IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NUMBER:

GAUTENG DIVISION, PRETORIA

COURT A QUO CASE NUMBER: 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**
NAZIR ALLI	**THIRD RESPONDENT**
DANIEL MOTAUNG	**FOURTH RESPONDENT**
SKHUMBUZO MACOZOMA N.O	**FIFTH RESPONDENT**
N3 TOLL CONCESSION (RF) (PTY) LTD	**SIXTH RESPONDENT**

APPLICANT'S APPLICATION FOR LEAVE TO APPEAL IN TERMS OF SECTION 17 (2)(b) OF THE SUPERIOR COURTS ACT, 10 OF 2013

TAKE NOTICE THAT the applicant makes application for leave to appeal to the Supreme Court of Appeal alternatively the full Court of the Gauteng Division, Pretoria, against the whole of the judgment and order (including the order for costs) of the Gauteng Division, Pretoria (Coram Millar J) delivered on 10 October 2023 and the judgment and order delivered on 25 January 2024 refusing the applicant's application for leave to appeal with costs (which costs are to include the costs consequent upon the employment of 2 counsel, where so employed).

TAKE NOTICE FURTHER that the grounds for the application are set out in the accompanying affidavit of **STEFANIE FICK**.

If the respondents intend opposing this application, the respondents are required to lodge their affidavit in support of their opposition, after prior service upon the applicant, with the registrar of this Court within one month after service of this application on the respondents.

Dated and signed at Pretoria on this _____ day of February 2024.

_____

JENNINGS INCORPORATED
ATTORNEYS FOR THE APPLICANT
56 JEROME ROAD
LEOPARD COURT
LYNNWOOD GLEN
PRETORIA
TEL: 012 110 4442
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REF: A JENNINGS/OUT003
C/O SYMINGTON DE KOK INC
SYMINGTON DE KOK BUILDING
169B NELSON MANDELA DRIVE
BLOEMFONTEIN
REF: LVENTER/CSLACK/FFS2997

TO: THE REGISTRAR OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

TO: THE REGISTRAR OF THE ABOVE HONOURABLE COURT
BLOEMFONTEIN

AND TO: **EDWARD NATHAN SONNENBERGS**

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Ref: MR N KIRBY/MS B MOTI/NTHR1011.58

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N3 TOLL CONCESSION (RF) (PTY) LTD	**SIXTH RESPONDENT**

APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned

STEFANIE FICK

do hereby make oath and state the following:

1.

1.1. I am an executive director of the applicant's Accountability Division with offices situated at Unit 4, Boskruin Village, Cnr President Fouche and Hawken Road, Bromhof, Johannesburg, Gauteng.

1.2. I am duly authorised by resolution from the applicant's executive committee to represent the applicant in these proceedings and to depose to this affidavit on behalf of the applicant. The resolution is attached as **Annexure "FA1"**.

1.3. The facts contained herein fall within my personal knowledge, save where otherwise indicated or appears from the context, and are to the best of my belief true and correct.

THE PARTIES:

2.

2.1. The applicant is the Organisation Undoing Tax Abuse ("OUTA"), a non-profit company, duly incorporated in terms of the law of the Republic of South Africa with its principal place of business at the address set out in paragraph 1.1. above.

2.2. OUTA is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. OUTA was established to challenge the abuse of authority particularly the abuse of taxpayers' money.

2.3. The first respondent (SANRAL) is a State owned entity established in terms of the South African National Roads Agency Limited and National Roads Act, 7 of

1998. It is responsible for, and is given power to perform, all strategic planning with regard to the South African roads system, as well as planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic of South Africa.

2.4. The second respondent is the Minister of Transport who is cited herein in his representative capacity as the sole shareholder of SANRAL c/o the offices of the State Attorney at SALU Building, 316 Thabo Sehume Street, Pretoria.

2.5. The Third respondent is Nazir Alli ("Mr Alli") an adult male cited in his representative capacity as the relevant then information officer for SANRAL with his place of employment at 48 Tambotie Avenue, Val de Grace, Pretoria. Mr Alli was listed as SANRAL's information officer at the relevant time in its PAIA manual.

2.6. The fourth respondent is Daniel Motaung ("Mr Motaung") an adult male who is cited in his representative capacity as the deputy information officer of SANRAL with his place of employment at 48 Tambotie Avenue, Val de Grace, Pretoria.

2.7. The fifth respondent is Skhumbuzo Macozoma ("Mr Macozoma") an adult male who is cited in his representative capacity as chief executive officer of SANRAL with his place of employment at 48 Tambotie Avenue, Val de Grace, Pretoria.

2.8. The sixth respondent is N3 TOLL CONCESSION (RF) (PTY) LTD ("N3TC") a private company with whom SANRAL contracted, and which has attended to the construction, operation, management, and control of a section of the N3 highway.

THE PURPOSE OF THIS APPLICATION:

3.

3.1. This is an application for leave to appeal against the whole of the judgment (including the order for costs) delivered in the Court a quo on 10 October 2023. The applicant's application for leave to appeal against that judgment was dismissed by the learned judge a quo on 25 January 2024.

3.1.1. A true copy of the judgment of the court a quo and court order are annexed hereto as **Annexure "FA2" ("the 10 October 2023 judgment")** and **Annexure "FA3"** wherein the court a quo dismissed OUTA's application against the Respondents; and

3.1.2. A true copy of the leave to appeal judgment and court order of the court a quo are annexed hereto as **Annexure "FA4" ("the 25 January 2024 judgment")** and **Annexure "FA5"**.

4.

4.1. The pertinent paragraphs relating to the dismissal of OUTA's claim in the 10 October 2023 judgment are the following:

4.1.1. Ad [24] It was the case for both SANRAL and N3TC that Items 3, 4, 7 and 9 of the information requested in Part A was not in their possession and for that reason, could not be furnished to OUTA.

4.1.2. Ad [27] Since both SANRAL and N3TC denied that SANRAL is in possession of these specific items of information, there is no obligation upon SANRAL to furnish to OUTA that which it does not have.

4.1.3. Ad [48] SANRAL and N3TC argued that there is no basis for the application of the public interest *override* provided for in section 46 of Promotion of Access to Information Act 2 of 2000 ("PAIA"). (The Court justified such a basis, with reference to the decision in ***Centre for Social Accountability v Secretary of Parliament***.[1])

4.1.4. Ad [50] There is an onus on OUTA to show on a balance of probabilities, that the disclosure would reveal evidence of either a substantial contravention of, or failure to comply with the law, imminent or serious public safety or environmental risk, or that the public interest in disclosure would clearly outweigh the harm.

4.1.5. Ad [54] Both SANRAL and N3TC argued that OUTA failed to demonstrate that the non- disclosure of N3TC's confidential financial information would render either "*a substantial contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk, and that the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question"*.

4.1.6. Ad [60] 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.

4.1.7. Ad [65.3] The application is dismissed.

4.1.8. Ad [65.4] The applicant is ordered to pay the costs of the respondents who

[1] 2011 (5) SA 279 (ECG) para 92 and 94

opposed this application on the scale as between party and party, such costs to include the costs consequent upon the employment of two counsel, where so employed.

5.

