

**IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**SCA CASE NO.: 145/2024.  
HIGH COURT CASE NO.: 32095/2020**

**ORGANISATION UNDOING TAX ABUSE NPC**

**Applicant**

**and**

**SOUTH AFRICAN NATIONAL  
ROAD AGENCY (SOC) LTD**

**First Respondent**

**THE MINISTER OF TRANSPORT**

**Second Respondent**

**NAZIR ALLI**

**Third Respondent**

**DANIEL MOTAUNG**

**Fourth Respondent**

**SKHUMBUZO MACOZOMA**

**Fifth Respondent**

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

**Sixth Respondent**

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**FILING NOTICE**

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**DOCUMENTS FILED HERewith**

- 1 Sixth Respondent's Answering Affidavit



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TO:

**THE REGISTRAR OF THE  
ABOVE HONOURABLE COURT,  
BLOEMFONTEIN, FREE STATE**

AND TO:

**JENNINGS INC.**

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**22-03-2024**

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## Bianca Strydom

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**From:** Boitumelo Moti <bmoti@werksmans.com>  
**Sent:** Friday, 22 March 2024 11:07  
**To:** Andri Jennings  
**Cc:** Irene Pienaar; Delia Turner; Senzo Mbatha; Tumi Modubu; Neil Kirby  
**Subject:** ORGANISATION UNDOING TAX ABUSE NPC VS SOUTH AFRICAN NATIONAL ROAD AGENCY AND 5 OTHERS: SCA CASE NO. 145/2024 [IMAN-LITIGATION.FID560906]  
**Attachments:** Filing Sheet SCA(10076847.1).pdf; N3TC Answering Affidavit SCA 22-03-24\_Final.pdf

Dear Andri

Please find attached a copy of the Sixth Respondent's Answering Affidavit.

Kindly acknowledge receipt of this e-mail, together with the attachments.

Kind regards



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

**Sixth Respondent**

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**SIXTH RESPONDENT'S ANSWERING AFFIDAVIT**

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I, the undersigned

**BOITUMELO DORCAS MOTI**

do hereby make oath as follows –

- 1 I am an adult female attorney, employed as a Senior Associate at Werksmans Attorneys ("Werksmans"), the attorneys of record for N3 Toll Concession (RF) Proprietary Limited, the Sixth Respondent in this matter ("N3TC"), at The Central, 96 Rivonia Road, Sandton.

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- 2 I have been dealing with this matter on behalf of N3TC. I am familiar with the papers filed in the court *a quo*, the legal issues, and the conduct of the litigation, including the leave to appeal. The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are, to the best of my knowledge and belief, true and correct.
- 3 I deny the averments in the founding affidavit filed in support of the application for leave to appeal to the extent that they conflict with what is stated in this answering affidavit. My failure to respond to any aspect of the founding affidavit should not be construed as an admission as to the correctness thereof.

## INTRODUCTION

- 4 This affidavit is filed on behalf of N3TC in opposition of the application for leave to appeal brought by the Applicant, the Organisation Undoing Tax Abuse NPC ("OUTA"), in terms of section 17(2)(b) of the Superior Courts Act No. 10 of 2013.
- 5 OUTA applies for leave to appeal against the whole of the judgment (including the order for costs) delivered by Millar J, in the Gauteng Division, Pretoria, on 14 November 2023 and the judgment and order delivered by Millar J on 25 January 2024, refusing OUTA's application for leave to appeal, with costs.
- 6 OUTA has no reasonable prospects of success on appeal. It is consequently in the interests of justice for this application for leave to appeal to be dismissed.

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## BACKGROUND

7 On 30 July 2019, OUTA submitted to SANRAL, as a public body, a request for access to a set of records ("PAIA request"), in accordance with the provisions of the Promotion of Access to Information Act No. 2 of 2000 ("PAIA"), relating to an agreement concluded between N3TC and the South African National Roads Agency (SOC) Limited ("SANRAL"). The agreement was concluded more than twenty-four years ago on 2 November 1999 ("concession agreement"). The concession agreement pertains to the design, construction, financing, operation and maintenance of a portion of National Route 3 from Cedara in KwaZulu-Natal to Heidelberg South interchange in Gauteng as a Toll Highway, together with the developments and associated facilities.

