**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**Case no: 7955/21**

In the matter between:

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| **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.**<br>(In his capacity as Information Officer) | **Third Respondent** |
| **BAKWENA PLATINUM CORRIDOR CONCESSIONAIRE (PTY) LTD** | **Fourth Respondent** |

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**APPLICANT'S HEADS OF ARGUMENT**

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**Introduction:**

1. This is an application in terms of section 78(2)(c) read with section 82 of the Promotion of Access to Information Act, 2 of 2000 ("PAIA") for the setting aside of a deemed refusal by the first respondent ("SANRAL") to refuse the applicant ("OUTA") access to information requested under the provisions of PAIA.

2. The application is premised on the right to access to information held by the State or State-owned entities governed by section 32 of the Constitution, Act 108 of 1996 (“the Constitution”) read with section 11 of PAIA.

Constitution section 32:

*“Everyone has the right of access to-*
*(a) any information held by the State”.*

PAIA section 11:

***“11 Right of access to records of public bodies***

*(1) A requester must be given access to a record of a public body if-*
*(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and*
*(b) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.*

*(2) A request contemplated in subsection (1) excludes a request for access to a record containing personal information about the requester.*

*(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.”*

3. OUTA submitted a request for access to information to SANRAL on 8 June 2020 in terms of section 18(1) of PAIA, which prescribes the manner in which information should be requested.

4. The request pertained to the concession contract between SANRAL and the fourth respondent ("Bakwena") in terms whereof Bakwena was appointed as concessionaire for SANRAL to manage and operate a portion of the National Route N1 running from Tshwane northwards to Bela-Bela, and a portion of the National Route N4 running from Tshwane westwards through Rustenburg and Zeerust to the Botswana border **(Request for access to record; FA annexure "SF4" at 005-25 – 005-30)**

5. It is common cause between OUTA as the requester, and SANRAL as the decision-maker, that SANRAL failed to consider OUTA's request and make a decision on the request within the prescribed time. This constituted a *deemed refusal* in terms of section 27 of PAIA **(SANRAL AA par 3 at 038-3)**, to which I shall refer to as "the impugned decision". Section 27 states:

> *"If an information officer fails to give the decision on a request for access to the requester concerned within the period contemplated in section 25(1), the information officer is, for the purposes of this Act, regarded as having refused the request."*

6. From correspondence exchanged between the parties between 17 September – 6 October 2023 and after filing of the affidavits, it transpired that OUTA and SANRAL are *ad idem* that the matter should be reviewed and set aside and remitted back to SANRAL in terms of prayer 4 of the notice of motion to allow for compliance with Chapter 5 of PAIA. The only remaining issue in dispute between OUTA and SANRAL is the costs of the application.

7. Bakwena opposes the application in its totality.

8. The correspondence referred to in paragraphs 6 and 7 above are on Caselines **(at 041-1 – 045-15).** I refer thereto only for purposes of informing the Honourable Court of the *consensus* reached between OUTA and SANRAL with regards to certain aspects, as it serves to limit the disputes between these two parties. It does not, however, impact on any of the disputes between OUTA and Bakwena.

9. For the sake of convenience and brevity I shall refer to the founding affidavit as "FA", to SANRAL's answering affidavit as "SANRAL AA", to Bakwena's answering affidavit as "Bakwena AA", and to the replying affidavit as "RA". Where I underline parts of quoted text or use bold font for emphasis, such emphases are my own.

**PAIA requests and the *onus* to prove compliance:**

10. As the central point of departure, I refer the Honourable Court to what was stated by the Constitutional Court (per Ngcobo CJ, writing for the majority) in ***President of the Republic of South Africa and Others v M&G Media Ltd 2012 (2) SA 50 (CC)*** at paragraph 10 of the judgment:

*"The constitutional guarantee of the right of access to information held by the State gives effect to 'accountability, responsiveness and openness' as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy."*

11. In ***President of RSA v M&G Media*** referred to above, the Honourable Ngcobo CJ further stated the following at paragraphs 23 – 24 of the judgment:

> *"[23] In order to discharge its burden under PAIA, the State must provide evidence that the record in question falls within the description of the statutory exemption it seeks to claim. The proper approach to the question whether the State has discharged its burden under s 81(3) of PAIA is therefore to ask whether the State has put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.*
>
> *[24] The recitation of the statutory language of the exemptions claimed is not sufficient for the State to show that the record in question falls within the exemptions claimed. Nor are mere ipse dixit affidavits proffered by the State. The affidavits for the State must provide sufficient information to bring the record within the exemption claimed. This recognises that access to information held by the State is important to promoting transparent and accountable government, and people's enjoyment of their rights under the Bill of Rights depends on such transparent and accountable government."*

12. The burden is therefore on the State to put forward evidence as to why the requested record(s) should not be disclosed. This extends to State-owned entities like SANRAL.