5.1. OUTA's claim against SANRAL and N3TC was consequently dismissed with costs. Similarly, as stated above, the court a quo dismissed OUTA's application for leave to appeal. The following features appear from the 25 January 2024 judgment:

5.1.1. Ad [4] When the application was called counsel for the Applicant confined his argument to two of the grounds in the application for leave to appeal, firstly that the test set out in ***Ericsson South Africa (Pty) Ltd v Johannesburg Metro and Others***[2] had not been correctly applied by this Court, and following from this, the Court did not "*attach sufficient weight to SANRAL statutory duties and the public interest therein and in finding that the public interest override finds no application in respect of the disputed documents*".

5.1.2. Ad [5] It was argued that the test for the application of section 46 of 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.

5.1.3. Ad [9] It was argued on behalf of OUTA that the onus was on SANRAL to scrutinise the documents and to consider whether or not the provisions of

[2] 2023 (5) SA 219 (GJ)

section 46 would compel disclosure. Having regard to the provisions of section 46, an evaluation is required as to whether the record "would reveal", in terms of section 46(a)(i) what "*is substantial contravention of, or failure to comply with, the law"* and if it was found to be so, that in terms of section 46(b) if *"the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provisions 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.

5.1.4. Ad [14] It was argued for OUTA that the consequence of the fact that OUTA need not have furnished any reasons for why it requested documents that it did, was that there was no onus upon it to lay any basis for its claim for the application of section 46. Again, this approach is consonant with the findings in ***Ericsson***, but the court was of the view that this was not the case that was before it.

5.2. In the circumstances the Court ordered that the application for leave to appeal is refused, with costs which costs are to include the costs consequent upon the employment of two Council where so employed.

6.

6.1. The central question for decision under this application is whether there is a reasonable prospect that another Court would arrive at a different conclusion. I respectfully submit that there is indeed such a prospect.

7.

7.1. The central question for decision is whether there is a reasonable prospect that

another Court would arrive at a different conclusion on essentially, the following issues:

7.1.1. Was the correct onus applied in this matter;

7.1.2. Does public interest find application in respect of the disputed documents in Part B;

7.1.3. Upon an objective and proper interpretation of the facts presented, did OUTA make out a case which justifies the production of the disputed requested documents;

7.1.4. The court a quo correctly found that OUTA need not furnish reasons for its requested records. Is there a justification for the interrogation of OUTA's reasons so provided;

7.1.5. Is SANRAL's averments that it is not in possession of specific documents justified on the facts and in law;

7.1.6. Is failure to comply with section 23 of PAIA justified in these circumstances;

7.1.7. Does this judgment promote the purpose of PAIA, being to promote transparency, accountability and effective governance of all public bodies and in effectively limiting the public's right to effectively scrutinise and participate in decisions made by public bodies to ensure openness, requiring access to information in a speedy and inexpensive manner.

THE BACKGROUND TO OUTA'S APPLICATION:

8.

8.1. On 30 July 2019 OUTA, acting in accordance with the provisions of PAIA, requested from SANRAL, a set of records pertaining to the content of a concession contract, entered into between SANRAL and *N3TC.*

8.2. The request for access to information in terms of PAIA is an invocation of the right in section 36 of the Constitution and entitles the requester to access to the requested record or part thereof if that requester complies with procedural and statutory requirements set out in the Statute, unless there is a valid ground of refusal which a private or public body may rely on.

8.3. 25 September 2019 was the date that SANRAL received OUTA's request. Consequently, SANRAL's information officer ought to have made a decision on the request and accordingly to have informed OUTA thereof by 25 October 2019. OUTA confirmed that it had not been extended the courtesy of being notified of the decision on its request.

8.4. SANRAL objected to the disclosure of the records on the basis of its belief as to what the requester's reasons were for requesting access. In ***President of the Republic of South Africa v M and G Media LTD*** **2012 (2) BCLR 181 (CC)** the Constitutional Court explained the provisions of section 11 in the following terms:

"As is evident from its long title, PAIA was enacted "to give effect to the constitutional right of access to information held by the state and the formulation of section 11 casts the exercise of this right to pre-empt the terms – the requester must be given access to the report, so long as the request complies with the procedures outlined in the act and the record requested is not protected from disclosure by one of the exemptions set forth herein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception."

8.5. SANRAL’s objection was based principally on section 36 of PAIA which provides for the protection of commercial information of third parties (section 36(1)(b) and (c)). It contended (without particularity or proper motivation) that the requested information contained general and specific commercial, financial and technical information of a highly confidential nature belonging to the concessionaire. The information requested relates to the revenue generated by the concessionaire throughout the term of the N3TC concessionary contract.

8.6. SANRAL contended that the records sought are confidential, and that the disclosure of such confidential information will place the concessionaire at a disadvantage in its contractual negotiations, both in relation to similar contractual arrangements and so prejudice it in commercial competition.

8.7. OUTA convincingly rebutted these contentions on the basis that SANRAL had not set out any adequate reasons required by section 25 of PAIA for refusing access to the records requested in items 4 to 10 of part A. Accordingly, these records should be furnished in terms of PAIA.

8.8. The astronomical profit made by the concessionaire cannot be said to be cost effective. The motoring public are not furnished with accessible and accurate information, and yet they must pay these increases on the say-so of SANRAL, which 99% of the time accepts the recommendation given to it by the consultant. SANRAL's reliance on section 36(1)(b) and (c) of PAIA based on the aforesaid is at odds with SANRAL's duty in terms of sections 195 and 217 of the Constitution.

8.9. N3TC averred that it had no knowledge of whether or not SANRAL still has certain documents in its possession, in circumstances where they were originally provided to SANRAL more than 23 years ago. If SANRAL no longer has these documents in its possession, then, so it was contended, SANRAL cannot be compelled to give the documents to OUTA. N3TC, therefore, opposed the granting of the order in respect of these documents on this ground alone.

8.10. In short, N3TC relied on section 36(1) of PAIA. The information officer of SANRAL is obligated to refuse a request for access to the requested records if the requested records contain financial, commercial, scientific or technical information, the disclosure of which would likely cause harm to the financial, commercial or technical interests of N3TC, as a third party or as the information supplied in confidence by N3TC, the disclosure of which would be reasonably expected to place N3TC at a commercial disadvantage when contracting in other negotiations.

8.11. OUTA then approached the court a quo in terms of PAIA seeking certain relief against the respondents. Principally, OUTA sought orders directing the respondents to furnish it with their tendered records, as well as additionally requested records, which remained opposed in the main application. This application was brought in terms of section 78(2) read with section 82(2) of the PAIA.

THE PRINCIPAL GROUNDS OF APPEAL AGAINST THE JUDGMENT:

9.1. I respectfully submit that the court a quo failed to consider or apply the important principles set out in the *Ericsson South Africa (Proprietary) Limited v City Of Johannesburg Metropolitan Municipality And Two Others* **(A5048/2021; 33768/2020) [2022] ZAGPJHC 1046** ("Ericsson matter"), despite a copy of that judgment having been furnished to the Court at the hearing of the main application and by which judgment the court a quo was bound.

9.2. It is respectfully submitted that there is a reasonable prospect that another court would find that the facts in the Ericsson matter are applicable to this matter, and that the court a quo incorrectly found that it was distinguishable on the basis that OUTA invoked the *public interest override* and thus that its onus remains.

