

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No:32095/2020

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPO	Applicant
and	
THE SOUTH AFRICAN NATIONAL ROADS AGENCY (SOC) LTD	First Respondent
THE MINISTER OF TRANSPORT	Second Respondent
NAZIR ALLI	Third Respondent
DANIEL MOTAUNG	Fourth Respondent
SKHUMBUZO MACOZOMA	Fifth Respondent
N3 TOLL CONCESSION (RF) (PTY) LTD	Sixth Respondent

THE FIRST, FOURTH AND FIFTH RESPONDENT'S HEADS OF ARGUMENT

1. These submissions are filed in compliance with the Order of the above Honourable Court dated 31 January 2023¹.

¹ Caselines, 048-1

2. It is necessary to state from the outset that, as was the case in respect of the third respondent prior to the delivery of the answering affidavit, the fifth respondent is no longer in the employ of the first respondent (“**SANRAL**”).
3. Neither Mr Alli nor Mr Macozoma are involved in the litigation, nor can they be considered to be the directing minds of SANRAL. Both Mr Alli and Mr Macozoma have been mis-joined in their personal capacities. At best, they ought to have been cited in *nominee officio* capacities.
4. The Applicant (“**OUTA**”) contends that it did not mis-join Mr Alli because, *inter alia*, “*the timing of the concessionaire contract and the article in the Sunday Times are all events within Mr Alli’s knowledge*”². However, while a person’s knowledge about events qualifies such a person as a potential witness it certainly does not provide the basis for the joinder of that person as a respondent or a defendant in legal proceedings.
5. Indeed, OUTA was unable to serve the application on Mr Alli at all³ and, in the circumstances, no order against him can possibly be made.
6. Both Mr Alli and Mr Macozoma have been misjoined, at the very least in the capacities in which they are cited. Since no relief is sought against them personally, references to them ought to be struck from the record.
7. These concise submissions are structured in the following manner:
 - 7.1. Introduction, procedural background and issues to be determined;
 - 7.2. Relevant provisions of PAIA;
 - 7.3. SANRAL’s Compliance with PAIA;

² Caselines, 027-15, paras 56 to 58

³ Caselines 019-4, para 11

- 7.4. Grounds for Refusal;
- 7.5. OUTA's contentions concerning the public interest override; and
- 7.6. Conclusion and costs.

INTRODUCTION

- 8. OUTA originally made a request for information on 30 July 2019⁴, seeking access to SANRAL's contract with concessionaire N3TC and various associated documents pertaining to the upgrade and operation of the toll roads forming the subject-matter of the contract ("**the N3TC concession contract**").
- 9. The N3TC concession contract was concluded an entire decade prior to OUTA's request for information. This fact of the conclusion of the N3TC concession contract as long ago as 1999 always was, and remains, a matter of public record.
- 10. OUTA states in its affidavit that the reason for its request is the following:
 - 10.1. It conducted an investigation into a "series of irregularities" following the conclusion of the N3TC concession contract⁵;
 - 10.2. OUTA has established that the N3TC concession contract will come to an end in 2029 and then, inexplicably, states that "*Notwithstanding, SANRAL has continued to implement the agreement in absence of justifiable extension to that effect potentially in contravention of the Public Finance Management Act ("PFMA")*"⁶;

⁴ Caselines 004-1

⁵ Caselines 002-9, para 24

⁶ Caselines 002-9, para 25

- 10.3. OUTA will only be able to establish the legality of the N3TC concession contract once it has access to all its annexures and addenda⁷ (which, apparently, take on greater importance than the contract itself); and
- 10.4. OUTA's purpose in requesting the documents is to evaluate the agreement that is of public interest and that it is only able to do so on the production of the records pertinent to its request and further that "*should OUTA determined that SANRAL had acted unlawfully in the implementation of its agreement with N3TC OUTA ultimately wishes to institute relevant proceedings in a court of law*"⁸.
11. The rationale for the request is crucial to the determination of the application, since OUTA's own affidavit reveals that:
- 11.1. OUTA was, and remains, unable to identify with any precision or cogency any "irregularities" following the conclusion of the N3TC concession agreement. This is because no such irregularities exist and the allegation is made in absence of any factual basis whatsoever;
- 11.2. OUTA's contentions regarding the "unjustified extension" of the N3TC contract are misdirected, alternatively they pertain to some other agreement and request for information and feature in the founding affidavit as the result of a "copy and paste" error, since the N3TC concession contract continues in accordance with its terms and was never extended;
- 11.3. OUTA does not contend that the conclusion of the N3TC concession contract was unlawful, but rather that it is its implementation that is unlawful and "potentially" in breach of the PFMA. This is a slight of hand relied on by OUTA, presumably to justify its seeking all manner of documents which belong to N3TC and which came into