13. This *onus* and the duty on the State to discharge it have been dealt with by the courts in a consistent manner since the promulgation of PAIA in the early 2000's. In the 2003 judgment of ***Ccii Systems (Pty) Ltd v Fakie and Others NNO (Open Democracy advice Centre, as Amicus Curiae) 2003 (2) SA***

***325 (T)*** the Court (per Hartzenberg J) stated the following in paragraph 16 of the judgment:

*"<u>In my view, and because of the onus created in s 81, it will be necessary for the information officer to identify documents which he wants to withhold</u>. A description of his entitlement to protection is to be given, one would imagine, as in the case of a discovery affidavit in which privilege is claimed in respect of some documents. <u>The question of severability may come into play. Paragraphs may be blocked out or annexures or portions may be detached</u>. The provisions of s 82 of the Act read with s 80 cover the case where there is a dispute about the question whether a document or only a portion thereof is to be disclosed and the decision of the Court is required to rule whether a document is protected in whole or in part."*

And at paragraph 20 of the judgment:

*"Of course, it is likely that there are many instances of information which was given in strict confidence, not by other departments but by third parties. One can understand that there is a duty to protect such third parties and that the respondents would be remiss if they did not do so. <u>In my view, however, it is for the respondents to identify the record which is to be protected and to state concisely why it maintains that access to it can be withheld. Arguments may arise as to severability and may end up before a Judge.</u> Exactly the same considerations apply to documents which may be withheld in terms of s 41 on the basis that their disclosure may cause prejudice."*

14. In the recent judgment of ***<u>Ericsson South Africa (Pty) Ltd v Johannesburg Metro and Others</u> 2023 (5) SA 219 (GJ)*** a full Court (per Keightley J) confirmed the position at paragraph 49 of the judgment:

*"A refusal to provide access to a record which is legally under its control must be justified by the state. It bears the burden of laying a sufficient factual basis to establish that it is unable to produce any part of the record, even if that record was generated by a third-party independent contractor. In this case, it was incumbent on the respondents to have dealt with this issue squarely and clearly in the answering affidavit by averring the necessary facts. However, this was not the case made out here."*

And in paragraph 51 of the judgment:

*"If, indeed, the respondents were unable to produce any particular documents because, for example, they were in the possession of Nexus and not the City, the respondents ought to have stated such and identified the particular documents in question. This was not done. In the absence of a proper factual foundation being laid by the respondents, the court a quo erred in assuming, without evidence to support the contention, that the respondents were unable to produce any of the documents in question, and hence it erred in finding that Nexus ought to have been joined as a necessary party with a direct and substantial interest in the application."*

15. It follows that if SANRAL is not able to produce any particular documents, it falls to SANRAL to lay a sufficient factual basis as to why it is not able to produce the requested record or any part thereof.

16. Not only did SANRAL not address the grounds for refusal at all in its answering affidavit, but it *"reserved its right"* to deal with it and, in advocating for the decision to be referred back to SANRAL for consideration, stated that it did not

want to *"pre-judge"* the outcome **(SANRAL AA par 79 at 038-30)**. No factual basis has been laid for SANRAL's refusal.

17. Since SANRAL and Bakwena are both respondents but have very different approaches in the manner in which they have opposed the application, and since the disputes between OUTA and SANRAL are also very different from the disputes between OUTA and Bakwena, I consider it appropriate to deal separately with SANRAL and Bakwena and the grounds of opposition raised by each.

**SANRAL:**

18. SANRAL is a public body as defined in section 1 of PAIA **(FA par 8 at 005-3 read with SANRAL AA par 66 at 038-28)**. In terms of the South African National Roads Agency Limited and National Road Act 7 of 1998 ("the SANRAL Act"), SANRAL is a public company wholly owned by the State that was established for the purpose of *"taking charge of the financing, management, control, planning, maintenance and rehabilitation of the South African national roads system"* **(Section 2(1) of the SANRAL Act).**

19. SANRAL is therefore the custodian of the national road network in South Africa. The N1 and N4 toll roads for which Bakwena is a concessionaire form part of this national road network and are public roads.

20. SANRAL alleges that it opposed this application based on the relief requested in prayer 3 of the Notice of Motion as, according to SANRAL, the Court cannot in these circumstances compel SANRAL to provide the documents. The alternative relief requested in prayer 4 was opposed by SANRAL on the basis that *"relief to notify third parties, without a concomitant prayer for the remittal of the request, is incompetent."* **(SANRAL AA par 5 at 038-4)**

21. It is stated in OUTA's replying affidavit that SANRAL misconstrued the relief prayed for in prayer 4 of the notice of motion, as upon a proper interpretation it cannot mean anything other than a remittal back to SANRAL.

