

**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

**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,

STEFANIE FICK

do hereby make oath and say:

1. I am an adult female Executive Director of the applicant's Accountability Division with authority to depose to this affidavit on behalf of the applicant as set out in my founding affidavit.
2. The facts contained herein fall within my personal knowledge, unless from the context it appears otherwise, and are to the best of my belief true and correct.





3. Submissions of a legal nature are made on the advice of the applicant's legal representatives, which advice I accept as correct.
4. I will continue in this affidavit to refer to the applicant as "OUTA", the first respondent as "SANRAL", the second respondent as "the Minister" and the fourth respondent as "Bakwena", as the respective parties have done in the affidavits.
5. This affidavit is filed in reply to both the answering affidavits filed by SANRAL and Bakwena. It will accordingly be structured to first reply to SANRAL's answering affidavit, and thereafter to reply to Bakwena's answering affidavit.

AD SANRAL'S ANSWERING AFFIDAVIT:

In limine:

6. From the outset and before I deal with SANRAL's answering affidavit *ad seriatim*, I point out that SANRAL concedes that the impugned decision should be reviewed and set aside and requests a remittal back to it (SANRAL) for reconsideration.
7. SANRAL does so on the basis that it had not considered OUTA's request for information (as the refusal was a deemed one) and that there are third parties that may be affected by the request who first need to be notified of OUTA's

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request. SANRAL states in the last sentence of paragraph 28 of its answering affidavit:

"This third party notification process, can only be appropriately done in the context of section 47, if the court sets aside the deemed refusal and remits OUTA's request back for reconsideration."

8. What SANRAL is proposing is in line prayers 2 and 4 of OUTA's Notice of Motion. Prayers 2, 3 and 4 read:

"2. Setting aside the deemed refusal of the Applicant's request for access to the records of the First Respondent in its request for information in terms of the PAIA and dated 8th June 2020 ("the request").

3. Directing the First Respondent to provide the requested records to the Applicant within 15 (fifteen) days of the granting of this order.

4. Alternatively to prayer 3, directing the First Respondent to notify any third party of the request concerning records relating to them in accordance with section 47 of PAIA within 10 calendar days after service of this order, and thereafter to comply with the time periods and provisions in chapter 5 of PAIA." (Emphasis added)

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9. Chapter 5 of PAIA which consists of sections 47 – 49, deals with third party notification and intervention in circumstances where access to records of public bodies is requested.
10. The relief set out in prayer 4 of the Notice of Motion entails that the matter be referred back to SANRAL for purposes of notifying any affected third parties in accordance with section 47, whereupon such third parties will have an opportunity to make representations in terms of section 48, and SANRAL will be required to make a decision in terms of section 49 of PAIA. This prayer cannot be interpreted otherwise than that compliance with Chapter 5 would entail a remittal back to SANRAL. It is also in line with section 82(b) of PAIA which *inter alia* provides for a court hearing of a PAIA application to require that an information officer of a public body take action within a specified period.
11. SANRAL acknowledges that it has not complied with its obligations under PAIA and concedes that its decision should be reviewed and set aside, and further proposes relief (albeit not in the form of a counter-application) in accordance with the alternative relief contained in prayer 4 of OUTA's Notice of Motion. There is accordingly no real dispute between SANRAL and OUTA. SANRAL has nevertheless considered it prudent to oppose this application, is seeking the costs of two counsel, and has caused substantial costs to be incurred by the parties involved.




12. SANRAL could simply have indicated from the outset that it agreed to the alternative relief requested in prayer 4 of the Notice of Motion, with which OUTA would have agreed.
13. While OUTA is a non-profit organisation litigating with limited funds the source of SANRAL's funding is the public purse. SANRAL's answering affidavit shows that no expense was spared in employing two counsel, further illustrating SANRAL's cavalier attitude towards the use of public funds for unnecessary litigation.
14. This is particularly so in light of the fact that SANRAL invited OUTA to launch this application and created an expectation that the application would not be opposed. In this regard I refer the Honourable Court back to annexure "SF14" attached to OUTA's founding affidavit, being a letter from Werksmans Attorneys (on record for SANRAL), where it is stated in paragraphs 5 and 6 thereof:

"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 received OUTA's application.* (Emphasis added)

15. At no point prior to the filing of the answering affidavit did SANRAL inform OUTA that it was willing to consent to the review and setting aside and a remittal back to it in terms of section 47 and the provisions of Chapter 5. The first time OUTA

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learned of this was upon receipt of SANRAL's answering affidavit on 22 June 2023.

16. Following SANRAL's concessions in this regard, there is no real or *bona fide* dispute between OUTA and SANRAL. In order not to waste unnecessary time, OUTA will proceed to ask for the alternative relief as set out in prayer 4 of the Notice of Motion and will not persist with the relief set out in prayer 3. It is submitted that this should be the end of the matter.
17. Bakwena's opposition to the review and setting aside of the impugned decision has no merit or relevance where SANRAL, the decision-maker, has admitted that it has not complied with its obligations under PAIA and where SANRAL itself advocates for the review and setting aside of the impugned decision.
18. OUTA will accordingly ask for an order in terms of prayers 1, 2, 4 and 5 of the Notice of Motion. Given the manner in which SANRAL has approached its opposition hereto, OUTA will request the Honourable Court to exercise its discretion in favour of awarding a cost order against SANRAL on the scale as between attorney and client.

I now turn to deal with the paragraphs contained in SANRAL's answering affidavit *ad seriatim*.

Ad paragraph 1:



19. Save to deny that the allegations contained in SANRAL's answering affidavit are true and correct, the remaining content hereof is noted.

Ad paragraphs 2 and 3:

20. The allegations contained herein are admitted.

Ad paragraph 4:

21. Although I admit the content of this paragraph, it only refers to a part of the alternative relief requested by OUTA. In this regard I refer the Honourable Court to OUTA's Notice of Motion where the relief sought is set out in prayers 1 to 6 thereof, read with what I have stated above about the relief contained in prayer 4 of the Notice of Motion.

Ad paragraph 5:

22. I deny the allegations contained herein and submit that it largely amounts to legal argument. I specifically deny that it is "*impermissible*" to ask a court for substitution of a decision in circumstances where SANRAL has failed to comply with its statutory duties in terms of PAIA. The court retains a discretion in this regard.
23. I further deny the allegation in paragraph 5.3 that OUTA requested relief to compel SANRAL to notify third parties without a concomitant prayer for the



remittal of the request. Prayer 4 of the Notice of Motion (which is prayed for in the alternative to prayer 3 thereof) entails precisely this and I refer the Honourable Court to what I have stated in this regard above. Full legal argument in this regard will be advanced on behalf of OUTA at the hearing of the matter.

Ad paragraph 6:

24. I take note of SANRAL's reason for opposition but deny that there is any merit therein. It is clear from this paragraph that SANRAL and OUTA are *ad idem* that the impugned decision should be reviewed and set aside.
25. SANRAL could have indicated from the outset that it would agree to an order in terms of prayer 4 of the Notice of Motion, which would have avoided unnecessary costs to be incurred.
26. It is worth noting that SANRAL seems to seek specific relief based on its own non-compliance with the provisions of PAIA but does not do so by way of a counter-application. The relief sought in this paragraph is also contrary to what SANRAL prays for in its concluding paragraph, where it asks for a dismissal of the application with the costs of two counsel (despite the admission that the decision ought to be reviewed and set aside).

Ad paragraph 7:

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27. I take note of the way SANRAL intends to structure its answering affidavit.

Ad paragraphs 8 to 21 thereof:

28. These paragraphs seem to set out the provisions of various clauses contained in PAIA, and the content is accordingly admitted insofar as it corresponds with the referenced clauses of PAIA.

Ad paragraphs 22 and 23:

29. I admit the content of these paragraphs.

Ad paragraph 24:

30. I admit the first sentence of this paragraph. SANRAL only replied to OUTA on 30 July 2020 and not 29 July 2020 as suggested (annexure “SF8” to the founding affidavit).

31. I deny that SANRAL “*purportedly*” refused the request. It is not an alleged refusal but a factual one (albeit a deemed refusal).