9.3. I however highlight the following principles that ought to have been applied from the Ericsson matter:

9.3.1. The importance of the right of access to information held by the State is founded on the values of accountability, responsiveness and openness, and to foster transparency, which is one of the basic principles governing public administration.[3] It is impossible to hold accountable a government that operates in secrecy.[4] When access is sought to information in the possession of the State it must be readily availed. Refusal constitutes a limitation of the right of access to information. As such, a case must be made out that the refusal of access to the requested records is justified.[5]

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[3] *Brümmer Minister for Social Development and Others* 2009 (6) SA 323 (CC)
[4] *M & G Media Ltd* 2012 (2) SA 50 (CC) para 10
[5] *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) para 23, cited in *The South African History Archive Trust v South African Reserve Bank and Others* [2020] ZASCA 56 (29 May 2020) para 6.

9.3.2. The evidentiary burden must be discharged on a balance of probabilities.[6] The imposition of this burden on the holder of the information is understandable as it would be *manifestly unfair* and *contrary to the spirit of PAIA to place the burden of showing that the record is not exempt on the requester*, who has no access to its contents.[7] The State is required to put forward 'sufficient evidence for a Court to conclude that, on the probabilities, the information withheld falls within the exemption claimed'.[8] The recitation of the statutory language is insufficient to discharge the burden, as are mere *ipse dixit* affidavits by the State.[9] As the Constitutional Court explains:

> *"Ultimately, the question whether the information put forward is sufficient for the State to show that the record in question falls within the exemptions claimed will be determined by the nature of the exemption. The question is not whether the best evidence to justify refusal has been provided, but whether the information provided is sufficient for a court to conclude, on the probabilities, that the record falls within the exemption claimed. If it does, then the State has discharged its burdens under s 81(3). If it does not, and the State has not given any indication that it is unable to discharge its burden because to do so would require it to reveal the very information for which protection from disclosure is sought, then the State has only itself to blame."*[10]

9.3.3. 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. It is incumbent on the

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[6] *M & G* para 14
[7] *M & G* para 15
[8] *M & G* para 23
[9] *M & G* para 24
[10] *M & G* para 25

State to deal with this issue squarely and clearly in the answering affidavit by averring the necessary facts. However, this was not the case that was made out. *(my emphasis)*

9.3.4. In the absence of a proper factual foundation being laid by the State, 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. Even if there had been a factual averment that some documents fell outside of the Respondents' control, this would not have justified a dismissal of the entire application. *(my emphasis)*

9.3.5. Section 4, read with s 1 of PAIA, the requested documents formed part of the record under the Respondents' control, and it was the Respondent, and not a third-party independent contractor who is required to grant access to them. *(my emphasis)*

9.3.6. Considering 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 the Applicant would reveal evidence of a substantial contravention or non-compliance with the law or an imminent and serious public safety risk. The full court referred to this as the 'harm' requirement, which is found in s 46(a). In addition, they must show that the public interest in disclosing the record 'clearly outweighs the harm contemplated'. The full court referred to this as the 'balance' requirement. It is found in s 46(b). *It is for the State who must show that the harm contemplated from disclosure outweighs the public interest in*

disclosure. (my emphasis) This means that unless the harm requirement is satisfied, no assessment can be made under the balance requirement.

9.4. The decision in *M&G Media* confirms that it is for the party claiming that it has complied with the provisions of PAIA in refusing a request for access to demonstrate this on a balance of probabilities. It remains relevant that a constitutional right is implicated and that access to information disputes of this kind are not purely private in nature, given the potential public interest.[11] The refusal of access must itself be reasonable. The mere say-so of the Information Officer or recitation of the words of PAIA to justify refusal has been held to be insufficient.[12] Another Court would find that SANRAL's recitation finds relevance herein and such recitation is insufficient in consideration of SANRAL's conduct throughout and in consideration of this matter.

9.5. The party seeking to justify refusal of access is obliged to put forward sufficient evidence for a court to conclude, on the probabilities, that the information withheld falls within the exemption claimed. This approach flows directly from PAIA's purpose to give effect to the constitutional right to access to information.[13] The nature of the exemption claimed is also relevant in determining whether sufficient information has been provided to justify the refusal.[14]

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[11] See *M&G Media* ibid para 33 on the difference between ordinary civil proceedings and an access to information dispute.
[12] *M&G Media* ibid para 22.
[13] *M&G Media* ibid paras 23, 24.
[14] *M&G Media* ibid para 25. It is equally clear that the relevant material to be placed before a court in a s 78 application is not confined to the material placed before the IO at the time access was refused: *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para 24.

9.6. Importantly, one of the established principles accepts that decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.

10.

10.1. The court a quo elected to place greater weight on the matter of Centre for Social Accountability v Secretary of Parliament and Others[15] than it did on the full bench Ericsson matter. Be that as it may, it must be noted that in the paragraph preceding the portions of the Centre for Social Accountability judgment as quoted in the main judgment, the court a quo erred in its judgment by not recognising the legal principles in totality, being:

> *"[90] I may add to the above examples the requirement that disclosure 'would' reveal evidence of contraventions or failure to comply with the law. Bearing in mind that a requester of information invariably has no, or very little, information at his or her disposal concerning the information requested (since such information resides with the State), it may very well be impossible* to prove that disclosure *'would'* reveal legal contraventions"

10.2. Further the court in the Centre for Social Accountability ordered the furnishing of the requested records based on this principle which equally finds application in this matter in that OUTA similarly would have no *information at its disposal concerning the information requested (since such information resides with SANRAL*), and it may very well be impossible to prove that disclosure 'would'

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[15] 2011 (5) SA 279 (ECG)

reveal legal contraventions. This highlights the incorrect onus applied by the court a quo.

10.3. The Court a quo applied the same legal principles, which principles ultimately led to the furnishing of the records in the Centre for Social Accountability v Secretary of Parliament and Others but dismissed OUTA's identical relief on the basis of a higher onus threshold OUTA had to meet.

10.4. The incorrect onus was applied and this error justifies the conclusion that the appeal would have a reasonable prospect of success. The application of the correct onus was a matter before the court a quo, which the court a quo with respect applied incorrectly. Further, the above collectively demonstrates that the Court a quo erred in its application of the law.

11.

11.1. Given OUTA's mandate and acting in the interest of the road users on a public road expected to pay the tolls, the matter is of great public importance. I respectfully request this Court to consider this application in this light.

11.2. I respectfully submit that the issues highlighted by me as examples of errors on the part of the court a quo in dismissing OUTA's application show that there are reasonable prospects that an appeal Court would come to a different conclusion not only on the disputed factual findings but also in applying the correct legal conclusions.

11.3. The substantial points of law involved relates to the onus to be applied within SANRAL as a public entity, and its statutory duties when a requester invokes the public interest override.

11.4. The appeal court ought to attach weight to SANRAL's statutory duties and the public interest in this matter and in finding that the public interest override finds application in respect of the disputed documents. The court a quo may be of the view that 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; however, when that profit is funded exclusively by the public, through the paying of tolls, this might cast a different light on the necessity for the information sought.

11.5. In addition, OUTA submits that the Court a quo misapplied the facts when adjudicating the matter. If one has regard to the evolution of the documents tendered by SANRAL before the Court a quo, ultimately by its attorney who deposed to an affidavit, the only items which SANRAL proclaimed not to be in its possession were items 4 and 9 in Part A. The remainder of the documents were then provided or tendered. OUTA was substantially successful in respect of Part A which ought to have had an impact on the costs determination which another Court could vary given OUTA's success in respect of at least Part A.