⁷ Caselines, 002-10, para 35

⁸ Caselines, 002 -16, para 59

existence after the conclusion of the contract. The stratagem is obvious, however, and once it was pointed out to OUTA that the PFMA cannot apply to the N3TC concession contract it was constrained to admit as much⁹;

11.4. At the heart of the request for information is OUTA's intent to investigate the alleged unlawfulness pertaining to the implementation of the N3TC concession contract and, if the unlawfulness is established, to "institute proceedings". While OUTA purposefully avoids stating what those proceedings might be, it could only have contemplated the review and setting aside of the entire N3TC concession contract, alternatively, the review and setting aside of specific decisions pertaining to its implementation.

11.5. The intent to review and set aside the N3TC concession contract after more than 20 years of its implementation and a handful of years before it comes to an end in 2029 demonstrates that OUTA's strategy was abortive from the start, since a Court would not be in the position to review and set aside an agreement which has been almost entirely implemented for close to three decades (or has been fully implemented by the time any potential review is finalised).

11.6. More importantly, OUTA's founding affidavit reveals that the very purpose of its request is to obtain information to mount a litigious attack against SANRAL and / or N3TC, or both. Its request, consequently, amounts to no more than a fishing expedition and an attempt to obtain pre-litigation discovery contrary to the provisions of section 7 of PAIA. More is said about this later in these submissions.

12. Upon receipt of OUTA's request, SANRAL acted in accordance with section 47 of PAIA and informed N3TC of the request¹⁰.

⁹ Caselines, 027-9, paras 31 to 34

¹⁰ Caselines, 025 – 9, para 13

13. N3TC responded to the request by:
- 13.1. Consenting to the disclosure of the actual N3TC concession contract and all annexures and addenda to the contract and all amendments to the contract, annexures and addenda; and
 - 13.2. Claiming confidentiality and / or prejudice and objecting to the disclosure of the remaining documents requested by OUTA¹¹.
14. For whatever reason, SANRAL's decision concerning the request for information was not communicated to OUTA. This bears no significance, and it is irrelevant in the context, since section 27 of PAIA explicitly contemplates that the failure to respond to a request for information constitutes a deemed refusal of the request for purposes of PAIA. The law-giver expressly contemplated the possibility that the response would not be forthcoming and authored the legislative provision so as to ensure that the requester is not prejudiced by the failure to make a determination.
15. OUTA then embarked on an internal appeal process. Subsequently, however, OUTA changed its mind and contended that the internal appeal was not a necessary step in the first place¹². The internal appeal process resulted in the delay in bringing the application in terms of section 82 of PAIA, for which OUTA seeks condonation.
16. These matters (the necessity for an internal appeal and the condonation application) are not contested in SANRAL's answering affidavit. The Court need not pronounce on the question as to whether an internal appeal process was in fact necessary or not. Similarly, SANRAL does not take issue with OUTA's condonation application – SANRAL's position is that the matter must be determined on the merits, instead of tangential issues and technicalities.

¹¹ Caselines 025 – 9 and 10 paras 15 and 16

¹² Caselines 022-18, paras 78 and subsequent

17. Despite the fact that its request for information concerned documents owned and generated by N3TC – and despite OUTA demonstrating an awareness of the requirements of section 47 of PAIA in the founding affidavit, when OUTA launched the present application on or about 22 July 2020, it failed to join N3TC as an interested party.
18. In the result, N3TC sought to intervene in the application and was eventually joined as the sixth respondent in these proceedings. Surprisingly, although the information sought by OUTA affects also N3TC's sub-contractors (with whom SANRAL does not have any direct relationship) those parties (N3TC's sub-contractors) were *also* not joined to the proceedings, either by OUTA or by N3TC.
19. The non – joinder of these parties is not an issue to be raised by SANRAL (and should properly be raised by N3TC). The non – joinder, does, of course, pose serious difficulties for OUTA in respect of a number of documents sought by it¹³. It is a bar to the substantive order it seeks because the Court itself will not grant an order against parties whose joinder was required as of necessity, but was not effected¹⁴.
20. On 7 April 2021, OUTA amended its Notice of Motion and the relief it currently seeks from the Court is the following:
 - 20.1. That OUTA's non-compliance with the 180-day period referred to in section 78(2)(c)(i) of PAIA is condoned;
 - 20.2. Declaring that SANRAL's deemed refusal of access to the records is unlawful and in conflict with the provisions of PAIA;
 - 20.3. Setting aside SANRAL's deemed refusal of OUTA's request ;