Ad paragraph 25:

32. A deemed refusal is still a refusal and I refer the Honourable Court to what I have stated above regarding the use of the word “*purportedly*” in this context.

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Ad paragraph 26:

33. The allegations contained herein appear to be premised on the provisions of sections 25 and 47 of PAIA and are admitted insofar as it corresponds with these sections.

Ad paragraphs 27, 28 and 29:

34. Although the information requested relates to Bakwena, the concession contract is one of a public nature to which SANRAL, a state-owned entity, is a party. All the documents that were requested should be in the possession of SANRAL.
35. If SANRAL was of the view that other third parties should have been informed, it was incumbent on it to inform those third parties in accordance with the provisions of section 47 of PAIA, which SANRAL had failed to do. That much seems to be common cause.
36. SANRAL's failure in this regard is further evident from the bold admission made in paragraph 29 of its answering affidavit, where the deponent states:

"The third-party notification process was simply not done, at least not within the 30-days which SANRAL was required to decide on the request in terms of section 25."

(Emphasis added)



37. The above admission by SANRAL makes it even more inexplicable why SANRAL opposes this application when prayer 4 of the Notice of Motion expressly provides for relief that would enable SANRAL to cure its non-compliance with section 47 of PAIA.
38. I further refer the Honourable Court to what I have set out under heading "*In limine*" above about SANRAL's unnecessary opposition to this application and the substantial costs that have been incurred, most which could likely have been avoided had SANRAL from the outset made clear its position.

Ad paragraph 30:

39. This paragraph again contains an admission by SANRAL that it did not comply with its obligations in terms of PAIA.

Ad paragraph 31:

40. I admit that the reasons as set out herein were provided as part of the background information in the founding affidavit.

Ad paragraphs 32 and 33:

41. Insofar as it may be suggested, I deny that any reasons are required or relevant when a request for access to information is made to a public body in terms of section 11 of PAIA, as was done here. Section 11(3) is clear on this aspect:



“(3) A requester’s right of access contemplated in subsection (1) is, subject to this Act, not affected by –

(a) any reasons the requester gives for requesting access; or

(b) the information officer’s belief as to what the requester’s reasons are for requesting access.”


42. Moreover, the prescribed form that has to be completed by a requester in terms of section 18(1) of PAIA does not make provision for reasons for the request to be provided. This can be seen from the request by OUTA on 8 June 2020 on the prescribed form attached to the founding affidavit as annexure “SF4”.

43. For SANRAL to now claim that *“the above information was not part of OUTA’s request for information”* when the prescribed form neither provides for such information to be part of the request for information nor requires it, is misleading.

44. I further fail to fully understand the meaning and applicability of these paragraphs, but insofar as it purports to convey a legal position about what may or may not be appropriate for a court to take into consideration or how decisions should be taken, the correctness of such a position is denied.

Ad paragraph 34:

45. I admit the content insofar as it corresponds with prayers 2, 3 and 4 of the Notice of Motion. OUTA is also seeking a cost order against SANRAL in prayer 5 of the Notice of Motion.

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Ad paragraph 35:

46. This paragraph again contains an admission that OUTA's request was not properly considered by SANRAL and that it accordingly failed to comply with its obligations in terms of PAIA.
47. I deny that it will not be "*permissible*" for the Court to direct that the records be granted and that this relief "*simply cannot be granted at this stage*". I am advised that the Court retains a discretion to grant this relief. However, as dealt with under the *in limine* point raised above, it is submitted that SANRAL's concession to the relief requested in prayer 4 should bring an end to matter and the Court will not need to exercise any further discretion or entertain argument about prayer 3 of the Notice of Motion.

Ad paragraph 36:

48. I deny that the Court makes decisions in terms of section 33 of PAIA, and therefore deny the applicability of this section and the legal contentions flowing from it as contained in this paragraph. There has already been a refusal.
49. The Honourable Court is tasked to adjudicate upon whether the impugned decision stands to be reviewed and set aside, and if so, whether the Court should substitute SANRAL's decision (prayer 3) or alternatively direct SANRAL in terms of section 47 to comply with the provisions of Chapter 5 (prayer 4). The latter would entail directing SANRAL to inform all third parties that may have an



interest of the request and following that, for SANRAL to make a decision in terms of section 49.

50. Insofar as it may still be of relevance following SANRAL's concession and OUTA's indication that it will not persist with prayer 3 of the Notice of Motion, I deny that the Court cannot grant this prayer. The Court retains such a discretion, although I submit that at this point has become moot for purposes of the present application.

Ad paragraph 37:

51. Although it is not clear how other parties (other than Bakwena) may be affected by the request, I take note of SANRAL's view in this regard. SANRAL was obliged in terms of section 47 of PAIA to inform such parties of the request but failed to do so.
52. The relief requested in prayer 4 of the Notice of Motion provides SANRAL with an opportunity to comply with this section and then, after having received feedback from affected third parties in terms of section 48, to make a decision in terms of section 49 of PAIA.
53. I do not understand what SANRAL is attempting to convey with the sentences *"The exact number of entities in each category cannot be determined from the request by the court, at least for the purposes of prayer 4. On this basis alone the remedy cannot be granted."*



54. There is no obligation on OUTA to identify third parties whom SANRAL needs to inform in terms of section 47. The *onus* would be on SANRAL to identify any potentially affected third parties and inform them of the request. This is precisely what prayer 4 of the Notice of Motion makes provision for. SANRAL cannot rely on its own failure to identify such potentially affected third parties as basis for opposing the relief sought in prayer 4.
55. Any remaining allegations that do not correspond with what I have stated above are denied.

Ad paragraphs 38 to 47:

56. The allegations contained in these paragraphs appear to be general legal submissions and views expressed by SANRAL and I deny that it has applicability to the facts in this matter. This Honourable Court is not called upon to decide a constitutional matter as envisaged by section 172 of the Constitution and none of the parties have delivered a Rule 16A notice indicating an intention to raise a constitutional point.
57. Moreover, SANRAL has already conceded that if failed to comply with the provisions of PAIA and that the impugned decision should be reviewed and set aside. It is submitted that, given this concession by the decision-maker, the legal submissions made in these paragraphs regarding when a decision stands to be reviewed and set aside are superfluous. Where relevant, the applicable legal position will be appropriately dealt with in OUTA's heads of argument.

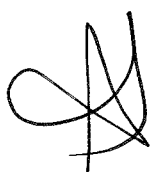
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Ad paragraph 48:

58. Insofar as it may be relevant, I point out that the conclusion reached in this paragraph is detached from the legal submissions made in the preceding paragraphs 38 to 47. However, this paragraph again confirms that SANRAL did not *"apply its mind properly while taking into account all relevant information and considerations."*
59. The relief for which SANRAL advocates in this paragraph and throughout its answering affidavit, corresponds with the relief requested by OUTA in prayers 2 and 4 of the Notice of Motion.

Ad paragraphs 49 and 50:

60. The allegations contained in these paragraphs appear to be an expression of legal opinion, the relevance of which is denied.
61. It is further denied that the relief requested by the applicant would amount to an *"intrusion"* by the Court or that the applicant is asking the Court to interfere with a decision with which it may disagree. The relief, if granted, will not amount to an *"intrusion"* or an *"interference"* by the Honourable Court. SANRAL failed to comply with its obligations in terms of PAIA and OUTA had a right to approach the Honourable Court for relief. In fact, as pointed out, OUTA was invited to do so by SANRAL's attorneys.



Ad paragraphs 51, 52 and 53:

62. It is correct that OUTA seeks an order to set aside SANRAL's decision. SANRAL agrees that this relief should be granted.
63. It is further correct that OUTA seeks an order in prayer 3 of its Notice of Motion for substitution. However, in the alternative to such substitution, OUTA seeks in prayer 4 of the Notice of Motion relief that will entail remittal back to SANRAL to inform any third parties that may be affected by the request, and then reconsider the request in accordance with the provisions of Chapter 5 of PAIA.
64. Section 49 of PAIA (which forms part of Chapter 5 dealing with requests for information made from public bodies) sets out the procedure for consideration of the matter and notification of the parties of the outcome of the decision after interested third parties have been notified and the public body has considered the request in conjunction with presentations made to it by third parties.
65. I deny that substitution involves the "*encroachment*" and further deny the correctness of the legal opinions expressed in paragraph 51. This Court retains a discretion to grant a substitution order. However, given what I have set out above regarding SANRAL's concessions pertaining to the relief requested in prayers 2 and 4 of the Notice of Motion, the issue of substitution has become moot for purposes of this application.