11.6. There exists a reasonable prospect that an appeal court would not attribute the same weight to SANRAL's and N3TC's contention as it relates to the possession of the requested documents, in correctly applying the principles set out in the Ericsson matter as set out above and section 23 of PAIA, (addressing records not in SANRAL's possession) which reads:

"23. (1) If—

(a) all reasonable steps have been taken to find a record requested: and

(b) there are reasonable grounds for believing that the record—

(i) is in the public body's possession but cannot be found: or

(ii) does not exist,

the information officer of a public body must, by way of affidavit or affirmation, notify the requester that it is not possible to give access to that record.

(2) The affidavit or affirmation referred to in subsection (1) must give a full account of all steps taken to find the record in question or to determine whether the record exists, as the case may be, including all communications with every person who conducted the search on behalf of the information officer.

(3) For the purposes of this Act, the notice in terms of subsection (i) is to be regarded as a decision to refuse a request for access to the record.

(4) If after notice is given in terms of subsection (1), the record in question is found the requester concerned must be given access to the record unless access is refused on a ground for refusal contemplated in Chapter 4 of this Part."

11.7. Section 23 is not discretionary. The Court a quo, in dismissing the application, in effect shut the door to records which SANRAL's attorney stated were found and would be provided at a later stage. The appeal court could rectify this.

11.8. A successful appeal would allow for the disclosure of the records in respect of Part B to the court and eliminate any doubt consistently cast by SANRAL in respect of the possession of the records in Part B. Section 80 of PAIA provides:

"Despite this Act or any other law, any court hearing an application, <u>or an appeal</u> against the decision on that application, may examine any record of a public or private body to which this act applies and no such record may be withheld from the court on any grounds."

11.9. On appeal, OUTA will invoke section 80 of PAIA. On this ground alone, leave to appeal should be granted.

11.10. I submit that the complexity of the case, involving important issues of general interest in respect of PAIA, in itself warrants the consideration thereof by this Court. Should OUTA be denied leave to appeal it would amount to a denial of justice, especially in the context of the manifestly complex facts and the issue of conflicting judgments in the court a quo departing with the principals as set out in the Ericsson matter.

THE PRAYER FOR RELIEF

The Court is requested to grant an order in terms of the Notice of Application.

_____

DEPONENT

SIGNED AND SWORN BEFORE ME AT_____ON THIS THE_____DAY OF FEBRUARY 2024 AFTER THE DEPONENT DECLARED THAT SHE IS FAMILIAR WITH THE CONTENTS OF THIS STATEMENT AND REGARDS THE PRESCRIBED OATH AS BINDING ON HER CONSCIENCE AND SHE HAS NO OBJECTION AGAINST TAKING THE SAID PRESCRIBED OATH. THERE HAS BEEN COMPLIANCE WITH THE REQUIREMENTS OF THE REGULATIONS CONTAINED IN GOVERNMENT GAZETTE R1258, DATED 21 JULY 1972 (AS AMENDED).

_____

BEFORE ME:
COMMISSIONER OF OATHS
FULL NAMES:
CAPACITY:
ADDRESS:

Unit 4, Boskruin Village Office Park
Cnr President Fouche & Hawken Road
Bromhof, 2188
Tel: 087 170 0639
Email: info@outa.co.za

RESOLUTION No 2024/033

Of the Executive Committee

The Executive Committee of the Organisation Undoing Tax Abuse ("OUTA") has discussed and resolved that:

- Stefanie Fick, in her capacity as the Executive Director of the Accountability Division of OUTA is hereby authorised to instruct Jennings Incorporated to proceed with the Appeal proceedings in the Supreme Court of Appeal against the South African Roads Agency Ltd ("SANRAL") and N3TC (and other respondents as set out in the Court a quo as applicable) on behalf of OUTA; and
- The scope of such authorisation includes, but is not limited to, the deposing to any affidavit so required by the relevant rules of court applicable to such legal proceedings.

Approved by the Executive Committee on this 21st day of February 2024.

Wayne Duvenage

Stefanie Fick

Julius Kleynhans

Kerry de Jonge

Samantha Van Nispen

Greig Morrison

Dr Ferrial Adam

"FA2"

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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: 14 November 2023
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

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MARILIZE DENISE MORTON
Commissioner of Oaths Ex Officio
Professional Accountant (SA)
SAIPA no: 27705 0000-1
838 Tiervis Street, Garsfontein, Pretoria, 0081

Heard on: 10 October 2023

Delivered: 14 November 2023 - 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 09H00 on 14 November 2023.

JUDGMENT

MILLAR J

[1] This is an application in which the applicant (OUTA) seeks an order against the first respondent (SANRAL) to furnish certain information (in documentary form) said to be in its possession or under its control, to it. The sixth respondent (N3TC) intervened in the application and opposed the furnishing of certain of the documents.

[2] OUTA describes itself as a "*proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. OUTA was established to challenge the abuse of authority, in particular the abuse of taxpayers' money.*"[1]

[3] SANRAL is the state-owned entity established in terms of the South African National Roads Agency Limited and National Roads Act.[2] It is *inter alia* "*responsible for, and is hereby given power to perform, all strategic planning with regard to the South African national roads system, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic, . . .*".[3]

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1 A self-description set out in paragraph 2 of a letter sent by OUTA to the Information Officer of SANRAL on 30 July 2019.
2 7 of 1998.
3 *Ibid* s 25(1).

[4] N3TC is a private company with whom SANRAL contracted, and which has over the last 24 years to attend to *inter alia* the construction, operation, management and control of a section of the N3 highway. The information which OUTA has requested from SANRAL, all relates to the contract between SANRAL and N3TC.

THIS APPLICATION

[5] The present proceedings are brought by OUTA in terms of the Promotion of Access to Information Act[4] (PAIA) for access[5] to copies of documents relating to a tender awarded to N3TC for the construction and management of a portion of the N3 highway between Heidelberg South in Gauteng and Cedara in KwaZulu Natal. Included in this construction and management is also the collection of tolls at various points from users of the road concerned.

[6] The application is brought by OUTA against SANRAL. While SANRAL is a public body in terms of PAIA, N3TC is not. It is a private company.

[7] PAIA is the means whereby effect is given to *"the constitutional right to access information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights."*.[6] The present application is not a review of the refusal by SANRAL to furnish OUTA with the documents that it requested but rather a reconsideration *de novo* of the request.[7] The reconsideration of the request is not limited to what was before SANRAL at the time that the request was made but must now be undertaken on what is presently before the Court.[8]

---

4 2 of 2000 and in particular s 78(2) read together with s 82 which permit a party who has been unsuccessful in procuring the information sought to apply to Court.

5 *Brummer v Minister of Social Development and Others* 2009 (6) SA 323 (CC) at paras [62] to [63] in which the Court said "*access to information is crucial to the right of freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.*"

6 The part of the preamble to PAIA relevant in this matter.

7 *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) paras [13] – [14].

8 *Transnet Ltd and Another v SA Metal Company Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para [24].

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[8] It is not in issue between the parties that at least insofar as OUTA and SANRAL are concerned, OUTA is entitled to request access to information in terms of PAIA. In issue between the parties is whether all the information which has been requested should be furnished. There is no dispute in respect of certain of the information which SANRAL has agreed to provide and had already provided by the time this application was heard.