¹³ See for example, Part A, items 4, 6, 8, 9 – Caselines 004-6

¹⁴ See **Bowring NO v Vrededorp Properties** 2007 (5) SA 391 (SCA) para 21

- 20.4. Directing SANRAL to supply OUTA with a copy of the requested information within 15 (fifteen) days of granting of this order;
- 20.5. Directing the Respondents to pay the cost of this Application in the event that they oppose the relief sought; and
- 20.6. Further and/or alternative relief

(“**Amended Notice of Motion**”).¹⁵

21. As appears from SANRAL’s answering affidavit, the position it adopts regarding OUTA’s request is that it tenders the documents which N3TC confirmed could be produced¹⁶ and lawfully declines the production of the documents over which N3TC claims confidentiality and / or prejudice (“**the disputed documents**”) on the basis of the provisions of section 36 of PAIA.
22. In simple terms, the dispute regarding the confidentiality and prejudice which will be suffered by N3TC if the disputed documents are to be produced is a dispute between OUTA and N3CT. SANRAL can only be indifferent in this regard because the documents (especially the financially sensitive and proprietary documents in Part B of OUTA’s request) do not belong to it.
23. OUTA nonetheless persists and contends that SANRAL is obliged to produce the documents failing which it will be in default of its obligations in terms of sections 195 and 217 of the Constitution – an argument borne of necessity (and a position invoked for the first time in the replying affidavit) as the result of OUTA being forced to concede that the PFMA finds no application to the N3TC concession contract.

¹⁵ Caselines 023-3
¹⁶ Caselines, 025-10, para 17

24. The argument is without merit for this simple reason – the record which is sought by OUTA (i.e, the disputed documents) are protected by the provisions of sections 36 and 37 of PAIA.
25. Insofar as there is any dispute regarding:
 - 25.1. whether these documents are indeed confidential, or
 - 25.2. whether N3TC would suffer prejudice as the result of the disclosure of the documents,that dispute must be determined on the basis of the version proffered by N3TC and in accordance with the *Plascon Evans* principle.
26. Importantly, in the length of its many affidavits, OUTA does not establish that the documents it seeks are not confidential or that their disclosure to OUTA (and into the public domain) will not result in prejudice to N3TC.
27. In simple terms, OUTA does not (and indeed cannot) answer N3TC's claim of confidentiality and / or prejudice with reference to the disputed documents. It cannot do so because it is not in possession of those documents and N3TC's version must be adopted.
28. That, then, leaves only the question of whether SANRAL's refusal to produce the disputed documents in terms of section 36 and 37 of PAIA is, or ought to be, overridden by the public interest provision of section 46 of PAIA.
29. As is demonstrated below, OUTA fails, abjectly, to meet the high threshold of the public interest override requirement in section 46 of PAIA.
30. Before the relevant provisions of PAIA are set out for the benefit of the Court, it is important to make a final note of OUTA's conduct in this rubric. Despite its insistence on obtaining the N3TC concession contract, addenda, annexures and amendments thereto, it did not make the necessary arrangements to obtain them from SANRAL. Instead, it sought them from N3TC and then complained about not having them for the purposes of its counsel's heads of

argument in respect of the disputed documents – a complaint which is entirely unmeritorious, since OUTA could not make out a new case for the disclosure of the disputed documents in its heads of argument: it either made out a case for this purpose in its founding affidavit, or it did not.

31. Surprisingly, however, OUTA has to date not obtained the N3TC concession contract, despite the tender of these documents and notwithstanding its original insistence on having to interrogate the contract and its annexures and addenda in order to establish the existence of the alleged irregularities.
32. OUTA's position in this regard demonstrates that this application is not about obtaining the concession contract as OUTA originally stated: it is about obtaining N3TC's financial and confidential documents in the hope to make them public to the obvious detriment of N3TC. OUTA appears utterly disinterested in the concession contract itself, despite the fact that the case made out in the founding affidavit focuses precisely on that contract¹⁷.
33. There is an obvious disconnect between what OUTA states in its affidavit and the documents it actually seeks. The request for information was plainly never about the concession contract and its addenda, but about the confidential and sensitive financial and commercial information: the contract and the references to PFMA are used by OUTA as a staling horse to get to information which amounts to no more than pre-litigation discovery. SANRAL associates itself with the submissions made by N3TC in this regard, although the arguments are not repeated.

¹⁷ Caselines, 002-10, paras 35 and 36

RELEVANT PROVISIONS OF PAIA

34. Section 11 of PAIA provides that a requester must be given access to a record¹⁸ of a public body if:

34.1. that requester complies with the procedural requirements of PAIA relating to a request for access to that record; and

34.2. access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4, Part 2 of PAIA.