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66. The remainder of these paragraphs contain legal argument which will, where relevant, be addressed in the heads of argument filed on behalf of OUTA and at the hearing of the matter.

Ad paragraphs 54 to 61:

67. The allegations contained herein again appear to be legal argument of a general nature about when and how the Court should exercise its discretion. Although most of what is stated here is of a general nature. I submit that, despite what is stated in these paragraphs, OUTA was entitled to ask for the relief contained in the Notice of Motion and the Court retains a discretion in this regard. Any allegations to the contrary are denied.

68. I do not intend to set out OUTA's full legal argument on the relief requested herein, as same will be contained in the heads of argument that will be filed on behalf of OUTA.

Ad paragraph 62:

69. I deny the allegations contained herein. It is further clear that SANRAL misconstrues the relief requested in prayer 4 of the Notice of Motion. As already pointed out earlier, upon a proper perusal and interpretation of prayer 4, it is clear that the relief requested therein entails a remittal back to SANRAL for purposes of notifying third parties and then making a decision in accordance

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with section 49 of PAIA. There is no other interpretation that can be attached to prayer 4 of the Notice of Motion.

I now turn to deal with the *ad seriatim* responses to OUTA's founding affidavit contained in SANRAL's answering affidavit. Where I do not expressly deal with any specific allegations, such allegations should be taken as being denied insofar as it does not correspond with what I have state in my founding affidavit or in this replying affidavit.

Ad paragraph 67:


70. Mr Macozoma is cited in his official capacity as Information Officer of SANRAL, as he was at the time when the application was launched. He was also the Chief Executive Officer.

71. I take note that he no longer holds these positions. In the premises, and if necessary, I will ask the Honourable Court for an amendment to the citation of the third respondent to reflect the name of the current Chief Executive and Information Officer, Mr Reginald Lavhelesani Demana, who is also the deponent of SANRAL's answering affidavit. I submit that such an amendment would hold no prejudice for any of the parties, as the third respondent is cited in official capacity.

Ad paragraphs 68 and 69:

72. I take note of the content of these paragraphs which confirms that Mr Macozoma was SANRAL's Information Officer at the time of the request. I

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further take note that SANRAL has not updated its website to reflect the correct information and trust it will be done without undue delay, so that members of the public can access the correct information.

Ad paragraphs 71 and 72:

73. I deny the allegations contained herein for reasons already set out above.

Ad paragraph 76 and 77:

74. I take note that SANRAL acknowledges that the averments in paragraphs 17 to 28 of the founding affidavit relate *inter alia* to OUTA's reasons for requesting the information.

75. It is further correct that no reasons appear from the request (annexure "SF4" to the founding affidavit), as the prescribed application form does not make provision for reasons to be advanced in a request for information. Section 11 of PAIA further provides that a requester's right of access is not affected by any reasons the requester gives for requesting access, or by the information officer's belief as to what the requester's reasons are for requesting access.

76. Even if SANRAL did properly consider the request, the reasons would not have served before it for purposes of such a consideration, and further should play no role in its considerations. The allegations in paragraph 77 that the reasons were not considered by SANRAL and no decision based on these reasons

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exists, therefore have no relevance. In terms of section 11(3) of PAIA a requester's right to access to information is not affected by any reasons the requested may give.

Ad paragraphs 78 and 79:

77. I take note of the position taken by SANRAL in these paragraphs, but insofar as it may be relevant, deny that a respondent in motion proceedings can decline to deal with allegations made in the founding affidavit and then reserve its rights in this regard. I am advised that in such an instance the allegations contained in those paragraphs in the founding affidavit are, for purposes of this application, not deemed in dispute.

Ad paragraphs 80, 81 and 82:

78. I refer the Honourable Court to my responses to paragraphs 29 to 37 and paragraphs 68 to 70 of SANRAL's answering affidavit above and repeat what I have stated therein. Any allegations that do not correspond with these responses or with what I have stated in my founding affidavit are denied.

Ad paragraphs 84 and 85:

79. I take note that OUTA's application for condonation is not opposed by SANRAL, and further take note of the fact that SANRAL and OUTA are *ad idem* that SANRAL's refusal was a deemed refusal and not a decision that was reached in terms of section 25(3) of PAIA.



Ad Conclusion:

80. Despite SANRAL's admission that the impugned decision should be reviewed and set aside and its advocating throughout its answering affidavit that the request should be remitted for reconsideration, SANRAL nevertheless prays in this paragraph for dismissal of the application with costs of two counsel. The request for dismissal is directly in contradiction with the relief that is advocated for throughout SANRAL's answering affidavit.
81. I further submit that it is rather opportunistic of SANRAL to request a cost order against OUTA in circumstances where SANRAL conceded the principal relief of review and setting aside its decision, and further conceded that it did not comply with the provisions of section 25 of PAIA.
82. I have also already dealt with SANRAL's misconstruction of the relief requested in prayer 4 of OUTA's Notice of Motion above and the prejudicial financial consequences suffered by OUTA as a result thereof. SANRAL could simply have indicated at the outset of this matter through its attorney of record what its attitude regarding the relief was instead of going through the trouble of opposing the matter and causing all involved to incur the expenses of an opposed application.
83. In the premises OUTA will request an order in terms of prayers 1, 2, 4 and 5 of the Notice of Motion. Prayers 1, 2 and 4 is line with what SANRAL conceded. Given SANRAL's unnecessary opposition to this application, I submit that the



circumstances warrant for costs against SANRAL to be granted on a punitive scale.

AD BAKWENA'S ANSWERING AFFIDAVIT:

84. Bakwena's answering affidavit does not acknowledge that SANRAL failed to comply with its obligations in terms of PAIA and appears to be premised on the contention that SANRAL did make a decision in terms of section 25 of PAIA, despite SANRAL's admission that it did not, and further despite SANRAL's concession that the deemed refusal should be reviewed and set aside.
85. It is common cause between OUTA, the requester, and SANRAL, the decision-maker, that the decision should be reviewed and set aside. It is submitted that this renders substantial parts of what is stated by Bakwena in its answering affidavit irrelevant for purposes of this application. I nevertheless reply to Bakwena's answering affidavit where necessary and insofar as the Honourable Court may deem the contentions advanced by Bakwena relevant for purposes of the relief requested.

Ad paragraphs 1 to 5:

86. I deny that the allegations contained in Bakwena's answering affidavit are true and correct and further deny that the legal positions advanced are correct. Full legal argument on the latter will be presented at the hearing of the matter.

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Ad paragraph 8:

87. I take note of the topics that Bakwena intends addressing in its answering affidavit but deny the relevance of these topics and the contentions made in support of such topics.

Ad paragraph 9:

88. I admit that the two reasons mentioned in paragraph 9.1 and 9.1 of Bakwena's answering affidavit are *inter alia* contained in OUTA's founding affidavit but deny that these are "essentially" the grounds upon which OUTA seeks relief. OUTA's application is premised on a constitutionally entrenched right of access to information held by a public body as contained in section 32 of the Constitution read with section 11 of PAIA, and its right to a lawful and valid decision of the request following a proper consideration thereof by SANRAL.
89. The cause of action therefore is SANRAL's failure to comply with its obligations in terms of PAIA in considering the request and reaching a decision in accordance with the Act. Had SANRAL considered the request in accordance with the provisions of PAIA and reached a lawful and valid decision on the request, this application would not have been necessary.
90. Reasons advanced by OUTA in its founding affidavit for seeking the information should not be confused with the cause of action on which the application is premised. OUTA's right of access to information and fair administrative action exists irrespective of its reasons for wishing to exercise this right.

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91. Bakwena's attempt throughout its answering affidavit to pass off some of the reasons provided by OUTA for seeking the information as the "*cause of action*" is therefore rejected.