22. Given that SANRAL's unnecessary opposition to the matter appears to rest on the wording of prayer 4 of the Notice of Motion, this prayer requires further scrutiny. The prayer reads:

***"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."***

23. A similarly worded order was granted by the SCA in ***South African History Archive Trust v South Africa Reserve Bank and Another*** ***2020 (6) SA 127 (SCA)*** where the appellant ("SAHAT") requested access to records of the SARB that it had generated in the course of investigations into certain third persons.

24. The Court found *inter alia* that the SARB had failed to take reasonable steps to inform the relevant third parties of the records related to the request and accordingly this requisite for a decision to be made on the request had not been met. It was referred back to SARB to inform those parties who had not been informed appropriately in terms of an order that read:

*"The respondents are directed to notify Mr Palazollo and Mr Hill of the request concerning records relating to them in accordance with s 47 of PAIA within 10 calendar days after service of this order on them, and thereafter to comply with the time periods and provisions in ch 5 of PAIA."* **(Judgment at p 144)**

25. It is clear from SANRAL's answering affidavit that it (SANRAL) did not take the necessary steps to notify third parties who might be affected. Indeed, SANRAL is rather blasé about its non-compliance where the deponent states in paragraph 29 of the answering affidavit **(at 038-15):**

*"<u>The third-party notification exercise 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</u>. In law therefore, SANRAL refused OUTA's request for access to information on 8 July 2020 and thus became functus officio."*

26. SANRAL further states in paragraph 28 of its answering affidavit **(at 038-15)** that such a third-party notification process can only be done in the context of section 47 if the court sets aside the deemed refusal and remits OUTA's request back for reconsideration. This is exactly what OUTA is requesting in prayer 4 of the Notice of Motion, using the wording that was used by the SCA in ***SAHAT*.**

27. It follows logically that, if SANRAL is directed to notify third parties of the request in accordance with section 47 of PAIA, and thereafter to comply with the time periods as set out in chapter 5, a remittal is implied. SANRAL cannot take any further steps (be it to notify third parties or make a decision) unless the court first remits the impugned decision back to it.

28. Chapter 5 of PAIA consists of sections 47 – 49. Section 47 of PAIA places an obligation on the information officer of a public body to take all reasonable steps to inform third parties to whom the requested record may relate. Section 48 makes provision for third parties to make representations following the notification.

29. Section 49 follows upon such third-party notification(s) and reads:

*"**49 Decision on representations for refusal and notice thereof***

*(1) The information officer of a public body must, as soon as reasonably possible, but in any event within 30 days after every third party is informed as required by section 47-*

*(a) decide, after giving due regard to any representations made by a third party in terms of section 48, whether to grant the request for access;*

*(b) notify the third party so informed and a third party not informed in terms of section 47(1), but that made representations in terms of section 48 or is located before the decision is taken, of the decision; and*

*(c) notify the requester of the decision and, if the requester stated, as contemplated in section 18(2)(e), that he or she wishes to be informed of the*

*decision in any other manner, inform him or her in that manner if it is reasonably possible, and if the request is-*

*(i) granted, notify the requester in accordance with section 25 (2); or*

*(ii) refused, notify the requester in accordance with section 25 (3).*

*(2) If, after all reasonable steps have been taken as required by section 47 (1), a third party is not informed of the request in question and the third party did not make any representations in terms of section 48, <u>any decision whether to grant the request for access must be made</u> with due regard to the fact that the third party did not have the opportunity to make representations in terms of section 48 why the request should be refused.*

*(3) <u>If the request for access is granted, the notice in terms of subsection (1)(b) must state-</u>*

*(a) <u>adequate reasons for granting the request, including the provisions of this Act relied upon</u>;*

*(b) that the third party may lodge an internal appeal, complaint to the Information Regulator or an application, as the case may be, against the decision within 30 days after notice is given, and the procedure for lodging the internal appeal, complaint to the Information Regulator or application, as the case may be; and*

*(c) that the requester will be given access to the record after the expiry of the applicable period contemplated in paragraph (b), unless such internal appeal, complaint to the Information Regulator or application with a court is lodged within that period.*

*(4) <u>If the information officer of a public body decides in terms of subsection (1) to grant the request for access concerned, he or she must give the requester access to the record concerned</u> after the expiry of 30 days after notice is given in terms of subsection (1)(b),*

*unless an internal appeal, complaint to the Information Regulator or an application with a court, as the case may be, is lodged against the decision within that period."*

30. Section 49 of PAIA throughout refers to a decision that needs to be made by the information officer after third parties have been notified of the request, and deals with further steps to be taken after such a decision has been made. Where the court therefore orders compliance with section 47 and Chapter 5 of PAIA as requested in prayer 4 of the Notice of Motion, a remittal back to SANRAL is implied.

