IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 7955/2021

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC	Applicant
and	
SOUTH AFRICAN NATIONAL ROAD AGENCY LTD	First Respondent
MINISTER OF TRANSPORT N.O.	Second Respondent
SKHUMBUZO MACOZOMA N.O. (In his capacity as the Information Officer)	Third Respondent
BAKWENA PLATINUM CORRIDOR CONCESSIONAIRE (PTY) LTD	Fourth Respondent

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FIRST RESPONDENT'S HEADS OF ARGUMENT

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INTRODUCTION

1. On 8 June 2020 the applicant, the Organisation Undoing Tax Abuse NPC ("**OUTA**"), made a request for access to information to the South African National Road Agency ("**SANRAL**"), the first respondent, in a prescribed manner in terms of section 18 of the Promotion of Access to Information Act 2 of 2000 ("**PAIA**").[1]

2. It is common cause that SANRAL did not consider and decide on the request within the time limit provided in section 25 of PAIA for such decision to be made and as a result, in terms of section 27, the request was deemed to be refused.[2]

3. OUTA then launched the above application and sought orders in terms of section 82 of PAIA:[3]

> **"1. […]**
>
> **2. Setting aside the deemed refusal of its request for access to records of SANRAL in its request for information in terms of the PAIA dated 8 June 2020.**
>
> **3. Directing SANRAL to provide the requested records within 15 days of the granting of the order.**
>
> **4. Alternatively, directing SANRAL to notify any third party of the request concerning records relating to them in accordance with section 47 of PAIA within 10 (ten) calendar**

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1 Founding Affidavit ("**FA**"), Caseline 005-7, para 24; **see also** Annexure "SF4" at Caselines 005-26 – 005-30.
2 FA, Caselines 005-8 – 005-9, paras 29, 33-35; Answering Affidavit ("**AA**"), Caseline 038-3, para 3.
3 Notice of motion ("**NOM**"), Caselines 004-1 – 004-2.

days after service of the order on them, and thereafter to comply with the time periods and provisions in chapter 5 of PAIA."

4. In terms of section 82 of PAIA the remedies that the court may grant if it deems it just and equitable, may include orders:

4.1. confirming, amending or setting aside the decision which is the subject of the application concerned;

4.2. requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order; or

4.3. granting an interdict, interim or specific relief, a declaratory order or compensation.[4]

5. SANRAL accepts that the deemed refusal of OUTA's request for access to its records may be set aside on that basis alone.[5]

6. That, in our respectful submission, is the end of OUTA's case. OUTA did not make out a case justifying any of the other orders in its amended notice of motion.

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4 AA, Caselines 038-9 – 038-10, para 21.
5 FA, Caseline 005-09, para 35; AA, Caselines 038-14 – 038-15, paras 25, 29-30.

7. The only just and equitable remedy the court may appropriately grant in the circumstances is for OUTA's request for access to information to be remitted back to SANRAL for proper consideration and decision. OUTA did not seek such relief, either directly or in the alternative.

8. Instead, in prayer 3 of the amended notice of motion OUTA asks the court to direct SANRAL to provide the requested records within 15 days of the granting of the order; and in the alternative in prayer 4 thereof, to notify any third party of the request concerning records relating to them within 10 days of the order and thereafter to comply with the time periods and the provisions of Chapter 5.

9. The latter relief is flawed:

    9.1. firstly, because the decision to refuse the information is deemed and not one made on the exercise of discretion as contemplated in section 33 of PAIA, a substitution of the court's decision for that of SANRAL in those circumstances, is impermissible; and

    9.2. secondly, a relief to compel SANRAL to notify third parties, without a concomitant prayer for the remittal of the request, is incompetent.

10. SANRAL pointed out as much in its answering affidavit and in its replying affidavit filed on 18 August 2024, OUTA acknowledged the shortcomings in its relief and abandoned prayer 3. Prayer 3 is a substantive relief, extensive in effect and scope, and thus the main reason why SANRAL opposed this application.