Ad paragraph 10:

92. I deny the content of this paragraph. It should be borne in mind that the N1 and N4 toll roads in question are public roads and the concession agreement between SANRAL and Bakwena pertaining to these toll roads is of a public character.

Ad paragraphs 11, 12 and 13:

93. I admit the content of these paragraphs.

Ad paragraph 14:

94. I deny the allegations contained in these paragraphs. OUTA did not come to any "*realisations*" as suggested. As the agreement between SANRAL and Bakwena pertains to public roads and is of a public character, OUTA decided to request this information from SANRAL, as it is entitled to do.
95. Section 11 of PAIA does not require OUTA to identify any right it seeks to protect when requesting information from a public body.

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96. Moreover, although a request was made to Bakwena in 2016, OUTA had internal personnel changes dealing with matters such as the present one. Upon reviewing the matter in 2020, it was decided that the most appropriate route would be to request the information from SANRAL, as the concession contracts have a public character and would have had to be entered into by SANRAL in the public interest. There is nothing sinister in OUTA's choice to approach SANRAL for this information.

Ad paragraphs 15 and 16:

97. I admit the content of these paragraphs and confirm that the request for information was made in terms of the procedure provided for in section 53(1) of PAIA.

Ad paragraph 17:

98. I admit that SANRAL sent the letter attached as annexure “AA3” (also attached to my founding affidavit as “SF8”) to OUTA on 30 July 2020. This was outside the time period allowed by PAIA and, as SANRAL itself confirmed, at the time it (SANRAL) had already been *functus officio*. The letter, however, confirms that SANRAL did not independently consider the request for information as it was obliged to do in terms of PAIA, but merely echoed what Bakwena told it to relay, as can be seen from paragraph 7 of the letter:

“7. In these circumstances, we have been advised by Bakwena not to consider your PAIA request.”

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99. A private company cannot dictate to a public body not to consider requests made in terms of PAIA as appears to have happened here and it is of concern that SANRAL acted on the instruction of Bakwena without independently applying its mind. Fortunately, SANRAL has acknowledged this failure to independently consider the request in paragraph 30 of its answering affidavit:

“...SANRAL has not considered whether the information requested by OUTA is protected from disclosure in terms of section 36(1), subject to the public interest override contained in section 46.”

Ad paragraph 18:

100. I admit that the application was issued on 22 February 2021 but deny that there was anything strange or untoward about Bakwena not having originally been cited as a party to the proceedings. A request for access to information was made to SANRAL, a public body, which was deemed refused through SANRAL's failure to comply with the provisions of PAIA. None of the acknowledged grounds for refusal were provided.
101. Moreover, in the letter from SANRAL's attorneys, Messrs Werksmans Attorneys, on 19 November 2020 (attached to the founding affidavit as “**SF14**”), SANRAL indicated that it did not anticipate that it would oppose any relief that OUTA seeks reviewing and setting aside the decision.
102. OUTA therefore had no reason to believe that the application would be opposed (especially given the fact that prayer 4 of the notice of motion makes provision

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for third parties to be informed and allowed to make representations to SANRAL) and had no obligation to join Bakwena from the outset. However, when Bakwena brought an application to intervene, OUTA did not oppose the application and Bakwena has been provided an opportunity to put its case before Court.

103. Bakwena's participation, however, does not detract from the fact that SANRAL has failed to comply with its duties in terms of PAIA and that OUTA is entitled to have the deemed refusal reviewed and set aside.

Ad paragraph 19:

104. I deny the content of this paragraph and the insinuation of some form of impropriety contained therein. The fact that OUTA previously requested the information from Bakwena bears no relevance to the present application. OUTA later elected to request the information from SANRAL, a public body, as it was entitled to do.

Ad paragraph 20:

105. I deny the content hereof and refer the Honourable Court to what I have stated above regarding Bakwena not having been cited as a party initially. There was nothing sinister about it and no obligation on OUTA to join Bakwena from the outset.

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Ad paragraph 21:

106. I admit that Bakwena instituted an application to intervene. This was not opposed by OUTA.

Ad paragraphs 22 to 26:

107. I admit the content hereof. The judgment that was handed down by the Honourable De Beer AJ on 9 May 2023 can be found on Caselines at p 035-1 – 035-18.

Ad paragraph 27:

108. I deny that the *in limine* point raised by Bakwena is “a *crisp legal point*” that will be dispositive of the application and negate the need to hear or determine the merits. The alleged “*crisp legal point*” is not a legal point at all but is based on Bakwena’s attack on background information provided by OUTA in its founding affidavit. It has no bearing on the legal question of whether SANRAL complied with the provisions of PAIA or not.

Ad paragraph 28:

109. OUTA’s application is premised on its right of access to information held by SANRAL, a public body, and SANRAL’s failure to comply with the request in terms of the provisions of PAIA. The material question before this Honourable

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Court is whether SANRAL complied with its statutory obligations and if not, whether SANRAL's deemed refusal falls to be reviewed and set aside.

110. On its own version SANRAL did not comply with the provisions of PAIA and the request was deemed to be refused. SANRAL further concedes that the deemed refusal should be reviewed and set aside. No allegations made by Bakwena in its answering affidavit can change the fact that SANRAL did not properly consider OUTA's request for access to information as it was obliged to do.

111. The content of this paragraph is accordingly denied.

Ad paragraphs 29 and 30:

112. I deny the content of these paragraphs.

113. I specifically deny the correctness of Bakwena's understanding of OUTA's cause of action and that OUTA has raised the BRICS loan as "*its cause of action*". Whether or not the BRICS loan was granted has no bearing on the question of whether SANRAL complied with the provisions of PAIA and whether OUTA has a right to review and set aside the deemed refusal.

114. Furthermore, in terms of section 11(3) of PAIA this fundamental right of access to information is not in any way affected by any reasons the requester gives for wanting such access. Bakwena's excessive emphasis on the BRICS loan which takes up several pages of its answering affidavit therefore bears no relevance



to OUTA's right of access to information or its rights to fair and just administrative action, but only appears to be aimed at muddying the proverbial waters between background facts and legal issues.

Ad paragraphs 31 to 33:

115. I take note that the Public Private Partnership ("PPP") and the BRICS loan are two separate methods of funding but deny that this bears any relevance to the cause of action in this application and further deny that it constitutes a ground for dismissal of the application.

116. The remaining allegations contained herein are denied.

Ad paragraph 34:

117. I take note of the structure followed as set out in this paragraph but deny the correctness of Bakwena's understanding of what the basis of this application is, and further deny that there is any abuse of process by OUTA.

Ad paragraphs 35 to 50:

118. Although it does not bear any direct relevance to the question of whether OUTA is entitled to documents held by SANRAL, I take note of the explanation provided by Bakwena concerning the funding and financing of governmental infrastructure projects as set out in these paragraphs.



119. Of relevance, however, is that Bakwena acknowledges in the heading under which this explanation is provided that its contract with SANRAL is part of a *governmental infrastructure project* and that it relates to the N1/N4 toll road, which is a national public road.

Ad paragraph 51:

120. I again deny that OUTA relies on the BRICS loan as its cause of action and repeat what I have already stated in this regard above. OUTA does not seek disclosure "*on the basis of the BRICS loan*". OUTA seeks disclosure of the information based on its right to access to information held by a public body.

121. I accordingly deny the allegations contained in this paragraph.

Ad paragraphs 52 to 56:

122. The bulk of the allegations contained in these paragraphs are again premised on the misconception that OUTA's cause of action is premised on the BRICS loan and are accordingly denied insofar as it does not correspond with what I have already stated in my founding affidavit read with the facts deposed to herein.
123. At the time (and as acknowledged by Bakwena), the BRICS loan was already approved by the Board of Directors of the National Development Bank ("NDB"), and it was reported in the media that SANRAL had received the R7 billion loan

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following the NDB's approval. Based on these reports and the approval of the loan by the NDB, OUTA had assumed in good faith that the BRICS loan was granted to SANRAL and had cited transparency in the use of the loan as one of the reasons why it is requesting the information.

124. I take note, however, of Bakwena's contention that, despite approval by the NDB, the BRICS loan was never received by SANRAL. Notably, SANRAL did not deem it necessary to deal with the BRICS loan in its answering affidavit and accordingly did not deem it relevant for purposes of deciding the question of whether its deemed refusal should be reviewed and set aside.