31. At present SANRAL (on its own version) is *functus officio.* It follows that SANRAL cannot give effect to the provisions of Chapter 5 of PAIA if the matter is not referred back to it.

32. It is submitted that the fact that the word *"remitted"* or *"remittal"* is not contained in the notice of motion is of no consequence when the prayer cannot be interpreted in any other way. OUTA asks in prayer 4 for compliance with Chapter 5 which, if granted, would automatically entail a referral back to SANRAL for purposes of such compliance.

33. Regardless of the semantic dispute, OUTA and SANRAL are now *ad idem* that the impugned decision should be reviewed and set aside and referred back to SANRAL for compliance with notification of third parties in accordance with section 47 of PAIA and compliance with Chapter 5.

34. Despite SANRAL's admission that the request was not considered and therefore deemed to be refused, Bakwena persists with denying that this was the case **(Bakwena AA par 217 at 039-64)**. In this regard it is submitted that SANRAL's version (as the decision-maker) should be accepted. Bakwena does not have the requisite personal knowledge of what happened during the decision-making process to challenge SANRAL's version of events.

35. It is further submitted that SANRAL's concession that it did not apply its mind and that the impugned decision should be reviewed and set aside, should be the end of the argument on merits. SANRAL has not fulfilled its statutory obligations in terms of PAIA and has failed to discharge the *onus* imposed upon it. Such an *onus* can only be discharged where there is compliance with PAIA.

**<u>Prayer 3 of the Notice of Motion (prayed for in the alternative to prayer 4):</u>**

36. Given SANRAL's concessions in its answering affidavit, OUTA has indicated in its replying affidavit that it will pursue the alternative relief requested in prayer 4 of the Notice of Motion, rather than the relief requested in prayer 3. However, as SANRAL purports to base its opposition to the application on the relief requested in prayer 3 of the Notice of Motion, it is necessary to briefly deal with this prayer. The deponent to SANRAL's answering affidavit states in paragraph 35 thereof **(at 038-18)**:

*"Given the importance of the request, its scope and the 'public interest' arguments set out above by the applicant, it would be just and equitable that the request is remitted back to SANRAL so that the request can be properly considered and decided on. <u>It will</u>*

*therefore not be permissible for the court to direct that records be provided forthwith as part of its order. This relief simply cannot be granted at this stage."*

37. It is submitted that the allegation that the relief is not *"permissible"* is not correct. Although remittal to a decision-maker may in most instances be the preferred remedy to follow upon the review and setting aside of an impugned decision, the Court retains a discretion to compel disclosure of documents where a public body has failed to take a decision. Section 80 of PAIA, for example, very specifically grants such a discretion to a Court to request the record and decide thereon.

38. In ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC)** the Constitutional Court (per Khampepe) stated at paragraph 48 of the judgment in the context of a review in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"):

*"A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances a court may very well be in the same position as the administrator to make a decision. In other instances some matters may concern decisions that are judicial in nature. In those instances — if the court has all*

*the relevant information before it — it may very well be in as good a position as the administrator to make the decision."*

39. It is therefore not *"impermissible"* for the Court to compel documents. The Court retains a discretion, although in the present circumstances where the parties are still at an early stage in the process, remittal to the decision maker to comply with the provisions of PAIA as requested in prayer 4 of the Notice of Motion may be preferable.

40. It was accordingly prudent for OUTA to seek these two forms of relief in the alternative, as it had done in prayers 3 and 4 of the Notice of Motion. SANRAL could have informed OUTA from the outset that it agreed to the alternative relief in prayer 4, rather than incurring the costs of opposition.

**BAKWENA:**

41. Bakwena has filed a lengthy answering affidavit consisting of 67 pages (exclusive of annexures). The main issues raised by Bakwena can broadly be categorised as follows:

    a) that OUTA fails to disclose a cause of action for the relief sought. In support of this contention Bakwena relies extensively on the allegations surrounding the BRICS loan and the fact that, although it was approved by the National Development Bank ("the NDB"), SANRAL never received the loan. The argument is that because in the end there was no BRICS loan, there is no

cause of action **(Bakwena AA para 28 – 33 at 039-14 – 039-15; para 52 – 90 at 039-20 -309-32)**;

b) the request for access to information was in reality a section 50 PAIA application (where access to information is requested from a third party) and OUTA is attempting to obtain the information belonging to Bakwena, a private body indirectly through the *"backdoor"* by requesting it from SANRAL, a private body. OUTA therefore still has to comply with the requirements of section 50 of PAIA **(Bakwena AA para 112 – 122 at 039-37 – 389-39)**;