[9] Initially, OUTA sought an order in two parts – Part A and Part B, in the following terms:

> *"**PART A***
>
> 1. *A copy of The Concession Contract No. SAPR N0304102/1, for a portion of National Route 3 from Cedara in Kwazulu-Natal to Heidelberg South interchange in Gauteng as a toll Highway (hereinafter referred to as the N3TC Concession Contract) duly signed on the 27th of May 1999;*
>
> 2. *A copy of all Annexures and Addenda to the N3TC Concession Contract;*
>
> 3. *A copy of all Amendments and Addenda (if any) to the N3TC Concession Contract;*
>
> 4. *A copy of all Operation and Maintenance contracts entered into between the Concessionaire and the O&M Contractors, relating to the N3TC Concession Contract;*
>
> 5. *A copy of the Operational and Maintenance Manual pertaining to the N3TC Concession Contract;*
>
> 6. *A copy of the contracts entered into with the Independent Engineer(s), pertaining to the N3TC Concession Contract, as specifically stipulated in clause 6.1;*
>
> 7. *A copy of all the Independent Engineer(s) Reports submitted to SANRAL, pertaining to the N3TC Concession Contract;*

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8. *A copy of all Construction Work contracts entered into by the Concessionaire relating to the N3TC Concession Contract, as set out in Clause 8.5.2;*

9. *A copy of all "Performance Certificates" issued, relating to the Construction Works contracts entered into by the Concessionaire (as referred to in item 8, above);*

10. *A copy of all "Taking Over certificates" that have been issued in terms of the N3TC Concession Contract, as set out in Clause 9.2;*

PART B

1. *Copies of N3TC's complete financial statements for each fiscal year, submitted to SANRAL in terms of the N3TC Concession Contract (as from 1999/2000 financial year to present) as specified in Clause 16.3.1(a);*

2. *Copies of all reconciliations of N3TC's Profit & Loss Accounts, together with their proposed budgets for each fiscal year, submitted to SANRAL, from 1999/2000 fiscal year to present in terms of the N3TC Concession Contract, with specific reference to Clause 16.3.1(d);*

3. *Copies of all Annual Reports submitted to SANRAL, pertaining to the N3TC Concession Contract (as from the 1999/2000 financial year to present), issued by the N3TC's appointed auditors, certifying that the computation of the Highway Usage Fee for the previous year was correctly calculated, as specified in Clause 16.3.1(e);*

4. *Copies of the lists, submitted to SANRAL in terms of the N3TC Concession Contract (as from 1999 to present), of N3TC's lenders and creditors to which N3TC owns a sum in excess of the equivalent of R10 000 000 (ten million Rand), including the amounts due to each of them, as stipulated in Clause 16.3.2(c);"*

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[10] Initially, the information sought by OUTA in its request was not furnished, in part because N3TC had not agreed to this. By the time this application was heard, however:

[10.1] In respect of PART A:

[10.1.1] The furnishing of items 1, 2, 5 and 6 was no longer opposed and was tendered.[9]

[10.1.2] In respect of items 3, 4, 7 and 9, SANRAL asserted that it did not have this information in its possession and for this reason it could not be furnished; and

[10.1.3] In respect of item 8, the furnishing of this was opposed.

[10.2] In respect of PART B:

[10.2.1] The furnishing of items 1, 2, 3 and 4 was opposed.

BACKGROUND

[11] OUTA asserts that it conducted an investigation into a series of irregularities *"following a concessionaire agreement entered into between SANRAL and N3TC."* OUTA sought to give some indication of what this investigation had revealed. It contended, somewhat illogically, that:

> "*Without elaborating on the merits of the above-mentioned agreement, OUTA has established that the agreement will lapse during the course of May 2029.*

[9] A complaint was made by OUTA that the tendered documents had not been received from SANRAL sufficiently far in advance of the hearing by OUTA to enable it to consider them and to make further submissions in respect of the disputed documents. I invited the parties to make further submissions in writing which invitation was accepted by OUTA, SANRAL and N3TC. Those submissions were considered together with all the other papers filed of record and the arguments advanced at the hearing in the preparation of this judgment.

Notwithstanding, SANRAL has continued to implement the agreement, in the absence of justifiable extension to that effect, potentially in contravention of the Public Finance Management Act, 1999 ("PFMA").

[12] The agreement has not yet run its course and so self-evidently, there is no need for any extension for the continued performance of obligations in terms of the agreement. OUTA went on to assert that the legality of the agreement entered into between SANRAL and N3TC could only be established upon consulting all relevant annexures and addenda to the agreement.

[13] It is not necessary for purposes of the request in terms of PAIA,[10] to furnish any reason for which the information is required. However, the reference by OUTA to both the investigation as well as to specific clauses in the agreement (in the relief sought in PARTS A and B) make it apparent that OUTA at the time it brought the present application already had the agreement, or at least substantial parts of it, in its possession. N3TC asserted that this was already publicly available and hence the withdrawal of its opposition to the furnishing of certain of the information.

[14] It bears mentioning at this stage, that despite the entire application being predicated on item 1 of Part A – the main contract – being made available, OUTA, although it was apparently already publicly available, did not disclose this in its application. What it did disclose through the request, was its knowledge of specific parts of the main contract. Of the 14 items requested in Parts A and B, 8 of the items are specifically referenced in the main contract.[11]

[15] It is access to the information that was not publicly available before OUTA's request to SANRAL on 30 July 2019, that is the crux of this application – items 3, 4, 7, 8 and 9 in Part A and items 1 to 4 in Part B.

---

[10] Section 11(3)(a) of the Act provides that: "*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.*".

[11] In Part A, item 6 refers to clause 6.1, item 8 refers to clause 8.5.2, item 9 refers to clause [illegible] item 10 refers to clause 9.2 and in Part B, item 1 refers to clause 16.3.1 (a), item 2 refers to clause 16.3.1(d), item 3 refers to clause 16.3.1(e) and item 4 refers to clause 16.3.2(c).

[16] It is OUTA's case that notwithstanding the refusal of access to the information which has not been tendered, that this Court should nevertheless, and having regard to the public interest override set out in s 46 of PAIA, order SANRAL to make all the information it has requested, available to it.

CONDONATION

[17] There was initially some concern about whether or not the present application had been brought timeously. The genesis of this arose out of the apparent failure on the part of SANRAL to update its PAIA manual[12] on its website to reflect the correct details of its Information Officer.

[18] The date on which the request was made and the failure on the part of SANRAL to communicate a decision within 30 days of the request,[13] obfuscated when it had actually been received. This had a consequential effect. One consequence was that OUTA embarked upon an internal appeal process in respect of the deemed refusal on the part of SANRAL and another was the joinder of the third and fifth respondents, Mr. Alli and Mr. Macozoma respectively.

[19] It bears mentioning that the initial request, which was made on 30 July 2019, was forwarded by SANRAL to N3TC which in turn had communicated its agreement to the furnishing of certain documents and objection to the furnishing of others. SANRAL for its part failed to respond to the request of OUTA timeously. SANRAL did not refuse the request in express terms or provide reasons and hence the failure to communicate its decision resulted in it being a deemed refusal.[14]

[20] In consequence of this, OUTA sought condonation in respect of its non-compliance with the 180-day period referred to in s 78(2)(c)(i) of PAIA, insofar as there may have been any non-compliance, for the bringing of this application.

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12 In terms of sections 14 and 51 of PAIA, it is required to update its manual annually.
13 Section 25 of the Act.
14 Section 27 of the Act.

