IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case No. 145/24

Court *a quo* 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
NAZIR ALLI	Third Respondent
DANIEL MOTAUNG	Fourth Respondent
SKHUMBUZO MACOZOMA N.O.	Fifth Respondent
N3 TOLL CONCESSION (RF) (PTY) LTD	Sixth Respondent

FILING SHEET: 1st, 4th AND 5th RESPONDENTS' ANSWERING AFFIDAVIT

PRESENTED FOR SERVICE AND FILING:

The 1st, 4th and 5th Respondents' Answering Affidavit deposed to by Mr Selby Mashiyi.

DATED at **SANDTON** on this **22ND** day of **MARCH 2024**.

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1st, 4th AND 5th RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned,

SELBY MASHIYI

do hereby make oath and say:

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1 I am an adult attorney currently employed as a Senior Legal Advisor by the First Respondent ("**SANRAL**"). I am duly authorised to depose to this affidavit on behalf of the First, Fourth and Fifth Respondents ("**respondents**").

2 The facts contained in this affidavit are within my personal knowledge, save where the contrary is indicated, and are both true and correct. To the extent that I make any legal submissions in this affidavit, I rely on the advice of the respondents' legal representatives, which I accept as correct (and for the avoidance of any doubt in respect of which I do not waive privilege).

3 I have read OUTA's petition where it seeks leave to appeal against the whole of the judgment (including the order for costs) delivered by the Honourable Judge Millar in the Court *a quo,* and the judgment and order refusing it leave to appeal. OUTA contends that its petition is premised on the provisions of section 17(1)(a)(i) and (ii) of the Superior Courts Act, but, factually, there is neither any prospect of success, nor any compelling reason for entertaining the appeal.

4 The thrust of OUTA's case is that the Court *a quo* erred in not finding that the public interest override in section 46 of the Promotion of Access to Information Act 2 of 2002 ("**PAIA**") found application, and that SANRAL (*qua* recipient of the request for information) was obliged to discharge an onus in satisfying the Court that the public interest override in section 46 *did not* apply. The contention is misdirected: SANRAL did not rely on the provisions of section 46 of PAIA – OUTA sought to invoke it. In those circumstances, OUTA was required to establish (in its founding affidavit) that SANRAL was not entitled to refuse the disclosure of

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the requested information, because the public interest override in section 46 found application.

5 This OUTA did not do. Instead, it belatedly argued (absent any factual basis for this being laid in its founding affidavit and only at the leave to appeal stage) that if SANRAL wished to rely on the public interest override it was required to demonstrate that it assessed the requirements of section 46 and concluded that public interest did not outweigh the harm that would be suffered as the result of the disclosure. Of course, SANRAL did not rely on the public interest override. Nor was it required to demonstrate in its answering affidavit that it considered and applied section 46 of PAIA.

6 OUTA's interpretation of section 46 of PAIA reverses the onus and leads to an absurdity, as I demonstrate below.

7 Accordingly, there is no merit to OUTA's contentions that it enjoys any prospects of success or that there is some other compelling reason to entertain its appeal, given that –

7.1 The Court *a quo* applied the correct onus in its assessment of the public interest override in section 46 of PAIA; and

7.2 OUTA failed to meet the very high threshold set out in section 46 and the public interest override did not find application.

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NO PROSPECTS OF SUCCESS AND NO OTHER COMPELLING REASONS EXIST TO HEAR THE APPEAL

The Court *a quo* applied the correct onus

8 OUTA contends that the Court erred by failing to apply the principles set out in *Ericsson South Africa (Pty) Ltd v Johannesburg Metro and Others*[1] which concluded that –

> "*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.*" (Own emphasis).