11. However, OUTA introduces a new argument in which it contends that prayer 4 of the notice of motion, which is an the "*alternative*" relief, by implication constitutes a "*the remittal of the request*" to SANRAL for reconsideration. OUTA regretfully tries to lay the blame of its own pitfalls on SANRAL by stating that SANRAL should not have opposed this application and instead indicated that it concedes prayer 4.[6]

12. This argument is untenable. It flies in the face of OUTA's own case and the relief it seeks in the notice of motion, as we argue in detail later in these heads of argument.

13. As further indication that OUTA acknowledges its difficulties, on 17 September 2023 OUTA addressed a letter to the SANRAL and the third respondent and intervening party, Bakwena Platinum Corridor Concessionaire (Pty) Ltd ("**Bakwena**") in which it advised that in light of SANRAL's agreement that the deemed refusal falls to be reviewed and set aside, there is no real dispute between the parties and

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6 Replying Affidavit ("**RA**"), Caselines 040-5 – 040-6, paras 8-12.

therefore the application should be settled on that basis. OUTA then proposed that as part of the agreement, SANRAL must pay the costs of the application up to the date of the agreement.[7]

14. SANRAL rejected this proposal on the basis that it has always maintained the position that consequent the deemed refusal, it has become *functus officio* and only opposed the application on the competency of the remainder of the relief in the notice of motion, which OUTA has now abandoned. Therefore, in those circumstances, it would be unreasonable for SANRAL to bear the costs of this application at all.[8]

15. Furthermore, prior to the launch of this application and in a letter addressed to OUTA by SANRAL's attorneys of record dated 19 November 2020 and attached as "SF14" to the founding affidavit, SANRAL had indicated to OUTA that in light of the deemed refusal and the fact that it was now *functus official*, it does not anticipate that it will oppose any application to set the "deemed refusal" of the request aside.[9]

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7 See Caselines 041-1 – 041-2, paras 5-8.
8 See Caselines 041-10 – 041-11.
9 See **also** FA, Caseline 005-18, para 74.

16. The relief sought by OUTA in the notice of motion goes further than setting aside the deemed refusal and it is not a remittal of the request for consideration.

17. SANRAL was therefore entitled to oppose the application on the bases that it did and OUTA's response thereto in its replying affidavit, as well as its belated attempt to elevate prayer 4 as its main relief, points to the legitimacy of SANRAL's opposition. In fact, what OUTA is contending for is a remedy proposed by SANRAL, which is the remittal of the request.

18. As we argue later in these heads, prayer 4 can never be a remittal. It is one of the court-directed remedies contemplated in section 82(*b*) of PAIA. Secondly, the court cannot grant an order which is OUTA's own interpretation of prayer and does not appear in the notice of motion.

19. OUTA's belated argument is therefore nothing but an attempt to avoid the responsibility to pay the costs of this application.

20. It is therefore unreasonable of OUTA to take this application to a full hearing thereby incurring further unnecessary costs, in circumstances where there is no longer a live issue on the merits in so far as SANRAL is concerned, only because SANRAL does not agree to bear responsibility for the costs of the entire application. This constitutes abuse of process.

21. The only disputes that remain and always have been, are those between OUTA and Bakwena. As it will appear more fully below, such disputes are protracted and preceded OUTA's request for information now forming the subject matter of debate of prayer 2, which SANRAL has conceded.

22. In **Stainbank v SA Apartheid Museum at Freedom Park and Another**,[10] the court stated the following:

> **"[51] The basic rule on costs is that all costs, unless otherwise enacted, are within the discretion of the judge, and the discretion must be judicially exercised. Factors that would have a bearing on whether a successful litigant would be entitled to costs include the following: the conduct of the parties, the conduct of the legal representatives, whether a party has had only technical success and the nature of the proceedings."**

23. We submit based on the above, and as we demonstrate more fully later in these heads of argument that even if the deemed refusal in itself falls to be set aside, OUTA only achieved technical success. However, OUTA is not entitled to the remainder of the relief in the notice of motion, and therefore should not be entitled to any costs, at least against SANRAL.