c) in conjunction with the point referred to in b) above, Bakwena raises the point that OUTA did not initially join Bakwena to the proceedings but rather sought to obtain the information indirectly from SANRAL as a conduit to obtain such information and to avoid identifying the right which it (OUTA) seeks to protect. Bakwena alleges that the way in which the application was brought is *"mischievous"* and *"improper"* and amounts to an abuse of process **(Bakwena AA para 92 – 100 at 039-32 – 039-34)**;

d) the documents sought contain confidential information that ought to be protected from disclosure and Bakwena will be disadvantaged in contractual- and other commercial negotiations if the documents are disclosed. It will also cause a breach of confidence to other third-party contractors **(Bakwena AA para 125 – 141 at 039-42 – 039-48)**; and

e) other general points of opposition.

42. I deal with each of these categories below.

**a) <u>The BRICS loan and the “cause of action” question:</u>**

43. Section 11(3) of PAIA makes it clear that a requester’s right of access to information is not affected by any reasons the requester gives for requesting access. Reasons for seeking the requested information are irrelevant.

44. The question before this Court is therefore: from where does OUTA derive its right to bring this application?

a) Does this right derive from the fact that SANRAL failed to comply with the provisions of PAIA after a request for information was made by OUTA?

b) Or does OUTA’s right to bring this application hinge on whether or not the BRICS loan was received by SANRAL?

45. It is submitted that the BRICS loan has no bearing on OUTA’s right to bring this application and is accordingly unrelated to the cause of action. The BRICS loan and assessing how it was allocated was merely advanced as one of the reasons why OUTA seeks the information.

46. Bakwena would like the Honourable Court to conclude that this reason advanced for seeking the information constitutes OUTA's *"entire cause of action"* **(Bakwena AA par 80 at 039-28)**, while section 11(3) of PAIA of clearly states that a requester's right of access to information sought is ***not*** affected by any reasons the requester gives for requesting access.

47. It is common cause that the BRICS loan was approved by the National Development Bank and that it was reported to have been granted to SANRAL **(Bakwena AA par 57 – 58 at 039-22)**. This reporting later transpired to be incorrect. In OUTA's replying affidavit, the deponent explains in paragraph 123 **(at 040-24 - 040-35)** that a *bona fide* error was made in the founding affidavit in this regard:

*"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 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."*

48. Notably, SANRAL did not deem it necessary to deal with any aspects whatsoever regarding the BRICS loan in its answering affidavit. This illustrates that it bears no relevance to the cause of action on which this application is premised.

49. The application is rooted in SANRAL's failure to comply with a request in terms of section 11 of PAIA. *"Cause of action"* should not be confused with *"subjective reasons"*, such reasons to be regarded by section 11(3) of PAIA to be irrelevant for requests of access for information from public bodies.

**b) <u>Does OUTA need to meet the requirements for a request made to a private body?</u>**

50. Bakwena alleges that OUTA had to comply with the provisions of section 50 of PAIA which governs requests for access to information from private bodies, even though the information was requested from a public body in accordance with the right to do so afforded in section 11 of PAIA. Bakwena further alleges in paragraph 111 of its answering affidavit **(at 039-36)** that the relief sought in the application would have to be directed at it (Bakwena) and not at SANRAL.

51. In this regard, Bakwena attempts to place a rather peculiar but misplaced *onus* on OUTA where it states in paragraph 121 of its answering affidavit **(at 039-38):**

*"Similarly, the intention of seeking the documents of a private body through a public body does not relieve it from the obligation of meeting the PAIA thresholds for a private body."*

52. The above contention by Bakwena stands in stark contrast with what the SCA held in ***Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA)*** at paragraph 55 of the judgment:

> *"To my mind the overriding consideration here is that the appellant, being an organ of State, is bound by a constitutional obligation to conduct its operations transparently and accountably. Once it enters into a commercial agreement of a public character like the one in issue (disclosure of the details of which does not involve any risk, for example, to State security or the safety of the public) the imperative of transparency or accountability entitles members of the public in whose interest an organ of State operates, to know what expenditure such an agreement entails."*

53. The position in ***Transnet*** is in line with the provisions of section 217 of the Constitution which require that where an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive, and cost-effective.

54. The concession contracts that SANRAL has with its concessionaires are for the operation and management of public roads which should be managed and operated in the public interest. It is submitted that there can be no doubt that these contracts have a public character and should be subject to the principles of transparency and accountability required from any third parties doing business with State-owned entities in South Africa.

55. In the present instance there are no allegations by either of the respondents that the concession agreement involves any risk for State security or the safety of the public and it is submitted that the attempt to shift the *onus* to OUTA to *"meet the PAIA threshold for a private body"* is misplaced. The *onus* remains with SANRAL to justify refusal.