9 In the context of *Ericsson,* the respondents were the City, its deputy manager and information officer (*qua* recipients of Ericsson's request for information and documents in terms of PAIA). Ericsson sought information (specifically, copies of an investigation report procured by the City concerning Ericsson's conduct in the course of a tender and a series of subsequent transactions). The City contended that it was not required to disclose the report on various grounds, including on the basis of the inapplicability of the public interest override in section 46. But the Court concluded that, in order to "rely" on section 46, the City had to demonstrate that it weighed the harm arising from disclosure (on the one

1 2023 (5) SA 219 (GJ)

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hand) and non – disclosure (on the other) and satisfy the Court that the facts weighed in favour of non – disclosure.

10 The Court in *Ericsson* (with respect erroneously) approached the question of onus under section 46 on the premise that it was a ground of refusal as opposed to a mandatory disclosure provision which overrides the permissible grounds of refusal under chapter 4 of PAIA[2]. Flowing from that incorrect premise, the Court concluded that the public body (*qua* recipient of the request) thus bears the onus to establish that the requirements for a mandatory disclosure have been met.

10.1 However, section 46 is expressly designed to override a ground of refusal invoked by a public body and is in fact the complete opposite of what the Court in *Ericsson* concluded . This is made plain in section 33 of PAIA which provides that a public body must refuse a request for access to a record contemplated in section 36(1) unless the provisions of section 46 apply.

10.2 The court in *Ericsson* was therefore correct in finding that a public body bears the onus of establishing that its refusal accords with PAIA. However, due to its mischaracterisation of section 46 as a ground of refusal, the Court incorrectly placed the burden of proof on the public body instead of on the requestor.

10.3 It stands to reason that the legislature could never have intended for a public body to, on one hand, discharge a burden of proof to establish that the refusal of a request for access complies with PAIA (in accordance with section 81),

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2 The judgment in *Ericsson* at [79] states "*Finally, I consider the reliance on s 46, which permits an exemption from disclosure in the public interest*"

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then once it has done so, show that a public interest override is applicable and therefore provide the information sought nonetheless.

10.4 If a public body assessed that the public interest override is applicable, then there would be no need for litigation to compel such public body to disclose the information sought under PAIA. But the public body is not required to make such an assessment or consider the applicability of section 46 unless some basis exists for it to do so. That basis must be laid (i) in the request or (ii) the subsequent internal appeal of the decision to refuse the disclosure or (iii) in the application to compel the disclosure in terms of section 78(2) as read with section 82. In the present instance, it was not.

10.5 All of the above accords with the conclusions drawn by the Constitutional Court in *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v South African Revenue Service and Others*[3] has defined the burden of proof and threshold that a requestor, invoking the public interest override under section 46, has to meet:

> *"[140]* ***A PAIA requester who seeks to successfully invoke the benefit of section 46 has formidable substantive and procedural hurdles to overcome****. An information officer must be satisfied that the record sought reveals evidence of a substantial contravention of the law or an imminent or serious public safety or environmental risk. This in itself is a high threshold to meet and, at least objectively, represents*

3 2023 (5) SA 319 (CC) at [140].

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aims that are closely aligned with the public interest. The procedural provisions in Part 4 of PAIA ensure that third parties must be notified where disclosure of a record pertaining to them is contemplated. If a person (including such a third party) is aggrieved by a decision of the information officer concerning the application of section 46, there can be recourse to an internal appeal, a complaint to the Information Regulator, or an application to the High Court, if need be. A decision of the High Court may in turn be subject to further appeal. These procedures would have to be exhausted before a record is finally disclosed or withheld in terms of section 46."

10.6 *Arena Holdings* is accordingly binding authority for the propositions that the requestor invoking section 46 (as is the case *in casu*) bears the burden of meeting the requirements for the application of a public interest override.

11 In conclusion, the principles set out by the Court in paragraphs 79 to 83 of *Ericsson* are incorrect and the Court *a quo* was not bound by them. Furthermore, the Court *a quo* correctly held that it was for OUTA to lay the basis for the conclusion that the disclosure of the documents would (and not might) reveal some unlawfulness or a risk which would outweigh the protections afforded to N3TC under sections 36 and 37.

