



066-1

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

DATE: 25 JANUARY 2024

SIGNATURE:.....

Case No. 32095/2020

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC

APPLICANT

And

SOUTH AFRICAN NATIONAL ROADS AGENCY LTD

FIRST RESPONDENT

THE MINISTER OF TRANSPORT

SECOND RESPONDENT

ALLI, NAZIR

THIRD RESPONDENT

MOTAUNG, DANIEL

FOURTH RESPONDENT

MACOZOMA, SKHUMBUZO N.O

FIFTH RESPONDENT

N3 TOLL CONCESSION (RF) (PTY) LTD

SIXTH RESPONDENT

Coram:

Millar J

066-1

Heard on: 19 January 2024

Delivered: 25 January 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 25 January 2024.

JUDGMENT

MILLAR J

- [1] This is an application for leave to appeal against a judgment and order handed down on 14 November 2023¹ in which the applicant's application was dismissed with costs. The present application is brought in terms of s 17(1)(a)(i) and (ii) of The Superior Courts Act² (The Act).
- [2] The application sets out a number of grounds upon which it was said the court erred and in consequence of which the test set out in s 17(1)(a)(i)³ of the Act for the granting of leave to appeal would be met. Most of these were a re-traversal of what was argued in the main case and have already been dealt with in the judgment and I do not intend to revisit them specifically.
- [3] I refer to the parties in this judgment as in the main judgment – the applicant as “OUTA”, the first respondent as “SANRAL” and the sixth respondent as “N3TC”.
- [4] When the application was called, counsel for the applicant confined his argument to two of the grounds – firstly that the test set out in *Ericsson South Africa (Pty)*

¹ (32095/2020) [2023] ZAGPPHC 1903 (14 November 2023).

² 10 of 2013.

³ That the appeal “would have a reasonable prospect of success.”

*Ltd v Johannesburg Metro and Others*⁴ had not been correctly applied and following from this that the court had not “attach[ed] sufficient weight to SANRAL’s statutory duties and the public interest therein and in finding that the public interest override finds no application in respect of the disputed documents.”⁵ This argument was addressed in respect of s 17(1)(a)(ii)⁶ of the Act.

- [5] It was argued that the test for the application of s 46⁷ of The Promotion of Access to Information Act⁸ (PAIA) set out in *Ericsson* was that there was an onus upon SANRAL to demonstrate that, notwithstanding N3TC’s objection to the production of the requested documents, the documents nevertheless did meet the requirements for the application of the public interest override.
- [6] Put differently, SANRAL was required to objectively consider the requested documents themselves and to then, either say on oath that the documents did not meet the requirements for disclosure set out in s 46(a)(i) of PAIA or, if they did, in the opinion of SANRAL, to make those documents available.
- [7] This argument was supported by reference to the following paragraphs from *Ericsson*-

“[79] Finally, I consider the reliance on s 46, which permits an exemption from disclosure in the public interest. The respondents must show that granting access of the record to *Ericsson* would reveal evidence of a substantial contravention or non-compliance with the law or an imminent and serious public-safety risk. I refer to this as the ‘harm’ requirement. It is found in s 46(a). In

⁴ 2023 (5) SA 219 (GJ).

⁵ The 14th ground in the application for leave to appeal.

⁶ That “there is some other compelling reason why the appeal should be heard.”

⁷ “Mandatory disclosure in the public interest – 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 the public interest in the disclosure of the record clearly outweighs the harm in the provision in question.

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

⁸ 20 of 2000.

addition, they must show that the public interest in disclosing the record 'clearly outweighs the harm contemplated'. I refer to this as the 'balance' requirement. It is found in s 46(b).

[80] *These two requirements are linked. A public body relying on s 46 must not only show that there is a public-interest element in refusing disclosure. It must show also that the harm contemplated from disclosure outweighs the public interest in disclosure. This means that unless the harm requirement is satisfied, no assessment can be made under the balance requirement.*

[81] *The respondents' case is that 'the public interest is better served by not disclosing forensic reports which contain confidential information related to sensitive proceedings'. It is noteworthy that this statement is not even directed at the Nexus report per se, but at all forensic reports of a similar nature. Once again, the statement is so generalised as to be of no assistance to the court.*

[82] *More critically, however, the respondents' defence is ill-founded for the simple reason that they fail to address the harm requirement. They do not indicate what substantial contravention of the law would be revealed by providing access to the report, or what serious and imminent risk to public safety would arise as a result of disclosure. Their failure to do so precludes them from being permitted to rely on this ground of exemption."*

[8] Notwithstanding the objection of N3TC to the furnishing of its information to OUTA and the mandatory refusal to furnish the documents that s 36 enjoins in those circumstances, it was argued that s 46 expressly provides that this may nevertheless be overridden. From a plain reading of the two sections this is apparent.