56. Bakwena further appears to portray that it (Bakwena) is the owner of the concession contract and that the documents sought belong to it. Bakwena states in paragraph 122 of its answering affidavit **(at 039-39)**:

*"The documents sought by OUTA belong to Bakwena, a private body, and not SANRAL."*

And in paragraph 120 of its answering affidavit **(at 039-38)**:

*"The mere fact that OUTA is now seeking the documents in relation to Bakwena from SANRAL does not transpose the ownership of the documents."*

57. The argument that Bakwena is the *"owner"* of a contract entered into with a State-owned entity is flawed as was made clear by the SCA in ***Transnet*** at paragraph 56 of the judgment:

*"Moreover, the agreement, in incorporating the tender documentation also incorporates the schedule of prices and quantities. The agreement is not Inter Waste's document. It is a contract document to which the appellant, a public body, is a party. What applies to public entitlement to know the contract price applies equally, on the facts of this case, to the agreement itself."*

58. Bakwena also alleges in paragraph 118 of its answering affidavit **(at 039-38)** that *"It is clear that no proper right has been set out by OUTA, and that no proper and adequate explanation was provided, as required by the provisions of PAIA."*

59. Again, the above statement directly contradicts section 11(3) of PAIA read with the relevant authorities. No explanation is required and if one is offered, it is not for Bakwena to determine whether it is *"proper"* or *"appropriate"*.

60. In ***De Lange and Another v Eskom Holdings Ltd and Others 2012 (1) SA 280 (GSJ)*** the Court (per Kgomo J), sitting as the Court of first instance, stated at paragraph 34:

> *"PAIA deals with information held by public bodies differently than information held by private bodies. For public bodies, which include Eskom, the requester does not need to explain why it seeks the information, let alone why it requires it for the exercise of its rights…"*

61. In ***De Lange***, Mr de Lange, a financial journalist, and his employer, Media24, had requested Eskom to furnish them with documentation concerning two contracts concluded in the 1990's between Eskom and BHP Billiton, a private company, for the supply of discounted electricity to two of Billiton's aluminium smelters. Eskom refused to provide the information requested and this decision was set aside in the High Court. BHP Billiton appealed to the SCA, and the appeal was dismissed, as reported in ***BHP Billiton plc Inc and Another v De Lange and Others 2013 (3) SA 571 (SCA)***.

62. It is submitted that the contractual relationship in ***De Lange*** between Eskom and Billiton is analogous to the contractual relationship between SANRAL and Bakwena in the present instance.

63. OUTA was accordingly fully entitled to request the information from SANRAL, a public body, under section 11 of PAIA, as SANRAL is a party to the concession agreement and should hold the information requested. The fact that Bakwena is or may also be in possession of the information does not impact in any way on the *onus* borne by SANRAL.

64. Where SANRAL is a party to the concession agreement, OUTA does not need to explain why it needs the information or why it requires it for the exercise of its rights.

65. Despite the fact that OUTA in 2016 made a request for access to information to Bakwena, the request on which the present application is premised is one that was made from SANRAL in terms of section 11 of PAIA. The earlier request to Bakwena did not preclude OUTA to request the information from SANRAL in terms of section 11.

66. Bakwena's attempts to cast OUTA's request in terms of section 11 as a section 50 request to a private body and using language such as OUTA attempting to *"secure Bakwena's information through the backdoor"* does not change the fact that OUTA made a request in terms of section 11 from a SANRAL, a public body for information held by SANRAL. This obliged SANRAL to deal with the request in terms of PAIA, which it failed to do.

**c) <u>Notification/joinder of third parties:</u>**

67. Bakwena takes issue with the fact that OUTA did not join Bakwena to the proceedings from the outset and accuses OUTA of being *"mischievous and improper"* for not having joined Bakwena to the proceedings from the outset **(Bakwena AA par 97 at 039-33)**.

68. In terms of section 47 of PAIA the obligation to notify third parties of a request for access to information from a public body lies with the information officer of that public body.