35. Section 27 of PAIA provides for a deemed refusal of a request for access to a record:

35.1. *'If an information officer fails to give the decision on a request for access to the requester concerned within 30 days the information officer is regarded as having refused the request'.*

36. Section 36 of PAIA provides for the protection of commercial information of third parties in the following terms:

'(1) Subject to subsection (2), the information officer of a public body must refuse a request for access to a record of the body if the record contains—

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information, other than trade secrets, of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

¹⁸ Record is defined as any recorded information in the possession or under the control of the public body, Section 1, PAIA

(c) information supplied in confidence by a third party the disclosure of which could reasonably be expected—

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

or

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

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

(a) already publicly available;

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

(c) ...

...¹⁹

37. Section 78 (2) of PAIA provides as follows:

'(2) A requester—

(a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;

(b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75 (2);

¹⁹ The provisions of subsection 2(c) and 3 are irrelevant for the present purposes

(c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1—

(i) to refuse a request for access; or

(ii) taken in terms of section 22, 26 (1) or 29 (3);

(d) aggrieved by a decision of the head of a private body—

(i) to refuse a request for access; or

(ii) taken in terms of section 54, 57 (1) or 60; or

(e) that is aggrieved by any decision of the Information Regulator,

may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82'.

38. Section 47 of PAIA provides that:

'(1) The information officer of a public body considering a request for access to a record that might be a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1) must take all reasonable steps to inform a third party to whom or which the record relates of the request.

(2) The information officer must inform a third party in terms of subsection (1)—

(a) as soon as reasonably possible, but in any event, within 21 days after that request is received or transferred; and

(b) by the fastest means reasonably possible.

(3) When informing a third party in terms of subsection (1), the information officer must—

(a) state that he or she is considering a request for access to a record that might be a record contemplated in section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1), as the case may be, and describe the content of the record;

(b) furnish the name of the requester;

(c) describe the provisions of section 34 (1), 35 (1), 36 (1), 37 (1) or 43 (1), as the case may be;

(d) in any case where the information officer believes that the provisions of section 46 might apply, describe those provisions, specify which of the circumstances referred to in section 46 (a) in the opinion of the information officer might apply and state the reasons why he or she is of the opinion that section 46 might apply; and

(e) state that the third party may, within 21 days after the third party is informed—

(i) make written or oral representations to the information officer why the request for access should be refused; or

(ii) give written consent for the disclosure of the record to the requester.

(4) If a third party is not informed orally of a request for access in terms of subsection (1), the information officer must give a written notice stating the matters referred to in subsection (3) to the third party’.

39. Section 48 of PAIA provides for the consent of third parties:

‘..(1) A third party that is informed in terms of section 47 (1) of a request for access, may, within 21 days after the third party has been informed—

(a) make written or oral representations to the information officer concerned why the request should be refused; or

(b) give written consent for the disclosure of the record to the requester concerned.

(2) A third party that obtains knowledge about a request for access other than in terms of section 47 (1) may—

(a) make written or oral representations to the information officer concerned why the request should be refused; or

(b) give written consent for the disclosure of the record to the requester concerned”.

40. Finally, section 46 provides for the public interest override:

'Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45, if —

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

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

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

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

COMPLIANCE WITH PAIA

41. It is common cause that OUTA failed to comply with the provisions of the PAIA in that it failed to:

41.1. exhaust all the internal appeal procedures as set out in Chapter 1, Part 4 of PAIA in respect of the deemed refusal;

- 41.2. exhaust the complaints procedures set out in Chapter 1A, Part 4 of PAIA in respect of the deemed refusal; and
 - 41.3. apply to a Court within 180 days of the deemed refusal.
42. As stated, however, these points are not taken in the answering affidavit.
43. SANRAL, however, acted in accordance and complied with their obligations under PAIA in that:
- 43.1. It notified the third party (N3TC) of OUTA's request in terms of Section 47; and
 - 43.2. It brought about the deemed refusal of OUTA's request in terms of section 27 of PAIA, thus allowing the continuation of OUTA's request process.