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[10] 2011 (10) BCLR 1058 (CC).

STRUCTURE OF THE HEADS OF ARGUMENT

24. These heads of argument are structured as follows:

24.1. first, we deal with the legal scheme governing requests for information in terms of PAIA;

24.2. second, we deal with OUTA's request for information;

24.3. third, we deal with the constitutional principle of judicial deference as the sound basis for SANRAL opposing the extraordinary relief which was sought in prayer 3 by OUTA;

24.4. third, we deal with the competency of the relief sought;

24.5. fourth, we deal with costs; and

24.6. finally, the conclusion.

SCHEME REGULATING ACCESS TO INFORMATION

25. The introduction of PAIA in 2000 codified the constitutional right to access to information held by the State, including public bodies such as SANRAL, as enshrined in section 32 of the Constitution and has extended the scope for the disclosure of such information to any party who requests it. This right is subject to limitation as contemplated in

terms of section 36 of the Constitution, but only on the bases as provided for in the PAIA.

26. Section 11 provides for the right of access to records of public bodies, and in sub-section (1) it states that a requester must be given access to a record of a public body if (i) that requester complies with all the procedural requirements in PAIA relating to a request for access to that record and (ii) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of Part 2 of PAIA.

27. In terms of sub-section (3) a requester's right in this regard, is not affected by any reasons the requester may give for requesting access or the information officer's belief as to what the requester's reasons are for requesting access.

28. In terms of section 25, the information officer must, as soon as reasonably possible within 30 days, after the request is received (i) decide whether to grant the request and (ii) notify the requester of the decision.

29. In terms of section 27 the failure to respond to a request for information within the given time period as set out in section 25, is regarded as a deemed refusal of the request.

30. The requirement in section 25 that a decision must be made within 30 days of a request, does not apply if the information officer considers that the record requested might be of a third party whereby notification and intervention might be necessary. In those circumstances, the information officer must take all reasonable steps to inform the third party to whom the record relates of the request as contemplated in section 47, among others, in Chapter 5 of PAIA. The time periods for notification in the latter section have the effect of extending the time period in section 25.

31. Section 33 provides for the discretion of the information officer of a public body, such as SANRAL, when considering a request under PAIA. The provisions of section 33 do not apply to this application because no such discretion was exercised by SANRAL in respect of OUTA's request.

32. The exercise of the discretion in section 33(1) may however be overridden for public interest considerations as contemplated in section 46. That is where (i) the disclosure of the record would reveal evidence of a substantial contravention of, or failure to comply with, the law and (ii) the public interest in the disclosure clearly outweighs the harm contemplated in one of the mandatory or discretionary exclusion grounds listed in section 46, the information officer must disclose the information.

33. In those cases, the motivation for, and purpose of, the request would be relevant because such discretion may only be appropriately exercised based on the applicable facts substantiating the public interest in the disclosure of the information.

34. There is no dispute pertaining the application or interpretation of the above provisions of PAIA in this application.

35. In light of the parties being in agreement that the deemed refusal of OUTA's request falls to be set aside, it is not necessary to assess OUTA's public interest submissions as set out in its founding affidavit.[11]

36. In terms of section 78, a requester or third party may only apply to a court for appropriate relief in terms of section 82, among other things, if the requester is aggrieved by a decision to refuse a request.

37. In terms of section 82, the court hearing an application may grant any order that is just and equitable, including orders:

    37.1. confirming, amending or setting aside the decision which is the subject of the application concerned;

[11] FA, Caselines 005-6 – 005-7, paras 17-24.

37.2. requiring from the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order; or

37.3. granting an interdict, interim or specific relief, a declaratory order or compensation.