125. As pointed out in paragraph 19 of my founding affidavit:

"OUTA enquired on the purpose of the loan but SANRAL refused to disclose the details of the terms. All that SANRAL disclosed concerning the loan is that it is a sovereign and enjoys the best interest rates offered by NDB."

126. This response (which is not challenged by SANRAL in its answering affidavit) further conveyed the impression that the loan was granted. SANRAL never informed OUTA prior to the launching of this application that the BRICS loan had not been granted, nor has it denied it in its answering affidavit in these proceedings.

127. If the loan was never received by SANRAL, it follows that OUTA will not use the documents requested to assess anything in relation to that loan. This does

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not impact on OUTA's right to access to information in terms of PAIA in any way.

128. Insofar as it may be relevant, it is further clear from OUTA's founding affidavit that the assessment of the use of the BRICS loan is not the only reason for which OUTA is requesting the documents. However, irrespective of OUTA's reasons for wanting the information, OUTA was entitled to request the information from SANRAL and, following SANRAL's failure to comply with its obligations in terms of PAIA in dealing with the request, to launch this application.

Ad paragraphs 57 to 67:

129. I take note of the allegations contained herein. If SANRAL answered the query raised by OUTA in respect of the BRICS loan referred to in paragraph 19 of my founding affidavit, any further confusion on this issue could have been avoided.

130. As pointed out, SANRAL did not deal with the BRICS loan at all in its answering affidavit.

Ad paragraphs 68 and 69:

131. The present application was launched in February 2021. In these paragraphs Bakwena refers to SANRAL's response in another application to which it is not

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a party that was launched in November 2021, and bears no relevance to the present application.

132. Insofar as Bakwena is therefore attempting to insinuate any bad faith on OUTA's part in this paragraph, same is denied. At the time OUTA was of the *bona fide* but mistaken belief that the BRICS loan was granted to SANRAL for reasons already set out above.

Ad paragraph 70:

133. I deny the allegations contained herein. Whether or not the BRICS loan was eventually received by SANRAL has no bearing on OUTA's right to launch this application and there was no reason for OUTA to withdraw the application. This is amplified by SANRAL's concessions as referred to above.

134. The references to the BRICS loans were made as part of the background information provided in my founding affidavit on the *bona fide* but mistaken belief the loan was granted to SANRAL. This has no bearing on the question of whether the impugned decision falls to be reviewed and set aside and Bakwena's repeated attacks in this regard takes the matter at hand no further.

Ad paragraphs 71 to 73:



135. I take note of the allegations contained herein. The articles and media statements referred to herein were all published long after this application was launched.

Ad paragraphs 74 to 79:

136. I take note of the allegations contained herein. The allegations regarding the BRICS loan were made on the *bona fide* but mistaken belief that the BRICS loan was received by SANRAL based on media reporting at the time and SANRAL's response as referred to in paragraph 19 of my founding affidavit and dealt with above.

Ad paragraphs 80 to 83:

137. The allegations contained herein are a repetition based on the misconception that OUTA's "*entire cause of action*" is premised on the BRICS loan and are denied insofar as it does not correspond with what I have already stated above in this regard. The question of whether there is a BRICS loan has no bearing whatsoever on OUTA's cause of action in the present application.

Ad paragraph 84:

138. I deny the allegations contained herein. Despite the deponent's "*astonishment*" as articulated in this paragraph, OUTA was successful in its Rule 30 Application. From a perusal of the judgment of the Honourable De Beer AJ it is

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clear that it is Bakwena's irregular *in limine* application that caused delay and led to unnecessary legal costs to be incurred.

Ad paragraphs 85 and 86:

139. The allegations contained in these paragraphs are again a repetition of what Bakwena has already repeatedly stated and are denied to the extent that they are inconsistent with what I have stated above about the BRICS loan and the cause of action on which this application is based.

Ad paragraph 87:

140. Bakwena quotes here from a rescission application to which it is not a party, and which bears no relevance to the present application. Aside from the fact that it is hearsay and that the merits of that application still need to be decided, SANRAL has had an opportunity to place relevant facts regarding the BRICS loan in its answering affidavit before this Honourable Court but deemed it unnecessary for purposes of this application.

141. It is accordingly submitted that Bakwena's attempt to "import" allegations made by SANRAL in another application should be struck and/ or rejected. If SANRAL deemed such allegations to be relevant in the present application, it would have put it before this Honourable Court in its answering affidavit.

142. The correctness of those "imported" allegations are in any event denied.

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Ad paragraphs 88, 89 and 90:

143. The allegations contained in these paragraphs are a repetition of the allegations regarding the BRICS loan and the alleged failure by OUTA to set out a cause of action and are denied insofar as it does not correspond with what I have already stated in the regard herein above.

Ad paragraphs 92 to 97:

144. I deny the allegations contained in these paragraphs.
145. OUTA has not sought to "*circumvent*" anything, nor has it sought to obtain information "*indirectly*" from SANRAL. The request to SANRAL was a direct request for documents that are in possession of a public body.
146. These paragraphs indicate that Bakwena will leave no stone unturned in preventing the public from having access to the concession contracts that relate to public roads and shows a complete disregard for the principles of openness and transparency, which are (or should be) the cornerstones of doing business with state-owned entities in South Africa.
147. I have further repeatedly dealt with the reasons why Bakwena was not cited as a party to the proceedings from the outset and maintain that there was no obligation on OUTA to do so. Information was requested from SANRAL, and



after SANRAL's deemed refusal to provide it, the application was launched against SANRAL.

148. I deny that there was anything "*mischievous*" or "*improper*" about OUTA's application and these emotionally-laden descriptions are clearly inserted only for dramatic effect and to create atmosphere. It takes the matter no further.

Ad paragraph 98:

149. Bakwena again refers in this paragraph to another application to which it is not a party in an unsubstantiated attempt to put OUTA in a bad light. In that application information was also requested from SANRAL and OUTA had a right to approach the Court upon SANRAL's refusal to provide the requested information. Any allegations or insinuations to the contrary are denied.

Ad paragraphs 99, 100 and 101:

150. The allegations contained herein are denied. OUTA has a right of access to records kept by a public body by virtue of section 32 of the Constitution read with section 11 of PAIA.

Ad paragraphs 102 and 103:

151. I deny the allegations contained herein. There is nothing "*desperate*" or "*meaningless*" about the referenced statement in my founding affidavit.



152. Bakwena seemingly wants the Honourable Court to completely disregard the fact that the roads that it is administering are public roads and that the public therefore has an interest in the way that these roads are administered. Bakwena may maintain and administer these toll roads, but the roads are not Bakwena's private property.
153. Regardless of whether these roads are self-funded, the money that enables such self-funding and allows Bakwena to operate profitably still comes from members of the public who use these toll roads. As such, members of the public (and especially those who use the toll roads managed by Bakwena) have a right to know whether these roads are managed in a fair and cost-effective manner and whether the profits derived by Bakwena from tolls are excessive in relation to the costs of maintaining the roads.

Ad paragraphs 104 and 105:

154. Bakwena misconstrues the stated intention by me in OUTA's founding affidavit of conducting an analysis into the funding generated by Bakwena in relation to the toll roads. From a reading of paragraph 67 of the founding affidavit OUTA is concerned that Bakwena, as a service provider, generates a disproportionate amount of profit at taxpayers' expense compared to the actual costs of maintaining the toll roads. OUTA and the public at large are allowed to know whether these contracts are fair, competitive, and cost-effective.



155. I therefore deny the allegations contained in these paragraphs and the allegations that OUTA is somehow through a mere request for information attempting to regulate the governance of private bodies or conduct investigations into a private entity's financial affairs.

Ad paragraphs 106 and 107:

156. In these paragraphs Bakwena seems to be suggesting that because it has gone through a competitive bidding process and SANRAL is audited annually by the Auditor-General, OUTA has no right to the information requested, nor is OUTA entitled to question the operation of the concession agreement. This is the antithesis of an open and democratic society where all dealings with state entities must be transparent. Any allegations that suggest otherwise are denied.