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OUTA failed to make out a case for the application of the public-interest override

12 The Court *a quo* held that the information and documents sought by OUTA are protected from disclosure under section 36(1)(a) and (b) on the basis that they contain confidential information essential to the profitability, viability or competitiveness of a commercial operation.

13 The basis for SANRAL's refusal is explained as follows:

13.1 Upon receipt of OUTA's request, SANRAL informed NT3C of the request, in accordance with section 47 of PAIA. N3TC responded to the request by:

13.1.1 Consenting to the disclosure of the N3TC contract and amendments thereto, annexures and addenda; and

13.1.2 Claiming confidentiality and/or prejudice and objecting to the disclosure of the remaining documents requested by OUTA.

13.2 Pursuant to N3TC's responses, SANRAL brought about a deemed refusal of OUTA's request in terms of section 27 of PAIA on the basis that it is under an obligation to refuse its request under sections 36 and 37 of PAIA.

14 In view of the aforementioned principles, the only remaining issue is whether OUTA satisfied the requirements for the invocation of the public interest override in section 46.

15 As demonstrated below, OUTA failed to meet the high threshold of the public interest override requirements in section 46 of PAJA.

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16 While it is correct that a requestor seeking information under PAIA from a public body need not furnish reasons for its request, the facts put up by OUTA must be assessed on a balance of probabilities in order to assess whether it discharged its onus to invoke the public interest override.

17 In the circumstances, the rationale for OUTA's request and claim in terms of section 46 becomes relevant in establishing the public interest override. OUTA was, moreover, required to do this in the founding affidavit, or its original request.

18 OUTA was aware of its obligation to do so at the time of bringing the application and therefore attempted (albeit inadequately) to make out a case in favour of the invocation of the section 46 public interest override in its founding affidavit.

19 In summary, OUTA's case (as set out in the founding affidavit) was that –

19.1 It conducted an investigation into a "series of irregularities" following the conclusion of the N3TC concession contract.

19.2 OUTA established that the N3TC concession contract will come to an end in 2029. OUTA then, inexplicably, stated that "*Notwithstanding, SANRAL has continued to implement the agreement in absence of justifiable extension to that effect potentially in contravention of the Public Finance Management Act ("PFMA")*".

19.3 OUTA will only be able to establish the legality of the N3TC concession contract once it has access to all its annexures and addenda (which, apparently, took on greater importance than the contract itself); and

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19.4 OUTA's purpose in requesting the documents is to evaluate the agreement that is of public interest and that it is only able to do so on the production of the records pertinent to its request and further that "*should OUTA determine that SANRAL had acted unlawfully in the implementation of its agreement with N3TC OUTA ultimately wishes to institute relevant proceedings in a court of law*".

20 At first, OUTA contended that the information sought would reveal irregularities under the PFMA however, it later conceded that the PFMA found no application (the contract was concluded prior to the PMFA coming into effect) and thereafter belatedly attempted to place reliance on section 195 and 217 of the Constitution. In addition, it then impermissibly sought to make out an entirely different case in its replying affidavit, by attempting to place reliance on the contents of a newspaper article, which had no evidentiary value whatsoever.

21 OUTA's contention in respect of public interest are generalised and without any factual basis, and reveal that:

21.1 OUTA was, and remains, unable to identify with any precision or cogency any "irregularities" following the conclusion of the N3TC concession agreement. This is because no such irregularities exist and the allegation is made in absence of any factual basis whatsoever.

21.2 OUTA's contentions regarding the "unjustified extension" of the N3TC contract are misdirected, alternatively they pertain to some other agreement and request for information and feature in the founding affidavit as the result of a

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"copy and paste" error, since the N3TC concession contract continues in accordance with its terms and was never extended.