OUTA'S REQUEST FOR INFORMATION

The request

38. OUTA's request for information in terms of section 11, read with section 18(7) of PAIA was submitted to SANRAL on 8 June 2020. The information requested relates to the upgrades of the N1N4 route running from Tshwane northwards towards Bela-Bela (N1) and the N4 route running from Tshwane westwards through Rustenberg and Zeerust to the Botswana border (N4).[12]

39. The specific information is listed in the request form attached as "SF4" to the founding affidavit, in two parts; Part A and B, as follows:[13]

39.1. Part A - N1:

[12] AA, Caseline 038-10, para 22.
[13] AA, Caselines 038-10 – 038-13, para 21.

39.1.1. a copy of the Concession Contract, for a portion of the N1 running from Tshwane northwards to Bela-Bela (Warmbaths) and a portion of National Route N4 running from Tshwane westwards through Rustenberg and Zeerust to the Botswana border (N4) concluded between SANRAL and the fourth respondent, Bakwena Platinum Corridor Concessionaire (Pty) Ltd ("**Bakwena**") (the "**Bakwena Concession Agreement**");

39.1.2. annexures and addenda to the Bakwena Concession Agreement;

39.1.3. amendments and addenda if any, to the Bakwena Concession Agreement;

39.1.4. all Operation and Maintenance contracts entered into between Bakwena and the O&M Contractors, relating to the Bakwena Concession Agreement;

39.1.5. Operational and Maintenance Manual pertaining to the Bakwena Concession Agreement;

39.1.6. contracts entered into with the independent engineer(s), pertaining to the Bakwena Concession Agreement;

39.1.7. Independent Engineer(s) Reports submitted to SANRAL, pertaining to the Bakwena Concession Agreement;

39.1.8. all Construction Work contracts entered into by the Concessionaire relating to the Bakwena Concession Agreement;

39.1.9. all “Performance Certificates” issued, relating to the Construction Works contracts entered into by Bakwena; and

39.1.10. all “Taking Over certificates” that have been issued in terms of the Bakwena Concession Agreement.

39.2. Part B - N4:

39.2.1. Bakwena’s complete financial statements for each fiscal year, submitted to SANRAL in terms of Bakwena Concession Agreement (as from 1999/2000 financial year to present);

39.2.2. all reconciliations of Bakwena’s Profit & Loss Accounts, together with their proposed budgets for each fiscal year, submitted to SANRAL, from 1999/2000 financial to present in terms of the Bakwena Concession Agreement;

39.2.3. all Annual Reports submitted to SANRAL, pertaining to the Bakwena Concession Agreement (as from 1999/2000 financial year to present), issued by Bakwena's appointed auditors, certifying that the computation of the Highway Usage Fee for the previous year was correctly calculated;

39.2.4. the lists, submitted to SANRAL in terms of the Bakwena Concession Agreement (as from 1999 to present), of Bakwena's lenders and creditors to which Bakwena owes a sum in excess of the equivalent of R10 000.00 (ten million Rand), including the amounts due to each of them.

40. SANRAL did not reply to OUTA's request within 30 days, being the period within which SANRAL was required to consider and decide on the request in terms of section 25(1) of PAIA. This date lapsed on 8 July 2020.[14]

41. On 29 July 2020, SANRAL addressed a letter to OUTA in which it "purportedly" refused the request.[15]

[14] AA, Caseline 038-13, para 24.
[15] See FA, Annexure "SF8", Caselines 005-35 – 005-38.

42. This response was of no legal force and effect because the 30-day period required in terms of section 25(1) lapsed on 8 July 2020. Therefore, SANRAL had become *functus officio*.[16]

43. The 30-day limit does not apply if the requested information might contain information of a third party, in which case SANRAL would be required in terms of section 47 to take all reasonable steps to inform the affected third party of the request within 21 days thereof, in order to allow the third party either to make representations as to why the request must be refused, or grant written consent for the disclosure of the record.[17]

44. Because the only real issue remaining between OUTA and SANRAL is that of costs, it is important to address what was set out in SANRAL's letter of 29 July 2020 (SF8) as the reason for the refusal of OUTA's request.