Ad paragraph 108:

157. I take note that SANRAL has its own processes in place to oversee the conduct of Bakwena. This does not impact on OUTA's right to the information requested from SANRAL. To the contrary, the public is entitled to know what these processes are.

Ad paragraph 109:

158. I take note that Bakwena is a for-profit company and is entitled to make a profit. OUTA takes no issue with that. However, the public (which includes OUTA and



its supporters) is entitled to understand how Bakwena administers the public toll roads for which it is a SANRAL concessionaire and further entitled to assess whether it is cost-effective and in the public interest.

Ad paragraph 110:

159. I take note that the profit that Bakwena makes is capped in terms of the Highway Usage Fee. Bakwena does not provide further details of what the Highway Usage Fee is, or how it is calculated, so the cost-effectiveness or reasonableness of such a cap as alleged cannot be assessed and this allegation bears little meaning due to the vagueness thereof. If there is, however, such a cap there should be no reason for Bakwena's profits to be clouded in secrecy.

160. The second sentence of this paragraph, however, speaks volumes about Bakwena's attitude regarding transparency when contracting with state-owned entities and the content thereof is denied. Bakwena alleges:

"There are accordingly sufficient checks and balances in place, and OUTA's unauthorised meddling is not only unnecessary, but totally unwarranted."

161. Firstly, it is pointed out that OUTA at this stage is requesting information held by a state-owned entity as it is entitled to do in terms of section 11 of PAIA. There is no "*meddling*".

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162. Secondly, should OUTA be provided with the information and it decides to take further steps (whether in a court or law or in another forum), it will be for such forum to decide whether such steps amount to unauthorised or unwarranted *"meddling"*.
163. Thirdly, it is not for Bakwena to decide that OUTA is not entitled to information because in its (Bakwena's) view there are sufficient checks and balances in place. The public body from whom the record is requested must apply its mind and make an independent determination about the request for information, which SANRAL failed to do. It is submitted that if this argument and attitude displayed by Bakwena is allowed to stand at this point in the proceedings, there will never be any transparency or public accountability for commercial entities doing business with state-owned entities such as SANRAL.

Ad paragraph 111:

164. The allegations contained herein are denied. OUTA has the right under section 11 of PAIA to request access to the records of public bodies. There was accordingly no *"requirement"* to request these from Bakwena in circumstances where the records are held by SANRAL and the information sought relates to public roads.

Ad paragraphs 112 to 122:

165. OUTA's request for access to information was not made in terms of section 50 of PAIA and this section of PAIA finds no applicability. Bakwena's attempt to



artificially import the 2016 request for information (which was not proceeded with) as the actual request to which this application pertains, lacks merit.

166. OUTA's request was made to SANRAL, a public body, in terms of section 11 of PAIA. There is no "*indirect*" request to Bakwena and there was no obligation on OUTA to meet the requirements of section 50 of PAIA which pertains to requests made to private bodies. Any allegations to the contrary are denied.
167. I further fail to understand how Bakwena can allege in paragraphs 120 and 122 that it (Bakwena) has "*ownership*" of the documents requested and that the documents "*belong*" to it. The concession contract which forms the *crux* of OUTA's request is a contract entered into between Bakwena and SANRAL in terms of which Bakwena was granted an opportunity to derive a profit from public-owned roads. This contract is of a public character and can never be "*owned by*" or "*belong to*" Bakwena.
168. It would be mere lip service to the principles of transparency and accountability if all private companies contracting with state-owned entities could cite "*ownership*" of the contracts as an excuse not to disclose it. This will allow corruption to further thrive in our society.
169. The relevance of the allegations contained in these paragraphs and the legal interpretation given by Bakwena to the nature of the request for information as contained in these paragraphs are accordingly denied. Full legal argument in this regard will be advanced on behalf of OUTA at the hearing of the matter.



Ad paragraph 123:

170. This paragraph and sub-paragraphs contain references to certain sections of PAIA and what they stipulate. I admit the content thereof insofar as it accords with the corresponding provisions of PAIA.

171. Given its deemed refusal of OUTA's request for access to information, SANRAL has not properly invoked any of the permissible grounds for refusal.

Ad paragraph 124:

172. In this paragraph the documents that OUTA requested from SANRAL are listed. The content is accordingly admitted insofar as it corresponds with the *"Request for Access to Record of Public Body"* attached to OUTA's founding affidavit as annexure "SF4".

Ad paragraphs 125 and 125.1:

173. I deny the allegations contained herein. If some of the documents are not in SANRAL's possession, SANRAL should have informed the court thereof in its answering affidavit. This has not been done.

174. There is also no indication of what documents are referred to in paragraph 125.1, so there is no way in which the Honourable Court can properly evaluate this statement.



175. If prayer 4 of the Notice of Motion is granted, SANRAL will have an opportunity to also deal with this aspect when reaching a decision and communicating such decision in accordance with the provisions of section 49 of PAIA.

Ad paragraphs 125.2 and 125.3:

176. These paragraphs contain vague, general allegations about alleged financial harm without containing any specificity, and the content is denied.

Ad paragraphs 125.4 and 125.6:

177. The allegations in these paragraphs are a repetition of Bakwena's view on the merit of this application, amount to legal argument, and are denied.

Ad paragraph 126:

178. The allegations contained herein are denied. OUTA requested information from SANRAL, a public body, as it was entitled to do in accordance with the Constitution and the provisions of PAIA.

Ad paragraph 127:

179. Notably, in this paragraph Bakwena again refers to "*its documents*" as if it is the owner of such documents. Allegations contrary to what I state below in reply to this paragraph are denied.

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180. OUTA has had a long-standing involvement in the e-toll dispute with SANRAL and has put information regarding that dispute in the public domain, as it was entitled to do. The matter was further widely reported on by various media organisations as it was of national importance.
181. OUTA will continue to put information that is in the public interest in the public domain, as is its right to do. The public has a right to know what contracts are concluded by the State and how or if it affects them. The public also has a right in terms of section 217 of the Constitution to assess whether such contracts are fair, equitable, transparent, competitive, and cost-effective. Any suggestions by Bakwena that these attempts at promoting transparency and holding the State accountable are negative in any way, are therefore rejected.
182. I further deny that OUTA is opposed to tolling in general and "*as a matter of principle*". Such vague unsubstantiated allegations take the matter no further. OUTA is simply concerned that the public who use the toll roads may pay excessive fees to private contractors operating the toll roads on behalf of SANRAL, which allow for disproportionate profits at the expense of the road-using public.
183. Regardless of the concession contract that Bakwena has with SANRAL, the roads are still public roads and must still be operated in the best interest of the public and ensuring the best value for money. The concessionaires are merely acting as temporary stewards for SANRAL and administer the public roads in



question on its behalf. SANRAL remains the custodian of the national road network in South Africa.

184. OUTA has no objection to Bakwena (or any of the other concessionaires) making profit for the services provided. Such profit must just not be excessive at the expense of the public in whose interest these roads are supposed to be operated. It is ultimately the road-using and toll-paying public using public roads that is the source of Bakwena's profits. Without the roads and the toll-paying public, Bakwena would have no business.

Ad paragraph 128:

185. I deny the vague allegations contained in this paragraph. Without knowing what such alleged commercially sensitive and proprietary trade information may entail, the allegations are devoid of any real meaning.

Ad paragraph 129:

186. I deny the allegations contained herein. SANRAL did not indicate that disclosure of the information would be an issue when it invited OUTA on 19 November 2020 to launch this application (annexure "SF14" to the founding affidavit).
187. Moreover, Bakwena failed to mention that its concession contract will only be up for renewal in 2030. The concession contract is a 30-year contract between



SANRAL and Bakwena that was entered into in October 2000. This information is publicly available *inter alia* from Bakwena's website. There can therefore be no reasonable grounds for an expectation that disclosure of information (especially financial information relating to the rates charged as against the profits made at present) will harm Bakwena in any way when it comes to competition for the award of a new contract that is several years away.