69. Similarly, the obligation to inform a third party of court proceedings lies with the public body from whom the information is requested and not with the requester. In the ***SAHAT*** judgment the SCA stated at paragraph 13 of the judgment:

*"Finally, if a decision is made to refuse access, and the requester proceeds with an application to court to review the decision, rule 3(5)(a) promulgated under PAIA requires an IO of head of body to give notice of such application to the third party concerned and to attach a copy of the application papers."*

70. In ***Ericsson*** the Court confirmed that there is no obligation on the requester to join third parties to the proceedings at paragraph 53 of the judgment:

*"It follows, for similar reasons, that the second basis for the court a quo's finding that Nexus had a direct and substantial interest in the application was also fatally flawed. <u>Ericsson did not seek any relief from Nexus in the notice of motion. It did not</u>*

*need to do so because, under s 4 read with s 1 of PAIA, the requested documents formed part of the record under the respondents' control and it was the respondents, and not Nexus, who were required to grant access to them. This puts paid to any implication that relief was being indirectly sought against Nexus. The court a quo thus erred in proceeding from the premise that such relief was on the table."*

71. There was therefore nothing *"mischievous and improper"* about the manner in which OUTA brought this application. The obligation was throughout on SANRAL's Information Officer to ensure that Bakwena (and any other third parties that may have an interest) were appraised of the matter.

72. Moreover, OUTA does not ask relief against Bakwena in the Notice of Motion. The requested documents formed part of the record under SANRAL's control, and it was SANRAL, not Bakwena, who were required to grant access to it. In the words of the Honourable Keightley J, this puts paid to any implication that relief was being indirectly sought against Bakwena.

73. When Bakwena brought an application to intervene, it was not opposed by OUTA. Bakwena had sufficient opportunity to put its case before court. However, OUTA was not obliged to join Bakwena at the outset. That obligation lay with SANRAL.

**d) Confidentiality of documents:**

74. Bakwena opposes the disclosure of *all* documents requested and make several allegations about confidentiality and commercial disadvantages that it will face

if the requested documents are disclosed. It does not, however, provide any further details as to which of the requested documents will cause these alleged difficulties or specify whether there are parts of the documents that are not confidential. Instead, it offers a blanket refusal of all documents.

75. In ***President of the RSA v M&G Media*** referred to earlier the Constitutional Court stated the following about a blanket refusal in paragraph 65 of the judgment:

*"Section 28 of PAIA requires that any information in a record that is not protected and that can reasonably be severed from the protected parts of the record be severed and disclosed. There is no discretion to withhold information that is not protected. The unprotected material must be disclosed 'despite any other provision' of PAIA, unless 'it cannot reasonably be severed' from the protected portions."*

76. Despite Bakwena's protestations, SANRAL's attitude is that it had not yet applied its mind and that it does not wish to "*pre-judge"* OUTA's request and that it wishes to reserve its rights to fully consider the request with an open mind. This can be found in paragraphs 48 **(at 038-22)** and 79 **(at 038-30)** of SANRAL's answering affidavit where the deponent states:

*"48. In the premises, in the event this honourable court review and set aside SANRAL's decision, this honourable court, ought to remit the matter to SANRAL to consider same and apply its mind properly while taking into account all relevant information and considerations.*

*…*

> *79. For the above reasons and in order not to pre-judge OUTA's request, I do not deal with the allegations in these paragraphs. SANRAL's rights in this regard are fully reserved."*

77. It is submitted that, in light of the absence of a decision reached by SANRAL and the *consensus* between OUTA and SANRAL that the impugned decision should be set aside and referred back to SANRAL for compliance with the provisions of Chapter 5 of PAIA, it is not at this stage required of this Court to delve into the merits of the confidentiality argument raised by Bakwena.

78. However, should the Honourable Court consider it necessary to deal with this aspect and specifically with the provisions of section 36 of PAIA (on which Bakwena places reliance), I refer the Court to what was stated by the SCA in ***De Lange*** at paragraph 25 of the judgment:

> *"The information that Billiton seeks to protect from disclosure is that relating to the 'pricing formulae'. It contends that if this information is supplied to Media 24 it will fall into the hands of its competitors and consequently cause harm to it as contemplated in ss 36(1)(b) and (c) of PAIA. As I understand the law, a party relying on these provisions must provide a basis to substantiate its reliance. (See President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) *para 15.) A party who relies on these provisions to refuse access to information has a burden of establishing that he or she or it will suffer harm as contemplated in ss 36(1)(b) and (c). The party upon whom the burden lies, in this case Billiton, must adduce evidence that harm 'will and might' happen if Eskom parts with or provides access to information in its possession relating to the contracts. The burden lies with the holder of the information and not with the requester."*

And at paragraph 29 of the judgment:

*"As to whether the information is protected from disclosure under s 36(1)(c), it is my view that the stance adopted by Billiton is without merit. The information requested by Media 24 is not 'information supplied in confidence' as the section requires. Billiton concluded an agreement with the state entity and the specific information sought constitutes a term in an agreement with the state entity."*

79. Following the above, it is submitted that, although there may be other information that could meet the test (which is not known at this stage as SANRAL did not apply its mind to reach a decision), the terms of the concession agreement should not be confidential. It is an agreement concluded with a state entity.