45. As appears from "SF8", rightly or wrongly, SANRAL based its refusal on the fact that OUTA has, in October 2016, made a request for access to similar information from Bakwena in terms of section 53 of PAIA, which request was refused.

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[16] AA, Caseline 038-29, para 15.
[17] AA, Caseline 038-15, para 30.

46. We highlight this aspect to demonstrate that OUTA knew, even before the request was made to SANRAL that significant parts of its request may affect, at the very least Bakwena as a third party.

47. We point out that given Bakwena's response to it in its letter dated 21 December 2016, OUTA ought to have noted that any such request for information to SANRAL, was likely to be met with resistance from Bakwena.[18]

48. Furthermore, the information listed in the request form (SF4) as set out in paragraph 39 above patently involves and/or relates to information of other entities, persons and/or institutions that may be affected, among others:[19]

    48.1. the auditors of Bakwena;

    48.2. the accountants of Bakwena;

    48.3. the Independent Engineer;

    48.4. contractors and sub-contractors; and

    48.5. lenders and creditors.

[18] See parts of annexure "SF8", Caselines 005-37 – 005-38.
[19] AA, Caselines 038-14 – 0038-15, paras 27-28.

SANRAL's discretion

49. The third-party notification exercise was not done, at least not within the 30-days which SANRAL was required to decide on the request in terms of section 25. In law therefore, SANRAL refused OUTA's request for access to information on 8 July 2020 and thus became *functus officio*. Anything done by SANRAL thereafter, in relation to OUTA's request has no legal force. The parties agree in this regard.[20]

50. Because the decision to refuse access to the information was deemed and not in fact made by SANRAL, the provisions of section 33, which provide for the discretion of the information officer when refusing a request, were not applied at all. In other words, SANRAL has not considered whether the information requested by OUTA is protected from disclosure in terms of section 36(1), subject to the public interest override contained in section 46.[21]

Affected third parties

51. As regards third parties that may be affected by the request as contemplated in section 47 of PAIA, Bakwena, which is mentioned by name in the request, is a party to these proceedings. Otherwise,

[20] AA, Caselines 038-15 – 038-16, paras 29.
[21] *Ibid*, at para 30.

SANRAL has not considered whether any third parties will be affected and as such whether the provisions of section 47 are applicable.[22]

52. As stated above, there are several other third parties that may be affected by the request just from the face of it. The listed entities are identified only by the discipline by which they are mentioned. The exact number of entities in each category cannot be determined from the request by the court, at least for purposes of the alternative remedy in prayer 4. Such determination falls within the discretion of SANRAL in terms of Chapter 5 of PAIA.

53. The remedy in prayer 4 cannot, on this basis alone, be granted by this court.

THE CONSTITUTIONAL PRINCIPLE OF JUDICIAL DEFERENCE AS THE SOUND BASIS FOR SANRAL OPPOSING THE EXTRAORDINARY RELIEF WHICH WAS SOUGHT IN PRAYER 3 BY OUTA

54. Critical to its prayers and as its main prayer, OUTA does not only seek this honourable court to set aside the impugned administrative conduct, but for this court to substitute its decision for that one of a duly empowered authority to deal with matters of this nature within its constitutionally recognised powers which are also provided for in the enabling legislation.

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[22] *Ibid*, at para 28.

55. The Constitutional Court has had an opportunity to consider whether, and to what extent, the courts should defer to other instruments of government created by the Constitution. Ackerman J in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs**[23], had occasion to say:

"The other consideration a Court must keep in mind is the principle of the separation of powers and, flowing therefrom, the deference it owes to the Legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislation. Whether, and to what extent, a Court may interfere with the language of a statute will depend ultimately on the correct construction to be placed on the Constitution as applied to the legislation and facts involved in each case."