Ad paragraphs 130 to 133:

188. I deny that any of the reasons advanced in these paragraphs justify non-disclosure of the documents requested. Transparency is the cost of doing business with state-owned entities in South Africa. Bakwena would have been aware of this at the time when it entered into the concession agreement.
189. I further fail to understand the allegations regarding "*access by competitors to each other's bids*" and the reference to the technical information that had to be put together presumably for purposes of the bidding process. OUTA is not seeking disclosure of Bakwena's bid. The allegation in paragraph 132 that "*...access by competitors to each other's respective bids could result in less competition for future tenders as the pricing and strategy of competing tender will be shared*" is not only unsubstantiated but also irrelevant in circumstances where the bid documents are not requested.



190. I reiterate that renewal of the contract is several years away. All tenderers will have to follow the applicable procurement procedures. The information sought by OUTA has no bearing on tenders in the distant future.

Ad paragraph 134:

191. The allegations contained herein are denied. In this paragraph Bakwena aims to ascribe an *onus* to OUTA to meet strict justification requirements for access to the documents. There is no such an *onus* on OUTA.

192. It is further unclear what it meant in this paragraph with the words "*Overall public disclosure*". OUTA is seeking the transparency that is expected of state-owned entities in South Africa.

Ad paragraph 135:

193. I deny the allegations contained herein. OUTA is not requesting bidding information submitted by subcontractors to Bakwena. These allegations are not only unsubstantiated but also irrelevant.

Ad paragraph 136 to 139:

194. I take note of the allegations contained herein but deny that it has any relevance to the question of whether OUTA is entitled to access to the information

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requested. These paragraphs appear to contain background information regarding toll road financing and financial projections.

Ad paragraphs 140 and 141:

195. I deny the allegations contained herein. Bakwena is in essence conveying in these paragraphs that the toll-paying public has no right to know what they are paying for and how the public roads (which are supposed to be operated in the public interest) are managed and operated.
196. I submit that allowing these types of allegations to stand as a defence against disclosure in PPP's such as the one between SANRAL and Bakwena, will result in the public never being able to have access to any information regarding such partnerships. All commercial entities with whom the State contract will simply allege what Bakwena is alleging here, and PAIA will become obsolete when it comes to PPP's.
197. State-owned entities in South Africa unfortunately already have a widely publicised problem with corruption and nepotism. Allowing PPP contracts to remain clouded in secrecy would do little to boost public confidence in the State's ability and purported dedication to conduct business in an open and transparent manner.

I now turn to deal with the *ad seriatim* responses to OUTA's founding affidavit contained in paragraphs 142 to 251 of Bakwena's answering affidavit. Much of it contain repetition of what has earlier been dealt with and I therefore only reply where



strictly necessary. Where I do not deal with any specific allegations and it does not correspond with what I have already stated in my founding affidavit read with what it stated herein above, such allegations should be taken as denied.

Ad paragraph 145:

198. As indicated earlier, I accept that the BRICS loan was eventually not received by SANRAL. As a civil society organisation with limited funds for investigative purposes, OUTA is often left to consider reporting from outside media organisations and investigative journalists as a preliminary source due to the extreme secrecy under which many state-owned entities conduct their operations. OUTA always attempts to verify information with the relevant state entity before taking a matter further, but such verification is often not forthcoming. It is submitted that legislation such as PAIA was enacted for this very reason to promote transparency and oblige state entities to provide information.

199. In the present instance OUTA requested information about the BRICS loan from SANRAL and was provided with an answer that created the impression that the BRICS loan was granted. This was amplified by reporting in the media at the time about the BRICS loan and the fact that the NDB had approved the loan. From the information that was available to it at the time, OUTA was of the *bona fide* but mistaken belief that the BRICS loan was received by SANRAL.



200. Aside from this *bona fide* error about the BRICS loan in the founding affidavit, I believe the remainder of what I have stated in my founding affidavit to be true and correct. Any allegations to the contrary are denied.

Ad paragraph 147:

201. Insofar as the allegations contained herein appear to yet again refer to the factual error that was made regarding the BRICS loan, I repeat what I have stated above in this regard and deny any allegations to the contrary.

Ad paragraphs 151 to 154:

202. I deny that OUTA is not entitled to the relief sought and further deny that SANRAL provided sufficient reasons in terms of PAIA for its refusal of the request. On SANRAL's own admission it (SANRAL) did not properly consider OUTA's request.

203. I further deny that there was any obligation on OUTA to specify the rights that it sought to protect. Section 11 of PAIA places no such an obligation on a party requesting information from a public body.

204. The remaining allegations contained in these paragraphs are denied insofar as it does not correspond with what I have already stated herein above.

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Ad paragraphs 157 to 159:

205. Save to admit that the SANRAL Act provides for funding by means of tolling, the remaining allegations contained in these paragraphs are denied.
206. OUTA has requested information from a public body in terms of PAIA. At this point OUTA has not made any challenges based on information that may be provided. OUTA will only do so if the information sought indicates some form of impropriety, irrationality, or other infringement(s) of a right. It will then be for a court or other forum hearing such challenges (if they are made) to decide whether there is merit therein. Challenging State conduct and operating procedures where warranted is vital for accountability and transparency and it is not for Bakwena to decide whether such potential challenges are *“unwarranted”* or *“not in any way of any benefit to any community.”*
207. It is, however, evident from such statements made by Bakwena that it operates the toll roads as if it is Bakwena’s private property, and it does not believe that the public has any right to have insight into how these roads are managed and operated. This position loses sight of the fact that these are public roads and should first and foremost be operated in the interest of the public, which in turn means that the public is entitled to have insight into contracts concluded in relation to these roads.



208. OUTA's broad objectives as an organisation provided in paragraph 16 of its founding affidavit should not be confused with the issue at hand, being OUTA's entitlement to the relief requested in the Notice of Motion.

Ad paragraphs 160 to 195:

209. The allegations made herein are largely a repetition about the BRICS loan and OUTA's entitlement to the relief requested, all of which have already been dealt with. The content of these paragraphs is accordingly denied insofar as it does not correspond with what I have already stated herein above.

210. I do, however point out that the following sentence in paragraph 194 of Bakwena's answering affidavit is telling about how it views its relationship with SANRAL and the public:

"It [Bakwena] is certainly not a public entity that should be subjected to scrutiny or pricing by OUTA, or even questioned about its revenue or profits made from operating the N1/N4 Toll Road."

211. The above illustrates a rather concerning lack of awareness by Bakwena of what contracting with a state-owned entity in South Africa entails and goes against the very essence of the principles of transparency and accountability.

Ad paragraphs 196 to 198:

212. I have already dealt with the issue of the earlier request and Bakwena's intervention in these proceedings above and deny the allegations contained

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herein insofar as it does not correspond with what I have previously stated in this regard.

Ad paragraphs 199 to 207:

213. The allegations contained herein are largely a repetition about the earlier request in 2016 that was made from Bakwena and the legal argument regarding OUTA's entitlement to the documents requested. These allegations are accordingly denied insofar as it does not correspond with what I have already stated above read with what is stated in my founding affidavit.
214. In terms of PAIA, OUTA is entitled to request information held by SANRAL, a public body, from SANRAL. There is no merit in Bakwena's repeated attempts to disregard this right and colour the request made to SANRAL as something else.


Ad paragraphs 208 and 209:

215. The allegations contained herein are denied insofar as it does not correspond with what is set out in paragraphs 26 and 27 of OUTA's founding affidavit.
216. The letter attached as annexure "SF8" to OUTA's founding affidavit confirms that SANRAL did not consider the request for information, and that this failure to comply with the provisions of PAIA was apparently done on the advice from Bakwena. This illustrates an alarming lack of independence by SANRAL.



Ad paragraphs 213 to 218:

217. I deny the allegations contained herein and disagree with the interpretation given to the 30 day-extension period referred to in these paragraphs and the allegation that SANRAL's response was one in terms of section 25(3)(a). On SANRAL's own version in its answering affidavit its response was a deemed refusal and not a decision in terms of section 25(3)(a).
218. In light of SANRAL's admission that the impugned decision was a deemed refusal and *not* a decision that was made in terms of section 25(3), it is submitted that Bakwena's contentions in this regard can take the matter no further. Bakwena's attempts to cast the deemed refusal by SANRAL as something else is without merit.
219. Insofar as it may be of any relevance, the request for an extension referred to was only granted to 29 July 2020 and no answer from SANRAL was forthcoming within this period. OUTA and SANRAL are *ad idem* that SANRAL did not make a decision within the prescribed time and that the request was therefore deemed to be refused.
220. Even if SANRAL's response was in terms of section 25(3)(a) of PAIA, which is denied, it failed to comply with the provisions of the section. A mere statement by SANRAL that it was advised by Bakwena not to consider the PAIA request does not meet the requirement of "*adequate reasons*" as contained in section 25(3)(a).