8 OUTA sought access to copies of the following records, as related to the upgrade of the N3 route from Durban to Pietermaritzburg ("requested records"):

8.1 in terms of Part A of the PAIA request –

8.1.1 the concession agreement;

8.1.2 all annexures, amendments, and addenda to the concession agreement,

(collectively the "concession agreement records");

- 8.1.3 all operation and maintenance contracts entered into between N3TC and the O&M contractors, relating to the concession agreement;
- 8.1.4 the operational and maintenance manual pertaining to the concession agreement;
- 8.1.5 the contracts entered into with the independent engineer/s related to the concession agreement;
- 8.1.6 all the independent engineer's/s' reports submitted to SANRAL related to the concession agreement;
- 8.1.7 all construction work contracts entered into by N3TC relating to the concession agreement;
- 8.1.8 all Performance Certificates issued, relating to the construction works contracts entered into by N3TC;
- 8.1.9 all Taking Over Certificates that have been issued in terms of the concession agreement.
- 8.2 in terms of Part B of the PAIA request -



- 8.2.1 N3TC's complete financial statements for each fiscal year, submitted to SANRAL in terms of the concession agreement;
- 8.2.2 all reconciliations of N3TC's profit and loss accounts, together with proposed budgets for each fiscal year, submitted to SANRAL, from the 1999/2000 fiscal year to present, in terms of the concession agreement;
- 8.2.3 all annual reports submitted to SANRAL pertaining to the concession agreement, issued by N3TC's appointed auditors, certifying that the computation of the Highway Usage Fee for the previous year was correctly calculated; and
- 8.2.4 the lists, submitted to SANRAL in terms of the concession agreement, of N3TC's lenders and creditors to which N3TC owes a sum in excess of the equivalent of R10 000 000, including the amounts due to each of any such lender and/or creditors.

9 SANRAL failed to respond to the PAIA request and this failure amounted to a "deemed refusal" by SANRAL, as contemplated in section 27 of PAIA. SANRAL did, however, request N3TC to provide SANRAL with its representations in regard to the PAIA request.

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- 10 On 22 October 2019, N3TC gave to SANRAL its representations, under section 48 of PAIA, for why the requested records should not be furnished to OUTA. These representations were not provided to OUTA.
- 11 On 4 November 2019, OUTA lodged an internal appeal against SANRAL's deemed refusal, in accordance with section 75 of PAIA. SANRAL failed to respond to OUTA's internal appeal.
- 12 On 22 July 2020, OUTA applied to the High Court, Gauteng Division, Pretoria, in terms of sections 78(2) and 82 of PAIA ("the main application"), for an order in the following terms –
- 12.1 declaring SANRAL's deemed refusal of access to the requested records to be unlawful and in conflict with the provisions of PAIA;
- 12.2 setting aside the deemed refusal by SANRAL to OUTA's request; and
- 12.3 directing SANRAL to supply OUTA with a copy of the requested records within fifteen (15) days of the granting of the order.
- 13 N3TC was not joined as a party to the main application, notwithstanding it being a third party, for purposes of PAIA, to the request for records. Given its direct and substantial interest in the outcome of the application, N3TC applied to intervene as a party in the main application.

14 On 17 February 2021, the court *a quo* granted N3TC leave to intervene as the sixth respondent in the main application.

15 The main application was ultimately heard in the court *a quo* before Millar J on 10 October 2023. On 14 November 2023, Millar J dismissed the application, with costs on a party and party scale, including the costs of two counsel.

16 OUTA applied for leave to appeal to the Full Bench alternatively to this Court. Its application was heard by Millar J on 19 January 2024. On 25 January 2024, Millar J dismissed the application for leave to appeal, with costs.

17 OUTA now applies for leave from this Court.

#### THE MAIN APPLICATION IN THE COURT *A QUO*

18 Due to the nature of the allegations set out in OUTA's founding affidavit in support of this application, it is necessary to provide a brief summary of the issues that were before the court *a quo*.