[21] The reasons for the bringing of the present application when it was, make plain that there was no tardiness on the part of OUTA in its pursuit of this matter. However, neither Mr. Alli nor Mr. Macozoma ought to have been joined in these proceedings even though no relief was sought against them. I am of the view that condonation, insofar as it may be required, should be granted,[15] and also that the references to both Mr. Alli and Mr. Macozoma in these proceedings be struck out.

[22] The grounds of refusal, although not furnished before the institution of this application, have now been furnished by SANRAL.[16] There are two main grounds – firstly, that information has been requested from SANRAL that is not in its possession and secondly, that information that is in its possession is confidential and that it is entitled to refuse access to that information. OUTA for its part argues that notwithstanding the confidentiality, disclosure should be ordered in the public interest. I propose dealing with each of these in turn.

[23] It is at this juncture and before dealing with the reasons for the refusal, to deal briefly with what are considered to be "adequate reasons" for the refusal of access to information. In the present matter, the reasons proferred fall squarely within the provisions of s 36 alternatively s 38 of the Act. In the present matter, the reasons for the refusal of the request have been cogently set out.[17]

THE DOCUMENTS THAT SANRAL DOES NOT HAVE

[24] It was the case for both SANRAL and N3TC that items 3, 4, 7 and 9 of the information requested in Part A was not in its possession and for that reason, could not be furnished to OUTA.

[25] The specific documents are:

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15 Section 82(e) of the Act.

16 In terms of s 25(3)(a) of the Act, when access is refused, the party refusing access is required to *"state adequate reasons for the refusal, including the provisions of the Act relied upon."*.

17 For this reason, the present matter is distinguishable from *CCII Systems (Pty) Ltd v Fakie and Others NNO* 2003 (2) 325 (T) para [16]; *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) para [19]; *South African History Archive Trust v South African Reserve Bank and Another* 2020 (6) SA 127 (SCA) para [36].

[25.1] Item 3 - *"amendments and addenda (if any) to the main contract"*. The possibility that the document/s requested does not exist was recognised by OUTA in its request.

[25.2] Item 4 - contracts entered into between N3TC and third parties.

[25.3] Item 7 - independent engineers reports submitted to SANRAL in respect of the N3TC concession contract.

[25.4] Item 9 - a copy of all "performance certificates" which were issued relating to the construction works undertaken by N3TC.

[26] On consideration of the items reflected in paragraphs [25.1], [25.3] and [25.4] above, it is readily apparent that if, insofar as any of those documents were to exist and have been submitted to SANRAL, this would have fallen squarely within the knowledge of both SANRAL and N3TC.

[27] Since both SANRAL and N3TC deny that SANRAL is in possession of these specific items of information, there is no obligation upon SANRAL to furnish to OUTA that which it does not have. It was argued for OUTA that the contention that the specific documents were not in the possession of SANRAL should not be accepted.

[28] While it may not suit the case for OUTA that SANRAL either no longer has documents it once had in its possession or has never been furnished with documents by N3TC, these are operational issues falling within the exclusive purview of both SANRAL and N3TC. This Court is in no position, absent a case being made out for it, to not accept this.[18]

[29] Insofar as the documents referred to in paragraph [25.2] above are concerned, it is the case for SANRAL and N3TC that SANRAL does not have these documents in its possession. In any event, those contracts are private contracts entered into

[18] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

between N3TC and other parties. SANRAL is not a party to those private contracts.

[30] PAIA does not require that the party from whom information is requested must embark upon a process to obtain information or documents that are not already in their possession.[19]

REFUSAL BY SANRAL IN TERMS OF THE ACT

[31] SANRAL refused to furnish item 8 of Part A – *"a copy of all Construction Work contracts entered into by the concessionaire relating to the N3TC Concession Contract, as set out in clause 8.5.2"*.

[32] It similarly also refused to furnish any of the items referred to in Part B. All the items in Part B relate to the financial records of N3TC and OUTA relies upon specific clauses in the concession agreement for its contention that SANRAL is in fact in possession of this information.

[33] The refusal by SANRAL to furnish OUTA with the disputed documents is predicated on the fact that it either does not have the documents in question in its possession alternatively that it is obligated to refuse access in consequence of the objection in doing so by N3TC.

SECTIONS 36(1)(b) and (c) of PAIA

[34] Section 36(1) provides that access to a record must be refused if it contains:

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

[19] Section 23 provides that if a record cannot be found or does not exist then an affidavit must be furnished setting out that it is not possible to give access to the record. In the present matter, SANRAL has confirmed on oath that it does not have certain of the documents in its possession. Insofar as those documents are concerned, N3TC has confirmed that it has the documents but objects on the grounds that it has stated to the furnishing of those documents.

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

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

(ii) *To prejudice that third party in commercial competition."*

[35] In *SA Metal and Machinery Company v Transnet Ltd,*[20] the Court held that:

> *"to cause harm to the commercial and financial interests of the third party by disclosure of the information, the information must obviously have an objective market value. This will be the case where the information sought is 'important or essential to the profitability, viability or competitiveness of a commercial operation.'"*

[36] In addition to the argument that the disclosure of the records would cause harm to N3TC. Although it was not necessary for it to do so, it demonstrated clearly and unequivocally to my mind, that the disclosure of its commercial or financial information fell squarely within the ambit of the section.

[37] It argued *inter alia* that it would within the next few years be required to undertake and perform a competitive arm's length tender process when the main contract came up for renewal besides concluding other contracts before then. Given the particularly small and competitive market within which it operates, its private financial information which, if disclosed to a competitor, would likely cause harm to it had not even been disclosed to SANRAL.

[38] Furthermore, the disclosure of commercial records in their raw form would prejudice N3TC in its ability to tender fairly and competitively. Insofar as its

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[20] [2003] 1 ALL SA 335 (W) para [12]. See also *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para [42]; *Van der Merwe v National Lotteries Board* 2014 (4) SA 0844 (GP) para [32]-[36].

financial records are concerned, besides the records relating to the day-to-day operations, N3TC had had to develop a bespoke and discreet financial model that could accommodate the specific financing requirements of the main contract to enable it to perform its obligations in terms thereof. This information, if disclosed, would especially cause commercial and financial harm to N3TC.[21]

[39] It was also argued that the request for the disclosure of these confidential documents, given the reasons proferred by OUTA for bringing the application, after having already conducted an investigation, was nothing more than an attempt to compel pre-litigation discovery – a situation which PAIA specifically provides in s 7(1)(a).[22]

[40] It was argued by OUTA that insofar as SANRAL had refused access on the basis of the confidentiality of the disputed information, that if there were a confidentiality clause and it were relied upon, this would negate the spirit and purpose of PAIA. I agree with this proposition.[23]

[41] However, s 36 expressly enjoins SANRAL to refuse access if N3TC does not consent to its furnishing and that is precisely the situation that prevails in the present matter.

[42] N3TC asserted that insofar as information and documentation relating to its operations but also contract/s with third parties had been furnished by it to SANRAL, this had been done on the basis that its confidentiality would be kept.

[43] In *South African History Archive Trust v South African Reserve Bank*,[24] it was held:

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21 *BHP Billiton PLC Incorporated v De Langa* [2013] ZASCA 11 (SCA).