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221. Moreover, even if SANRAL did apply its mind and was of the view that there was any confidential information contained in the documents requested, SANRAL should have specified what such information is and should then have provided those parts of the record that are not regarded by it as confidential. This was not done. Even if the requested documents contain certain confidential information (which is disputed), everything cannot simply be treated as confidential across the board, as advocated for by Bakwena.
222. Despite the indication from OUTA that the request stems from the right to transparency, OUTA was not required to justify to either Bakwena or SANRAL which specific right is sought to exercise and protect. OUTA requested information in possession of a public body and was not required to give reasons why such information is sought. This remains the position.

Ad paragraphs 219 and 220:

223. I deny the allegations contained herein. SANRAL has already conceded that it did not comply with the provisions of PAIA and that the impugned decision ought to be reviewed and set aside. It is submitted that the only discretion that the Honourable Court would have to exercise is on whether to substitute the decision (as per prayer 3 of the Notice of Motion) or refer the matter back to SANRAL in terms of Chapter 5 of PAIA (as per prayer 4 of the Notice of Motion).
224. In light of what I have stated above in my response to SANRAL's answering affidavit, OUTA will not persist with the relief in prayer 3 but will move for the

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alternative relief in prayer 4 insofar as the decision-making is concerned. This relief holds no prejudice for Bakwena.

Ad paragraphs 224 and 225:

225. I have provided an extensive explanation for the delay in launching the application in my founding affidavit and persist with these reasons in support of the request for condonation. I deny that any other PAIA proceedings in which OUTA may have been involved in bear any relevance to the reasons for the delay in these proceedings.

226. I take note that Bakwena will not oppose the request for condonation as mentioned in paragraph 225 of its answering affidavit. SANRAL has also confirmed in paragraph 84 of its answering affidavit that it does not oppose OUTA's request for condonation.

Ad paragraphs 226 to 229:

227. I deny the allegations contained herein insofar as it does not correspond with what I have already state above.

Ad paragraphs 230 to 236:

228. The allegations contained herein are a repetition of what has already been dealt with earlier and are denied.

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229. Bakwena further misconstrues OUTA's indication in the founding that it wishes to conduct an analysis of whether the funding generated by Bakwena is in excess to the funds required to maintain the toll road. This is not a formal "*audit*" as Bakwena appears to suggest. These roads are public roads. The public has a right to know whether the amounts they pay to use these public roads are reasonable and whether the roads are administered in a fair and cost-effective manner.
230. In terms of section 11 of PAIA, OUTA in any event has a right to request information held by SANRAL irrespective of the reasons for which it is required. OUTA is not hoping to "*stumble across something improper*", but if there is nothing improper in the information requested, there should be nothing to hide.

Ad paragraph 237:

231. I merely stated in paragraph 69 of my founding affidavit that SANRAL is subject to the provisions of Chapter 5 of the PFMA, and that non-compliance therewith may potentially amount to financial misconduct. I therefore do not quite understand Bakwena's response thereto but deny that anything stated in that paragraph amounted to a "*wild, yet vague and unsubstantiated statement.*"

Ad paragraph 238:

232. I deny that OUTA has not set out any reasons for the request. Reasons have been provided even though it has no bearing on OUTA's right to access to the information held by SANRAL, a public body.

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Ad paragraphs 239 to 241:

233. I admit that the rights enshrined in the Constitution and PAIA are in certain circumstances subject to limitations. I deny, however, that such circumstances are present here or that a proper case has been made out for confidentiality and/or non-disclosure. The remaining allegations are denied.
234. If the relief for reviewing and setting aside of the impugned decision is granted and the matter is referred back to SANRAL to be dealt with in terms of Chapter 5 of PAIA, the issue of confidentiality may arise again once SANRAL has properly considered the request and justified its decision with reasons.
235. It follows that, once SANRAL has made a decision in terms of section 49 of PAIA and has provided reasons, OUTA will consider such decision and reasons. If OUTA then, after the process as envisaged Chapter 5 of PAIA is completed, believes that there are grounds for review of such decision, an application for review will be made on the basis of that decision and the reasons provided by SANRAL.
236. SANRAL has deliberately not dealt with issues regarding confidentiality in its answering affidavit so as not to, according to it "*pre-judge OUTA's request*", as appears from paragraph 79 of SANRAL's answering affidavit.
237. SANRAL has therefore not advanced any grounds for refusal, either prior to the launching of this application or in its answering affidavit, and OUTA was neither



required nor able to address any such grounds in its founding affidavit. Given SANRAL's decline to deal with the issue of confidentiality in its answering affidavit and its indication that it does not wish to pre-judge OUTA's request for information, it is submitted that arguments regarding confidentiality of the information requested are premature at this stage.

Ad paragraphs 242 to 245:

238. The allegations contained in these paragraphs are a repetition of what has repeatedly been stated and dealt with earlier. I accordingly deny the content of these paragraphs insofar as it does not correspond with what I have already stated above.

239. I point out that OUTA's Constitutional- and legislative right to access to information is not dependent on whether or not the BRICS loan was received by SANRAL. Consequently, infringement of this right is in no way related to the BRICS loan as Bakwena attempts to portray. Infringement of this right takes place when access to information is refused without proper justification as provided for in PAIA.

Ad paragraphs 246 to 249:

240. Save to admit that SANRAL filed a notice of intention to oppose on 5 May 2021, the remaining allegations contained herein are denied. I submit that the vague allegations of prejudice made throughout its answering affidavit does not hold



water against the rights of the public and the principles of transparency and accountability enshrined in the Constitution read with PAIA.

241. Furthermore, SANRAL indicated in its letter of 19 November 2020 (annexure “SF14” to OUTA’s founding affidavit) that it did not at the time anticipate opposing the relief of reviewing and setting aside. Although SANRAL did in the end oppose the application, it concedes that the impugned decision should be reviewed and set aside. In fact, the relief contended for by SANRAL (for remittal back to it for a decision to be made) is premised on the impugned decision first being reviewed and set aside.

Ad paragraphs 250 and 251:

242. The allegations contained herein are denied.

Conclusion:

243. In the premises OUTA will persist with the relief as set out in prayers 1,2 and 4 and 5 in the Notice of Motion, with the costs of this application to be borne by SANRAL on the scale as between attorney and client.
244. I point out that SANRAL delivered its answering affidavit on 22 June 2023 and Bakwena delivered its answering affidavit on 27 June 2023. At the time when Bakwena delivered its answering affidavit it was therefore aware of SANRAL’s stance on the nature of the decision and the fact that SANRAL, as the decision-


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maker, conceded that the matter ought to be reviewed and set aside. In doing so, SANRAL also conceded that it did not consider the request for information in terms of section 25 of PAIA, as it was obliged to do.

245. OUTA makes it clear in this replying affidavit that it will not persist with the relief in prayer 3 of the Notice of Motion, but only with the alternative relief contained in prayer 4, as the latter accords with SANRAL's position. SANRAL and OUTA are also *ad idem* that the impugned decision ought to be reviewed and set aside.

246. Following the above, it is OUTA's view that further argument on the relief in prayer 2 (on whether the decision should be set reviewed and set aside) will only serve to waste unnecessary time and costs. If Bakwena therefore still insists on opposing the principal relief of review and setting aside the impugned decision as contained in prayer 2 at the hearing of the matter, OUTA will also seek a cost order against Bakwena, jointly and severally as against SANRAL, on the scale as between attorney and client.



 DEPONENT

Signed and sworn before me at Pretoria on this 18 day of AUGUST 2023 after the deponent declared that she knows and understands the content of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on her conscience. There has been compliance with



the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).



COMMISSIONER OF OATH

FULL NAMES:

ADDRESS:

EX OFFICIO:

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