56. Fundamentally, OUTA seeks this honourable court to act as an administrative body and to usurp the powers of SANRAL without any factual or legal basis to substantiate and/or to sustain such an approach.

57. It is trite that there must be a judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately

[23] 2000 (2) SA 1 (CC) at para 66.

pursued by administrative bodies and the practical and financial constraints under which they operate.

58. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for, and the consequences of, judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.

59. The deference we submit would be consistent with what the Constitutional Court said in **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd**.[24] In this matter, Schutz JA, in explaining deference, cited with approval Prof. Hoexter's account as follows:

"... a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual

[24] 2003 (6) SA 407 (SCA) at para [47].

rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."[25] (our emphasis)

60. The Constitutional Court in **Bato Star Fishing v Minister of Environmental Affairs**,[26] affirming that, in certain instances, there should be judicial deference, said the following:

"[48] In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decisionmaker.

A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker. This does not mean however that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubberstamp an unreasonable decision

[25] This passage is a quotation from Hoexter's '*The Future of Judicial Review in South African Administrative Law*' (2000) 117 SALJ 484 at 501-502.

[26] 2004 (4) SA 490 (CC) at para [48].

simply because of the complexity of the decision or the identity of the decisionmaker." (our emphasis)

61. Further, in **Intertrade Two (Pty) Ltd v MEC for Road and Public Works Eastern Cape**,[27] Plaskett J said the following:

"[44] Courts, like any other institutions that exercise public power in terms of the Constitution, are duty-bound to act in terms of the rule of law and its principle of legality.

[45] Courts are, furthermore, duty-bound to respect the separation of powers, an important pillar of the Constitution. Indeed, administrative law is, itself, an incident of the separation of powers, a point made in the following terms by Chaskalson P in the Pharmaceutical Manufacturers case:

> ***'Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them.'***

[46] <u>These constitutional principles mean that courts, when considering the validity of administrative action, must be wary of intruding, even with the best of motives, without justification into the terrain that is reserved for the administrative branch of government</u>. ..." (our emphasis)

62. Finally, in **International Trade Administration Commission v Scaw South Africa**,[28] the Constitutional Court said the following:

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[27] 2007 (6) SA 442 (CKHC) paras [43]-[46].
[28] 2012 (4) SA 618 (CC) at paras 95-99.

"[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.

…

[97] The affidavit explains that no decision has been made in relation to the existing anti-dumping duty. Once the recommendation of ITAC has been received, there would be extensive internal evaluation and only then would the minister make a decision in terms of the statutes. Lastly, the minister draws attention to the fact that in the past he has referred recommendations back to ITAC for further evaluation and consideration. He makes the final point that an interdict would hinder the proper administration of economic policy, a matter which the Constitution entrusts to the national executive.

[98] The statutory discretion the minister commands is indeed wide. Barring the predictable requirement that he must wield the power subject to the Constitution and the law, he or she may accept or reject the recommendation, or remit it to ITAC. Nothing obliges the minister to follow slavishly the reasoning and findings of ITAC. It is open to the minister, in making a decision, to weigh in polycentric considerations such as diplomatic relations, the country's balance of payments, the regional or global trading conditions, goods needed to foster economic growth and so forth. Thus, the recommendation of ITAC may be important but it is not the sole predictor of what the minister is likely to decide.

[99] It is a matter of some concern that the high court does not refer to the minister's legislative power and discretion in relation to the imposition, alteration or removal of duties... In effect, once the high court reached its conclusion that ITAC had botched its factual findings, it concluded that

SCAW had established a clear right to an interdict. That was the essence of its error."