GROUNDINGS OF REFUSAL

44. Although there is no evidence of the basis for the refusal being communicated to OUTA, it must be accepted, given the submissions SANRAL received from N3TC, that the refusal is premised on N3TC's claims of confidentiality and prejudice.
45. The requested information contained general and specific commercial, financial and technical information of a highly confidential nature belonging to the concessionaire. The information requested specifically relates to the revenue generated by the concessionaire throughout the term of the N3TC Concession Contract. In terms of section 36 (1)(b) and (c), the Respondents are therefore entitled and justified in refusing to grant access to the information requested by the Applicant.
46. SANRAL informed N3TC of OUTA's request for the information in terms of Section 47 of PAIA and N3TC objected to the request in terms of Section 48 of PAIA indicating that it will not consent to the disclosure as this will cause harm to the commercial and financial interest. The information is obviously confidential and the disclosure of such confidential information

will put the concessionaire at a disadvantage in its contractual negotiations both in relation to similar contractual arrangements and prejudice it in commercial competition.²⁰

47. If SANRAL were to disclose the documents relating to the formula or manner of the price determination, SANRAL would also be in breach of a duty of confidence owed to N3TC, thereby potentially exposing itself to claims.
48. The refusal is therefore entirely within the scope of section 36 and 37 of PAIA.
49. OUTA does not make out any case regarding the rationality of the refusal and indeed it cannot do so, since the refusal is a deemed refusal in terms of section 27.
50. In the circumstances the only issue to be determined is whether the public interest override gets OUTA over the line as far as the disputed documents are concerned.

OUTA'S CONCESSION REGARDING THE PUBLIC INTEREST OVERRIDE

51. Having conceded that PFMA is not applicable, OUTA places reliance on section 195 and 217 of the Constitution. Section 195 sets out the basic values and principles governing public administration. Section 217 sets out the principles regarding public procurement. Neither section is actionable (in the sense that it cannot ground a cause of action) and the principle of subsidiarity would in any event prevent OUTA from relying directly on the provisions of these sections for the purposes of setting aside decisions to conclude the concession contract, or to implement the concession contract²¹.
52. Once it is established that the grounds for refusal were cogent and that OUTA is limited, in terms of this application, to the four corners of PAIA, rather than the lofty provisions of the

²⁰ *BHP Billiton PLC Incorporated v De Lange ZASCA 11 (189/2012)*

²¹ See *My Vote Counts v The Speaker of the NA and Others* 2016 (1) SA 132 (CC) at [44] to [66]

Constitution, it is obvious that the only issue for determination is whether the public interest override requires that SANRAL be compelled to disclose the disputed documents.

53. OUTA's contentions in respect of public interest are generalised and without any factual basis, but even more importantly, they cannot form the basis for the application. That is because allegations regarding the so – called public interest are inextricably linked to the allegations, made for the first time in the replying affidavit, that an article in the Sunday Times identified the alleged irregularities and non – compliance with laws.
54. Firstly, it is trite that OUTA cannot rely on the contents of the replying affidavit to establish a case. This is impermissible and constitutes an ambush.
55. Secondly, it does not assist OUTA to refer to a newspaper article as a basis for demonstrating a prima facie case that the production of the disputed documents "*would reveal evidence of a substantial contravention of, or failure to comply with, the law*". OUTA is required to lay a basis on the public interest override.
56. The article alone (especially in absence of any confirmatory affidavits which OUTA undertook to furnish, but never did²²) has no evidentiary value whatsoever, much like OUTA's unmoored allegation that "*what is striking is that ninety – nine percent of the time SANRAL accepts the recommendation, and accepts the advice, given to it by the consultant*"²³.
57. There is nothing in the funding affidavit that would establish that the public interest override requires the disclosure of the disputed documents. The Court will similarly search in vain for any factual allegations (as opposed to generalised statements of trite propositions and quotations) establishing that the public interest of the disclosure outweighs the prejudice

²² Caselines, 027-14, para 49

²³ Caselines, 027-12, para 42

which will be suffered by N3TC. OUTA does not even attempt to satisfy the requirements of section 46(b).

CONCLUSION

58. Section 36(1) of PAIA is peremptory in nature and therefore SANRAL was obliged to refuse access to information falling within the ambit of Section 36 (1) and that OUTA can obtain the disputed documents only if the section 46 override applies.
59. Insofar as there is any uncertainty regarding the applicability of section 36(1), it is common cause that the refusal is a deemed refusal and that the dispute properly lies as between OUTA and N3CT. In that case, the dispute must be determined on the *Plascon Evans* principle in favour of N3TC, again reducing the matter to the crisp question of whether the override applies.
60. OUTA has not established the application of section 46 of PAIA, nor can it do so. Its entire application is abortive and serves an agenda entirely unrelated to the deponent's version in the founding affidavit.
61. In the event, the application is ill-founded and should be dismissed, with costs.

A Milovanovic-Bitter

Counsel the First, Fourth and Fifth Respondents

Chambers, Sandton

6 February 2023