21.3 OUTA does not contend that the conclusion of the N3TC concession contract was unlawful, but rather that it is *its implementation* that is unlawful and "potentially" in breach of the PFMA. This is a slight of hand relied on by OUTA, presumably to justify its seeking all manner of documents which belong to N3TC and which came into existence after the conclusion of the contract. The stratagem is obvious, however, and once it was pointed out to OUTA that the PFMA cannot apply to the N3TC concession contract it was constrained to admit as much. As a matter of fact, the information and documents which came into existence *as the result of the conclusion* of the contract are sought by OUTA for the purposes of its on-going (and unrelated) toll road litigation.

21.4 At the heart of the request for information is OUTA's intent to investigate the alleged unlawfulness pertaining to the implementation of the N3TC concession contract and, if the unlawfulness is established, to "institute proceedings". While OUTA purposefully avoids stating what those proceedings might be, it could only have contemplated the review and setting aside of the entire N3TC concession contract, alternatively, the review and setting aside of specific decisions pertaining to its implementation.

21.5 Neither section 195 or 217 is actionable in these proceedings in that neither can ground a cause of action and the principle of subsidiarity would in any event prevent OUTA from relying directly on the provisions of these sections

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for the purposes of setting aside decisions to conclude or implement the concession contract.

21.6 The intent to review and set aside the N3TC concession contract after more than 20 years of its implementation and a handful of years before it comes to an end in 2029 demonstrates that OUTA's strategy was abortive from the start, since a Court would not be in the position to review and set aside an agreement which has been almost entirely implemented for close to three decades (or has been fully implemented by the time any potential review is finalised).

21.7 More importantly, OUTA's case reveals that the very purpose of its request is to obtain information to mount a litigious attack against SANRAL and / or N3TC, or both. Its request, consequently, amounts to no more than a fishing expedition and an attempt to obtain pre-litigation discovery contrary to the provisions of section 7 of PAIA.

22 As correctly held in the judgment of the Court *a quo*, OUTA's public interest claim, properly construed, is not predicated in any irregularity with the contract but rather entirely upon 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. However, there is no provision in our law which prohibits any third party which contracts with the State (pursuant to a lawfully made and awarded tender) from making a profit. Accordingly, the evidence put up by OUTA in supports of a public interest override, which applies

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only in respect of contraventions of or a failure to comply with the law, falls far short of the threshold provided for under section 46.

23 In the premises, the Court *a quo* correctly found that OUTA failed to put up any cogent factual allegations (as opposed to generalised statements of trite propositions and quotations) establishing that the public interest of the disclosure outweighs the prejudice which will be suffered by N3TC.

24 It is submitted, therefore, that this Court is not likely to come to a different conclusion in respect of the following issues contended for by OUTA:

24.1 Was there any justification for the interrogation of OUTA's reasons for the request, in circumstances where the Court found that OUTA need not furnish reasons for its requested records? – As I have already stated, OUTA's reasons are entirely relevant when assessing whether it met the strict requirements set out in section 46. The reasons for the request are not to be confused with laying the basis for the application of the section 46 public interest override;

24.2 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? – For reasons already set out above, OUTA failed to make out a case for the application of the public interest override;

24.3 Does the public interest override find application in respect of the disputed documents in part B of OUTA's Notice of Motion? – With OUTA having failed to put up any cogent basis for the application of the public interest override,

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the Court *a quo* correctly found that the public interest override did not find application.

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25 I deal with the averments in the founding affidavit on a high – level basis and with reference to what I have already stated above. Any averments not specifically canvassed, but which are contradictory or irreconcilable with what I have already stated, are to be considered denied.

Ad paragraphs 1.1 to 1.3

26 I admit these paragraphs.

Ad paragraph 2.1 to 2.8

27 I do not dispute these allegations, save to state that OUTA's failure to cite or join the third parties related to the N3TC contract is detrimental to the scope of the relief sought in the Court *a quo*. The Court could not have granted relief affecting these parties absent their joinder to the proceedings.

Ad paragraph 3.1 to 5.2

28 I admit these paragraphs insofar as they accord with the express wording of the judgments granted by the Court *a quo*.