63. The court will only depart from a normal review remedy in those exceptional circumstances where the following considerations were considered:

63.1. whether the administrator in question is left with any discretion in the matter or whether the end result is a foregone conclusion;

63.2. the importance of time considerations in the present context;

63.3. the willingness of the administrator to re-apply its mind to the issues at stake;

63.4. indications of bias or incompetence on the side of the administrator;

63.5. the circumstances as they exist now as opposed to when the matter was decided by the administrator;

63.6. the competence of the court *vis-á-vis* that of the administrator in deciding the matter.

64. None of the above factors exist in these proceedings to justify the departure prayed for by OUTA in its papers. OUTA in its papers has failed to justify why this honourable court should depart from the ordinary approach.

65. There were indeed sound basis for SANRAL to oppose the extraordinary relief sought by OUTA in prayer 3 of its notice of motion. OUTA realising its difficulties in championing that relief, decided to abandon prayer 3. It therefore follows that OUTA is not in any manner successful and entitled to costs. Even more fundamentally, OUTA by abandoning prayer 3 demonstrated that SANRAL was correct to oppose the relief which was sought by OUTA in prayer 3.

66. This matter ought to have been settled on very simple terms which were advanced to OUTA, yet, OUTA proceeded with this application and this led to the unnecessary incurrence of costs which could have been avoided. Such a reckless approach should not lead to OUTA escaping responsibility of paying costs of SANRAL in the circumstances of this case where the matter could have been resolved without the incurrence of unnecessary costs. The *Biowatch* principle is not applicable in this case having regard to the conduct of OUTA.

OUTA'S REMEDIES ARE INCOMPETENT

67. OUTA has abandoned prayer 3 of the notice of motion in paragraph 16 of its replying affidavit.[29]

68. In prayer 4 OUTA seeks an order in the alternative ***"****directing SANRAL to notify any third party of the request concerning records relating to them in accordance with section 47 of PAIA within 10 (ten) calendar days after service of the order on them, and thereafter to comply with the time periods and provisions in chapter 5 of PAIA*."

69. This third-party notification process may only appropriately be undertaken in the context of section 47 of PAIA if the court sets aside the deemed refusal and remits OUTA's request back to SANRAL for reconsideration.

70. Prayer 4 does not say anything about remitting the request to SANRAL for reconsideration.

71. Prayer 4 as phrased by OUTA in the notice of motion, is in fact one of the orders a court may make following the setting aside of a refusal directing the information officer to take certain action in terms of section 82(*b*) of PAIA.

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[29] RA, Caseline 040-8, para 16.

72. Prayer 4 is also not part of the discretion exercised independently by the information officer in terms of section 47, because:

72.1 OUTA has determined that the notification of third parties must take place within 10 days of the order, whereas PAIA provides that this must be done by the information officer within 21 days; and

72.2 such third parties have not been identified, which is part of the discretion an information officer must exercise in terms of section 47.

73. It is therefore no wonder that OUTA now belatedly argues that prayer 4 should be read as an order in terms of which the request is remitted back to SANRAL. This is concession on the part of OUTA that prayer 4 in its formulation and on the merits of its own case, is quite plainly unsustainable and could not be granted.

74. To argue otherwise is to suggest that this court could potentially grant an order for directions in terms of section 82(*b*) of PAIA, which order would still be subject to the further discretion of SANRAL.

75. In the case of **Eke v Parsons**,[30] the court stated the following:

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[30] 2016 (3) SA 37 (CC).

"A court order must bring finality to the dispute, or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of non-compliance.

If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter, or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person on whom it applies the discretion to comply or disregard it done. The order may not be framed in a manner that affords the person on whom it applies the discretion to comply or disregard it."

76. The granting of prayer 4 will certainly not result in finality of this dispute as it is still open to SANRAL's further discretion against the principles set out in Eke above.