22 This section provides that PAIA does not apply to records for criminal or civil proceedings if *"(a) that record is requested for the purpose of criminal or civil proceedings."* See also *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) para [21]-[22]; *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 (3) SA 119 (C) at 135E-136A.

23 *SA Airlink (Pty) Ltd v Mpumalanga Tourism and Parks Agency and Others* 2018 (3) SA 112 (GSJ).

24 2020 (6) SA 127 (SCA) para [40].

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"*[40]* *Section 37(1)(b) gives rise to a discretionary refusal as opposed to a mandatory one. The discretion must be based on facts before it can be said to have been properly exercised. First, the record must consist of information which was supplied in confidence by a third party. Secondly, it must be proved that the disclosure could reasonably be expected to prejudice the future supply of similar information or information from the same source. Thirdly, it must be in the public interest that such information, or information from the same source should continue to be supplied.*"

THE PUBLIC INTEREST OVERRIDE – SECTION 46 OF PAIA

[44] It was argued for OUTA that it "*wishes to evaluate the legality of an agreement that is of public interest, however, OUTA will only be in a position to do so upon the production of the records referred to in its request. Should OUTA determine that SANRAL had acted unlawfully in the implementation of its agreement with N3TC, OUTA ultimately wishes to institute the relevant proceedings in a court of law.*"

[45] Section 46 of PAIA provides for the:

"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."

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[46] OUTA argued that having regard to s 195[25] and s 217[26] of the Constitution of the Republic of South Africa, 1996, which deal with basic values in principles governing public administration and procurement, respectively. It was argued that the reliance by SANRAL on s 36(1)(b) and (c) of PAIA as the basis for refusing to make the information in its possession available is at odds with its constitutional obligations.

[47] It was argued for SANRAL that neither s 195 nor s 217 are actionable (in the sense that they cannot ground a cause of action) and the principle of subsidiarity in any event prevented OUTA from relying directly on the provisions of these sections in the present application.[27]

[48] SANRAL AND N3TC argued that there is no basis for the application of the public interest override provided for in s 46 of PAIA.

[49] In *Centre for Social Accountability v Secretary of Parliament,*[28] it was held that:

> *"[92] In order to give effect to the constitutional right of access to information held by the State, qualified only by the limitation clause 36 of the Constitution and other rights, the restrictive wording used by s 46 of PAIA must be read subject to s 81 of PAIA. Section 81 stipulates that the rules of evidence applicable in civil proceedings apply to the proceedings on application in terms of s 78. This is an application under s 78 and the civil onus for the discharging of the burden of proof referred to in s 81(2) is proof on a balance of probabilities. It follows that the applicant in this case must prove on a balance of probabilities that the disclosure of the schedules would reveal evidence of a substantial contravention of, or failure to comply with, the law.*
>
> *[93]* . . .

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[25] These are set out in s 195(1) and are in terms of s 195(2)(b) applicable to organs of state.
[26] S 217(1) provides that when contracting for goods or services, an organ of state "*must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective*"
[27] *My Vote Counts v The Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) para [44]-[66].
[28] 2011 (5) SA 279 (ECG) paras [92] and [94].

> *[94] In these circumstances a requestor is called upon to show on a balance of probability that the disclosure would reveal evidence of the required contravention or failure – not that the disclosure would, as a fact, show such contravention or failure."*

[50] There is an onus on OUTA to show on a balance of probabilities that the disclosure would reveal evidence of either a substantial contravention of or failure to comply with the law, imminent or serious public safety or environmental risk or that the public interest in the disclosure would clearly outweigh the harm.

[51] The entirety of the argument made by OUTA on this score was predicated on its *"evaluation of the legality of the agreement"* and a determination in consequence of such evaluation as to whether or not SANRAL had *"acted unlawfully in the implementation"* of the agreement.

[52] In argument I was directed by OUTA to the provisions of s 80(1) of PAIA which provides that:

> *"Despite this Act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a public or private body to which this Act applies, and no such record may be withheld from the court on any grounds."*

[53] Notwithstanding the invitation to call for any of the disputed documents, OUTA inexplicably failed to place before the Court, when it was clearly able to do so, the main agreement or portions thereof that it had in its possession. The highwater mark of OUTA's argument that the disputed contract/s and financial records ought to be furnished in the public interest was the argument and conclusion, made and reached *in vacuo* without any basis[29] having been laid for it[30] that:

---

[29] Somewhat belatedly and in reply, OUTA sought to rely, 7 years after the fact, on an article published in the Sunday Times Newspaper on 25 November 2012 in which issue had been taken with the main contract concluded 13 years earlier.

[30] *Mostert v FirstRand Bank t/a RMB Private Bank* 2018 (4) SA 443 (SCA) para 17.

> *"The competitive tender process must be understood in the context of South Africa's small and competitive construction and toll operation sectors, particularly so when having regard to the recent demise of a number of participants."*

And

> *"The astronomical profit made by the concessionaire cannot be said to be cost effective. The motoring public are not furnished with timeously accessible and accurate information, and yet they have to pay these increases on the say so of SANRAL, whom, 99% of the time, accepts the recommendation given to them by the consultant".*

[54] Both SANRAL and N3TC argued that OUTA failed to demonstrate that the non-disclosure of N3TC's confidential financial information would reveal either "*a substantial contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk*";[31] and that *"the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."*[32]

[55] OUTA's claim that the disclosure of the disputed documents is in the public interest is, properly construed on the case before me, predicated entirely, not upon any irregularity with the contract that was concluded in 1999 between SANRAL and N3TC but rather upon on the perception, after an investigation conducted some 20 years after the fact, that N3TC in the performance of its obligations in terms of the contract may well have made profit.

[56] There is no provision in our law that any private third party which contracts with the State is prohibited, within the confines of a lawfully made and awarded tender, to make a profit. In its terms, s 46 of PAIA applies only to contraventions

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[31] *De Lange and Another v Eskom Holdings Ltd and Others* 2012 (1) SA 280 (GSJ) para [40].
[32] *ibid* para [40].

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or failure to comply with the law or public safety or environmental risk. None of these apply in the present case.

[57] However, does the public interest in the disclosure of the contract/s and confidential information of N3TC which is ancillary to the main contract, outweigh the harm to N3TC's present and future financial interests and would it prejudice them in their future commercial endeavours?

[58] In the *Health Justice Initiative v Minister of Health*,[33] the public interest override was found to be of application in respect of contracts that had been negotiated by the Ministry of Health for the provision of Covid-19 vaccines. In that case, the Minister of Health had been compelled to agree to onerous confidentiality clauses which shrouded the entire procurement and contracting process in secrecy. In that case, even the identities of the parties with whom the Ministry and contracted, were withheld in terms of the confidentiality clauses.

[59] The circumstances of the present case are entirely distinguishable. The main contract for which SANRAL issued and awarded a tender was already a public document by the time the present proceedings were brought. Having found that OUTA already had the main contract or at least substantial portions of it, it is apparent that the present application has nothing to do with the award of that contract.

[60] 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.

[33] 2023 JDR 3132 (GP).

[61] For the reasons set out above, I find that the public interest override finds no application in respect of the disputed documents and accordingly the application fails.

COSTS

[62] All the parties who appeared in this matter were *ad idem* that in the event that they were successful, that a punitive order for costs should be awarded against the losing party.