Ad paragraphs 6.1 to 7.1.7

29 These paragraphs are noted.

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Ad paragraph 8.1 to 8.3

30 These paragraphs are admitted.

Ad paragraph 8.4

31 This paragraph is denied. SANRAL's decision to refuse access to the information and documentation sought was based on section 36 of the Act, pursuant to an objection from N3TC to the production thereof in terms of section 49, read with section 47 of PAIA. In addition, OUTA did not have access to all the documents sought in the request. Once N3CT consented to the provision of certain documents, SANRAL made them available.

32 OUTA's *reasons* for seeking the documentation and information therefore did not form a basis for SANRAL's decision, nor could they have, given that the "reasons" were not disclosed in the original request; and such averments as were made in OUTA's founding papers regarding its "reasons" for seeking the information clearly pertained to some other contract.

Ad paragraph 8.5 and 8.6

33 I admit these paragraphs.

Ad paragraph 8.7

34 This paragraph is denied for reasons already set out above.

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35 Needless to state, OUTA did not establish that the records fell within the ambit of the grounds of refusal catered for in section 36 and the Court *a quo* correctly found that the documents sought fell squarely under section 36.

Ad paragraph 8.8

36 For reasons already stated above and correctly expressed by the Court *a quo*, the profit made by N3TC does not constitute grounds for invoking the section 46 public interest override. There is no law which prohibits a commercial party contracting with the State, pursuant to a lawful tender process, from making a profit. Such a proposition need only be stated to be rejected.

37 Furthermore, OUTA's reliance on section 217 and 195 of the Constitution are misplaced. It is trite that these provisions are not directly actionable – the principle of subsidiarity prohibits such an approach.

Ad paragraph 8.9 to 8.11

38 These paragraphs are admitted.

Ad paragraph 9.1 to 9.6

39 I deny these paragraphs and refer to what I have already stated above in respect of each and every averment set out in these paragraphs.

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Ad paragraph 10.1 to 10.4

40 I deny these paragraphs and refer to what I have stated above regarding the correct burden of proof in terms of section 46, read with section 81(3)(a) of PAIA.

Ad paragraph 11.1 to 11.4

41 These paragraphs are denied and ignore the requirements set out section 46 in favour of a less stringent and generalised public interest consideration. OUTA's submissions in this regard are inconsistent not only with the provisions of PAIA, but also the binding precedent in *Arena Holdings* and fall short of the very high threshold for the invocation of the public interest override provided for under Chapter 4.

Ad paragraph 11.5

42 I deny these averments.

43 The respondents were substantially successful in the application and were entitled to an order for costs. Importantly, OUTA never did make out a case regarding the Constitutional rights it wishes to protect and / or enforce.

Ad paragraph 11.6 to 11.7

44 These paragraphs are denied.

45 The documents sought span a 23-year period and pertain to N3TC and related third parties (N3TC sub-contractors). It is therefore neither inconceivable nor

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unreasonable for SANRAL to not have all the records sought in its possession: it is to be expected. SANRAL is not required to supervise or enter upon the relationship between the concessionaire and its sub-contractors.

46 In any event, even if the Court *a quo* were to have reached the same finding contended for in these paragraphs, it would have come the same conclusion on the basis that the documents and information are protected from disclosure.

47 In the circumstances, I deny that a different Court would reach a different outcome or that there are any prospects of success if leave to appeal were to be granted.

Ad paragraph 11.8 and 11.10

48 Save to deny that OUTA has made out a proper case for leave to appeal, the remainder of these paragraphs are denied.

CONCLUSION

49 As demonstrated above, the applicant has failed to demonstrate that there are prospects of success on appeal, that another court would reach a different conclusion to the Court *a quo*; or that there are any other compelling reasons for entertaining the appeal.

50 It is submitted therefore that the application falls to be dismissed with costs including the costs consequent upon the employment of two counsel.

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SELBY MASHIYI

I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me, Commissioner of Oaths, at Pretoria on this the 22nd day of **MARCH 2024** the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

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