80. The broad allegations about commercial sensitivity and confidentiality as those offered by Bakwena without specifying which of the documents requested or terms in the concession agreement contain such information are not sufficient to discharge the *onus* placed on the holder of information in terms of section 36 of PAIA.

81. If such a blanket refusal with broad reasons as those offered by Bakwena were indeed acceptable, no party would ever be able to obtain information held by a commercial party with whom the State contracts. As indicated by the Constitutional Court in ***President of the RSA v M&G Media,*** and clear from the wording of section 28 of PAIA, there is no discretion to withhold unprotected

information. There must at least be an attempt to sever protected information from unprotected information.

e) **Further general points of opposition by Bakwena:**

82. Bakwena's submission that *"Bakwena is a private entity and a company that operates the N1/N4 Toll Road having secured the right to do so through a competitive bid process. It is certainly not a public entity that should be subjected to scrutiny or policing by OUTA, or even questioned about its revenue or profits made from operating the N1/N4 Toll Road"* **(Bakwena AA par 194 at 039-59)** loses sight of the fact that Bakwena's concession contract is with a *public body* for the operation and administering of *public roads*.

83. Bakwena appears to advocate that contracts concluded by public bodies with private companies after a tender process should unquestioningly be accepted and not face any public scrutiny. It is submitted that this view is inconsistent with the principles of transparency and accountability that PAIA aims to promote.

84. Following the authorities referred to above, it is submitted that any contracts entered into by SANRAL should be submitted to the very scrutiny that Bakwena attempts to avoid. There is no reason for these concession contracts (or at least parts thereof) to be clouded in secrecy.

85. It should further be borne in mind that at this stage OUTA has only requested access to information. The process is therefore still in the early stages and OUTA is merely attempting to exercise the basic right to information provided to it by section 32 of the Constitution read with the provisions of PAIA.

86. Bakwena's allegations in paragraph 110 of its answering affidavit **(at 039-36)** that *"OUTA's unauthorised meddling is not only necessary but totally unwarranted"* is therefore inappropriate in circumstances where OUTA has not even received any documents in terms of its request. If OUTA decides to take further steps after receiving the requested documents, it will be for a court to decide on the merits of those steps. Bakwena cannot appoint itself judge of what may or may not be warranted or justified.

87. The *crux,* however, is that OUTA was entitled to request the information from SANRAL and was further entitled to have SANRAL consider the request in terms of the provisions of PAIA. This was not done.

**Costs:**

88. Despite SANRAL's admission that it has failed to comply with its obligations under PAIA and its concession that the impugned decision should be reviewed and set aside, it nevertheless seeks costs of two counsel for its opposition to this application. This is, with respect, opportunistic.

89. Opposition by SANRAL was entirely unnecessary in circumstances where SANRAL itself advocates for the relief sought by OUTA in prayers 2 and 4 of the Notice of Motion.

90. Bakwena has known since the filing of SANRAL's answering affidavit on 22 June 2023 that SANRAL concedes that it had not considered OUTA's request and advocated for the matter to be reviewed and set aside and remitted back to SANRAL for consideration. OUTA indicated in its replying affidavit filed on 18 August 2023 that, given the concessions made in SANRAL's answering affidavit, it will proceed with the relief requested in prayer 4 (which entails remittal and notification of third parties), rather than the alternative relief requested in prayer 3 (asking the Court to compel production).

91. It is submitted that OUTA has acted reasonably throughout. It is unreasonable of SANRAL to expect OUTA to pay the costs of an application which was in the first place necessitated by SANRAL's failure to comply with its legislative obligations and which OUTA was entitled to bring.

92. Similarly, given what SANRAL has stated in its answering affidavit and the fact that it is common cause between OUTA, the requester and SANRAL, the decision-maker that the impugned decision should be reviewed and set aside and remitted back to SANRAL, it is unreasonable of Bakwena to persist with its opposition of the principal relief and force an argument on the entire application, which in the circumstances may be premature.

93. OUTA is entitled to a properly considered decision by SANRAL and to assess the merits of any potential future applications based on reasons provided by SANRAL. Given that it is common cause that SANRAL never independently considered OUTA's request for access to information, OUTA could not assess and base the present application on reasons given by SANRAL, as there were none.

94. It is submitted that, without a version on the merits of the request from SANRAL who is the holder of the information, this Honourable Court is also not in a position to make an informed decision at this stage as to the status of the documents. SANRAL chose not to put a version on the merits before the Honourable Court.

95. In the premises it is submitted that the costs of this application should be borne by SANRAL on the scale as between attorney and client, *alternatively* and if Bakwena persist with its opposition to the principal relief of review and setting aside the impugned decision, that such costs should be borne jointly and severally by SANRAL and Bakwena.

**S Mentz**
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**16 October 2023**