entitled to access to records held by public bodies as of right, provided that the required procedures have been followed. The only basis upon which the public body can refuse to provide the records is by establishing one of the statutory grounds of refusal created by PAIA.

6.2. In any event, it is submitted that joinder of necessity (as opposed to joinder of convenience) would not be required in this matter, in light of the defences raised by SANRAL as they related to TRAC. In Judicial Service Commission v Cape Bar Council Brand JA dealt with the question of non-joinder in the following terms:

"It has now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see e.g. Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) par 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."[13]

6.3. In Burger v Rand Water Board, Brand JA summarised the principles applicable to joinder as follows:

"The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the Court might make. "[14]

6.4. It is submitted that at best for SANRAL, the joinder of TRAC may be competent on the grounds of convenience but certainly not of necessity. The documents relate to the contract which ought to be in the possession of SANRAL and currently regulates their relationship. There is no basis for this defence. Should the Court find merit in such a defence, it is again stated that public interest trumps such harm.

6.5. It is again submitted that SANRAL has failed to surpass the required threshold in reaching all the elements necessary for a rescission of the order to be

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[13] ***Judicial Service Commission and another v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)*** **2012 (11) BCLFI 1239 (SCA); 2013 (1) SA 170 (SCA) at para 12.**

[14] ***Burger v Rand Water Board and Another*** **2007 (1) SA 30 (SCA) at para 7.**

granted. The application should therefore be dismissed with costs, SANRAL to pay the costs of the application.

ADV E PROPHY
GROENKLOOF CHAMBERS
18 NOVEMBER 2022