18.1 OUTA brought the main application in terms of sections 78(2) and 82 of PAIA. In support of its case, OUTA alleged; *inter alia*, that –

18.1.1 OUTA conducted an investigation into a series of irregularities following the conclusion of the concession agreement, but it did not provide particulars of to the nature or outcome of this investigation;

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- 18.1.2 OUTA established that the concession agreement will lapse during May 2029 and that SANRAL has continued to implement the concession agreement in the absence of justifiable extension to that effect, potentially in contravention of the Public Finance Management Act No. 1 of 1999 ("PFMA");
- 18.1.3 the legality of the concession agreement can only be established upon consulting all of its relevant annexures and addenda;
- 18.1.4 in order to verify the above findings, OUTA submitted the PAIA request; and
- 18.1.5 OUTA relied on section 46 of PAIA, which effectively provides that the information officer of a public body, as SANRAL is, must grant a request for access to records, if (a) the disclosure of the record would reveal evidence of substantial contravention or failure to comply with the law, (b) the public interest in the disclosure of the record clearly outweighs the harm to the public body.
- 18.2 In its answering affidavit, SANRAL provided, for the first time, reasons for its refusal to grant OUTA access to the requested records. SANRAL stated, *inter alia*, that it is entitled and justified, in terms of sections 36(1)(b) and (c) of PAIA, to refuse to grant access to the requested records on the bases, amongst others, that -

- 18.2.1 the requested records contained general and specific commercial, financial and technical information of a highly confidential nature belonging to N3TC and specifically relates to the revenue generated by N3TC throughout the term of the concession agreement;
- 18.2.2 with reference to N3TC's representations in terms of section 48(1) of PAIA, SANRAL stated that the disclosure of the requested records will cause significant harm to the commercial and financial interest of N3TC and will put N3TC at a disadvantage in its contractual negotiations both in relation to similar contractual arrangements and prejudice it in commercial competition;
- 18.2.3 on the basis of N3TC's consent, SANRAL tendered the production of the concession agreement and all annexures and addenda thereto; and
- 18.2.4 as it specifically relates to OUTA's allegation that the provisions of section 46 of PAIA find application in this matter, SANRAL stated that the requested records "will not reveal any contravention of laws or regulations";
- 18.3 N3TC filed its own answering affidavit. In it, N3TC consented to the disclosure of certain additional documents. But, it set out extensively the

reasons why it opposed the disclosure of the following records pertaining to its financial, commercial and proprietary information -

- 18.3.1 all operation and maintenance contracts entered into between N3TC and the O&M contractors, relating to the concession agreement;
- 18.3.2 the operational and maintenance manual pertaining to the concession agreement;
- 18.3.3 all construction work contracts entered into by N3TC relating to the concession agreement;
- 18.3.4 all Performance Certificates issued, relating to the construction works contracts entered into by N3TC;
- 18.3.5 all Taking Over Certificates that have been issued in terms of the concession agreement,

(collectively "*commercial records*");

- 18.3.6 N3TC's complete financial statements for each fiscal year, submitted to SANRAL in terms of the concession agreement;
- 18.3.7 all reconciliations of N3TC's profit and loss accounts, together with proposed budgets for each fiscal year, submitted to

SANRAL, from the 1999/2000 fiscal year to present, in terms of the concession agreement;

18.3.8 all annual reports submitted to SANRAL pertaining to the concession agreement, issued by N3TC's appointed auditors, certifying that the computation of the Highway Usage Fee for the previous year was correctly calculated; and

18.3.9 the lists, submitted to SANRAL in terms of the concession agreement, of N3TC's lenders and creditors to which N3TC owes a sum in excess of the equivalent of R10 000 000, including the amounts due to each of any such lender and/or creditors,

(collectively "*financial records*").