[9] However, the argument of OUTA went further and was that the onus was on SANRAL to scrutinize the documents and to nonetheless consider whether or not the provisions of s 46 would compel disclosure. Having regard to the provisions of s 46, an evaluation is required as to whether the record "would reveal", in terms

of s 46(a)(i) “a substantial contravention of, or failure to comply with, the law” and if it was found to be so, that in terms of s 46(b) if “the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question.” Then SANRAL was obligated to make the documents available. This evaluation is something which was to be undertaken once the objection of N3TC to the furnishing of the records was received.

- [10] In the present matter, no reasons for the refusal were communicated to OUTA prior to the institution of the proceedings. The present proceedings were brought on the basis of a deemed refusal in terms of s 27 of PAIA. It was only thereafter that reasons were furnished.
- [11] The case for OUTA, both initially and even after SANRAL furnished its reasons, was never that SANRAL ought notwithstanding the objection of N3TC, to have considered separately the information sought through the lens of s 46 and to have then furnished its reasons specifically in this regard. It was argued in effect that SANRAL should have committed itself on oath that it had considered the information on this basis and found that s 46 did not apply. This argument was raised for the first time in this application and is consonant with what occurred in *Ericsson*.
- [12] In *Ericsson*, the respondents raised the s 46 public interest override as a defence against the disclosure of the requested documents. In the present matter the case before me was somewhat different. The public interest override was asserted not as the proverbial shield by SANRAL as was done by the respondent in *Ericsson*, but rather as a sword by OUTA.
- [13] Inasmuch as the respondent in *Ericsson* was unable to show that the disclosure of the information would not have revealed a substantial contravention of the law or that the public interest in the disclosure outweighed any harm, in the present matter, OUTA has failed to establish any contravention or failure to comply with the law on the part of either SANRAL or N3TC for that matter. This was dealt with in paragraphs [49] to [60] in the main judgment.

- [14] It was argued for OUTA that in consequence of the fact that OUTA need not have furnished any reasons for why it requested the documents that it did, that there was no onus upon it to lay any basis for its claim for the application of s 46. Again, this approach is consonant with the findings in *Ericsson*, but this was not the case that was before me.
- [15] The consequence of the deemed refusal was that it also encompassed any consideration on the part of SANRAL of the documents (if they had them, something which was in dispute in respect of certain documents) in terms of s 46 and on that basis, it must be deemed that SANRAL's consideration of the information did not trigger either s 46(a)(i) of s 46(b). Once that had occurred it was incumbent on OUTA to make out its case.⁹ In the present instance the case which was to be made out was what the right was that OUTA sought to protect.
- [16] OUTA did set this out and it was dealt with by me in paragraph [60]¹⁰ of the main judgment and found to be meritless.
- [17] I have carefully considered the order granted and the reasons set out in the main judgment together with the arguments presented at the hearing of this application for leave to appeal.
- [18] For the reasons above, I am not persuaded that another court would come to a different conclusion or that there are any other compelling reasons why leave to appeal ought to be granted.

⁹ *Centre for Social Accountability v Secretary for Parliament* 2011 (5) SA 279 (ECG) at paras [92] and [94]. I referred to this in the main judgment.

¹⁰ "The present case concerns the implementation of the contract. It was neither argued nor was any case made out that N3TC had failed to comply with its obligations in terms of the main agreement and to deliver that for which it had been contracted. The making of profit, in a private company, is an everyday commercial consequence and is not in and of itself a matter which requires disclosure in the public interest."

[19] In the circumstances it is ordered:

[19.1] The application for leave to appeal is refused with costs which costs are to include the costs consequent upon the employment of 2 counsel, where so employed.



A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:

19 JANUARY 2024

JUDGMENT DELIVERED ON:

25 JANUARY 2024

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