[63] OUTA argued that the refusal to furnish the information that it had sought from SANRAL together with N3TC's refusal to consent was to be construed as *"nefarious"* and nothing other than an attempt to subvert the operation of PAIA and to hide wrongdoing from public scrutiny. It was argued by OUTA that the fact that it even had to bring an application evidenced this.[34]

[64] It was argued by SANRAL and N3TC that should the Court find that the application brought by OUTA was without merit, that a punitive order for costs should be made against them. OUTA for its part argued that in the event that it did not succeed, since it was acting in the public interest, there ought to be no costs order against it.

In my view, the costs should follow the result. However, notwithstanding that OUTA was in possession of the main contract or parts thereof before these proceedings were instituted, it only became aware when the respective answering affidavits were delivered by SANRAL and N3TC of the reasons for the refusal of the disputed documents. For this reason, the institution of the proceedings was not unreasonable. I am of the view that a punitive order for costs is, in the circumstances, not warranted. However, given the nature and

[34] On this specific point the Court was referred to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 492 (CC).

importance of the disputed information, the engagement of more than one counsel by N3TC was appropriate and hence the order for costs that will follow.

ORDER

[65] It is ordered: -

[65.1] The applicant is granted condonation for non-compliance with the 180-day period referred to in s 78(2)(c)(i) of PAIA.

[65.2] All references in the present application to the third and fifth respondents are struck out.

[65.3] The application is dismissed.

[65.4] The applicant is ordered to pay the costs of the respondents who opposed this application on the scale as between party and party, such costs to include the costs consequent upon the employment of two counsel, where so employed.

A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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HEARD ON:	10 OCTOBER 2023
JUDGMENT DELIVERED ON:	14 NOVEMBER 2023
COUNSEL FOR THE APPLICANT:	ADV. E PROPHY
INSTRUCTED BY:	JENNINGS INCORPORATED
REFERENCE:	MR. A JENNINGS
COUNSEL FOR THE 1ST,4TH & 5TH RESPONDENTS:	ADV. A MILOVANOVIC-BITTER
INSTRUCTED BY:	ENS AFRICA ATTORNEYS
REFERENCE:	MR. T MODUBU
COUNSEL FOR THE 6TH RESPONDENT:	ADV. B LEECH SC
	ADV. T MPHALWA
INSTRUCTED BY:	WERKSMANS ATTORNEYS
REFERENCE:	MR. B MOTI

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"FA3"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 32095/2020

PRETORIA 14 NOVEMBER 2023

BEFORE THE HONOURABLE MR JUSTICE MILLAR

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC		APPLICANT
AND		
SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	1ST	RESPONDENT
THE MINISTER OF TRANSPORT	2ND	RESPONDENT
ALLI, NAZIR	3RD	RESPONDENT
MOTAUNG, DANIEL	4TH	RESPONDENT
MACOZOMA, SKHUMBUZO N.O.	5TH	RESPONDENT
N3 TOLL CONCESSION (RF) (PTY) LTD	6TH	RESPONDENT

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA Private Bag X67, Pretoria 0001 2024-02-21 GD-PRET-017 REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

HAVING HEARD counsel(s) for the parties and having read the documents filed the court reserved its judgment.

THEREAFTER ON THIS DAY THE COURT ORDERS

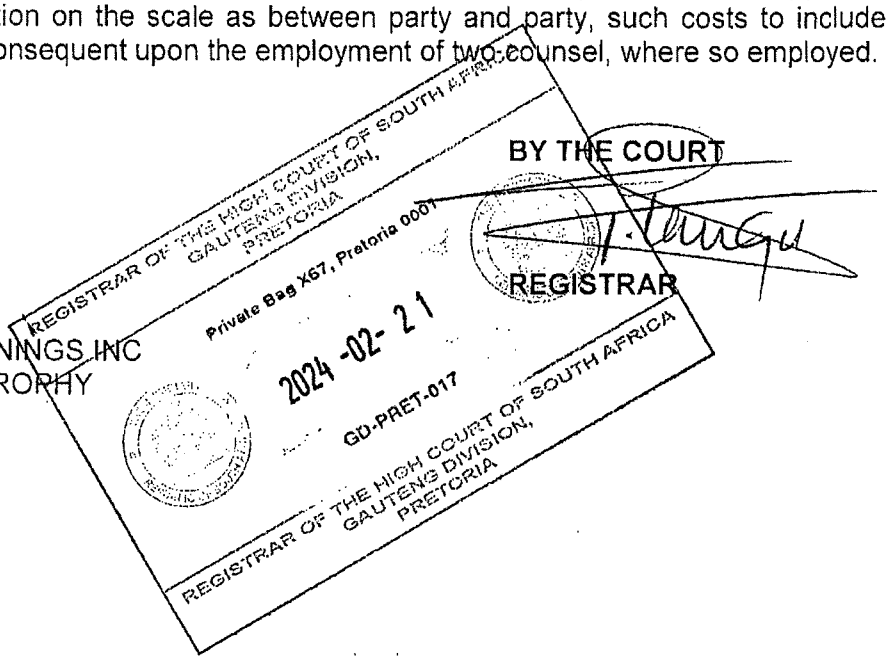
JUDGMENT

1. The applicant is granted condonation for non-compliance with the 180-day period referred to in s 78(2)(c)(i) of PAIA.

2. All references in the present application to the third and fifth respondents are struck out.

3. The application is dismissed.

4. The applicant is ordered to pay the costs of the respondents who opposed this application on the scale as between party and party, such costs to include the costs consequent upon the employment of two counsel, where so employed.



BY THE COURT

REGISTRAR

HH
Attorney: JENNINGS INC
Advocate E PROPHY

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: Mothar J

MARILIZE DENISE MORTON

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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 2023[1] 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 Act[2] (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)*

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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 46[7] of The Promotion of Access to Information Act[8] (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*

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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

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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.

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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."*

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[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
COUNSEL FOR THE APPLICANT:	ADV. A SUBEL SC ADV. E PROPHY
INSTRUCTED BY: REFERENCE:	JENNINGS INCORPORATED MR. A JENNINGS
COUNSEL FOR THE 1ST,4TH & 5TH RESPONDENTS:	ADV. A MILOVANOVIC-BITTER
INSTRUCTED BY: REFERENCE:	ENS AFRICA ATTORNEYS MR. T MODUBU
COUNSEL FOR THE 6TH RESPONDENT:	ADV. B LEECH SC ADV. T MPHALWA
INSTRUCTED BY: REFERENCE:	WERKSMANS ATTORNEYS MR. B MOTI

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"FA5"

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

CASE NO: 32095/2020

PRETORIA, ON THIS THE 25TH JANUARY 2024

BEFORE THE HONOURABLE MR JUSTICE MILLAR

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC		APPLICANT
AND		
SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	1ST	RESPONDENT
MINISTER OF TRANSPORT	2ND	RESPONDENT
NAZIR ALLI	3RD	RESPONDENT
DANIEL MOTAUNG	4TH	RESPONDENT
SKHUMBUZO MACOZOMA	5TH	RESPONDENT
N3 TOLL CONCESSION (RF) (PTY) LTD	6TH	RESPONDENT

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
Private Bag X67, Pretoria 0001
2024 -01- 25
GD-PRET-017

HAVING HEARD counsel for the parties and having read the application for leave to appeal against the judgment of the Honourable Justice **MILLAR** delivered on **14TH NOVEMBER 2023**.

IT IS ORDERED THAT

Judgment

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.

BY THE COURT

REGISTRAR
AM

ATT: -