77. Prayer 4 therefore falls to be dismissed.

COSTS

78. It appears from the above that OUTA only achieved a technical success in this case because a deemed refusal of its request was going to be set aside as a matter of cause. Hence SANRAL, in its letter of 19 November 2020 and attached as "SF14" to the founding affidavit, indicated to OUTA that it does not anticipate that it will

oppose any application to set the "deemed refusal" of the request aside.[31]

79. As argued above, the above application went further than just setting aside the deemed refusal. OUTA sought direct, pervasive orders which SANRAL felt duty bound to oppose.

80. Prayer 3 was substantive in nature and if granted its implementation would have been extensive in effect. A substantial part of SANRAL's answering affidavit, including the portion on just and equitable and the principles of judicial deference are dedicated to this relief. Contrary to OUTA's belated argument in relation to prayer 4, the argument in favour of the court's discretion to remit the request to SANRAL for reconsideration, was in direct answer to prayer 3.[32]

81. Prior to that and as expected Bakwena sought to intervene in the application, however despite its position as set out in affidavits filed on its behalf thereafter, OUTA maintained its position in relation to the relief it seeks in the notice of motion until after the filing of its sixty-five (65) paged replying affidavit on 18 August 2023.[33]

82. SANRAL did not participate in the protracted interlocutory battles that ensued between OUTA and Bakwena. SANRAL did only one thing

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[31] FA, Caseline 005-18, para 74; **see also** RA, Caseline 040-7, para 14.
[32] AA, Caselines 038-19 – 038-27, paras 38-62.
[33] RA, Caseline 040-08, para 18.

after the launch of this application. It filed a thirty-five (35) paged affidavit answering affidavit.

83. It is in fact SANRAL's answering affidavit that caused OUTA to abandon prayer 3 in the notice of motion and advance the new argument that prayer 4 is in fact different from what is articulated therein. OUTA then lays the blame for the mishap on SANRAL, arguing that SANRAL should not have opposed the application in the first place.

84. The unreasonableness of OUTA's approach is stark. SANRAL would never have opposed this application and incurring costs had OUTA only sought order 2. Prayer 4 is a consequence of a remittal and without a specific prayer for remittal in the notice of motion, and a case to that effect in the founding affidavit, prayer 4 was always going to fail.

85. In that result, the court would not have awarded OUTA any costs against SANRAL. At best, such costs would have been unopposed costs.

86. In the case of **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (No 2)**,[34] the court stated that:

> **"[3] The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles,**

[34] 1996 (4) BCLR 441 (CC).

> **the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer[35] and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should however be done on a case by case basis.[…].”**

87. We submit that taking into account (i) the fact that OUTA only achieved technical success in the form of prayer 2, and (ii) OUTA's unreasonable conduct towards SANRAL despite SANRAL's own straight forward approach which actually assisted OUTA's own case, SANRAL should not bare any of the costs in this application.

88. On the contrary, OUTA must be ordered to pay the costs of SANRAL's participation in this application.

CONCLUSION

89. For all the above reasons, it is submitted that it is just and equitable in terms of section 82(*b*) of PAIA that only prayer 2 of the notice motion

[35] *Kruger Bros and Wasserman v Ruskin* 1918 AD 63 at 69.

be granted, that is the setting aside of the deemed refusal of OUTA's request for information by SANRAL on 8 July 2020.

90. In the premises, the remainder of the relief sought in the application must be dismissed with costs, including costs of two counsel.

PL MOKOENA SC

MPD CHABEDI

Chambers

18 January 2023

LIST OF AUTHORITIES

1. *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC)

2. *Eke v Parsons* 2016 (3) SA 37 (CC)

3. *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (No 2)* 1996 (4) BCLR 441 (CC)

4. *International Trade Administration Commission v Scaw South Africa* 2012 (4) SA 618 (CC)

5. *Intertrade Two (Pty) Ltd v MEC for Road and Public Works Eastern Cape* 2007 (6) SA 442 (CKHC)

6. *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA)

7. *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC)

8. *Stainbank v SA Apartheid Museum at Freedom Park and Another* 2011 (10) BCLR 1058 (CC)