#### Commercial records

18.4 As it relates to the commercial records, N3TC stated that it opposed the disclosure of those records on grounds that, *inter alia* -

18.4.1 the concession period under the concession agreement is 30 years and as such the concession agreement will expire in 2029. In terms of the concession agreement, N3TC is required to undertake and perform a competitive tender process on an arm's-length basis, when procuring services and/or goods for, amongst others, the OCM contract;

- 18.4.2 to date, N3TC has concluded several contracts and will conclude many more contracts prior to the expiry of the concession agreement in 2029;
- 18.4.3 the competitive tender process and the contracts still to be concluded by N3TC 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 such as Group 5 and Basil Read;
- 18.4.4 the information submitted by the contractors as part of their tender bids, includes, the contractor's:
- (i) bid strategies;
  - (ii) bills quantities;
  - (iii) pricing information;
  - (iv) personal information, bank details and other information of the like;
  - (v) schedules of current projects and financial commitments; and
  - (vi) schedules of estimated monthly expenditures,

*("commercially sensitive and proprietary information").*



- 18.4.5 the commercially sensitive and proprietary information is not in the public domain, is confidential to N3TC, and has not been disclosed even to SANRAL in its complete form;
- 18.4.6 as such, should N3TC be required to disclose the commercial records, that will likely cause harm to not only N3TC but inevitably to the contractors; and
- 18.4.7 the disclosure of the commercial records will place N3TC at a disadvantage in contractual or other negotiations and prejudice N3TC in commercial competition. This will be so because:
- 18.4.7.1 the disclosure of the contractor's commercially sensitive and proprietary information will make the information available to the contractor's competitors and will thus prejudice the contractors in their future tender bids;
- 18.4.7.2 when tenderers believe that their contracts will be made public, N3TC will be harmed as contractors are likely to be unwilling to submit tenders for N3TC's contracts;
- 18.4.7.3 the competitiveness of N3TC's tender process will be harmed as bidders will be aware of the contractors' rates, bills of summary and tender strategies;

18.4.8 the disclosure of the commercial records may further impact N3TC's ability to ensure fair competition and low prices; and

18.4.9 N3TC is not the only entity procuring services from the contractors and, as such, a competitive arm's-length process is fundamental to the procurement of services and goods.

#### Financial records

18.5 As it relates to the financial records, N3TC stated that it is opposed to the disclosure of those records on grounds that, *inter alia* -

18.5.1 N3TC finances its operations under the concession agreement by raising finance that is specific for the project at hand ("*project finance*"). Project finance is the borrowing by a special purpose entity (in this case, N3TC) for the long-term financing of infrastructure projects ("N3 project") which is based on the complete life-cycle cash flows of the N3 project. Lenders and equity investors rely on N3TC's cash flows rather than the balance sheet of the entity;

18.5.2 project finance matters require a sophisticated financial model which is similar to a business plan and N3TC's financial model contains all revenues, operational costs and overheads, upgrades and rehabilitation costs, debt servicing, debt and/or

equity raised, capital redeemed and dividends paid out ("*financial model*");

- 18.5.3 N3TC has a fully developed financial model which it uses for determining financing related to the concession agreement. A substantial amount of resources and research has gone into developing and continually updating the financial model including traffic projections. The financial model is thus N3TC's intellectual property;
- 18.5.4 sharing N3TC's financial statements would be tantamount to sharing the financial model. This is so because, a competitor of N3TC with access to the financial model, through the financial statements, will have in their possession, a financial history of 21 years which will make it easy for a competitor to re-compute N3TC's business case and to take advantage of the intellectual property that has been developed over two decades;
- 18.5.5 access to N3TC's financial statements will give to competitors N3TC's business case and the way in which N3TC addresses its finances;
- 18.5.6 N3TC's financial records, which are ordinarily unavailable to the public, including N3TC's competitors, and if supplied to OUTA, will cause harm to N3TC's financial interests as it will inform its

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competitors and other industry participants of how N3TC finances its operations under the concession agreement, in so far as the design, construction, finance, operation and maintenance are concerned; and

18.5.7 the likelihood of harm is especially present, should SANRAL invite bidders to tender for services when the concession agreement expires in 2029, in which case the disclosure of the commercial records and the financial records will cause harm and prejudice to N3TC and its shareholders. This is because N3TC will have made all its information, proprietary information, and intellectual property (in relation to how it deals with finances) public. Any person having regard to the information will certainly be in a position to ascertain N3TC's strategy and approach. This is especially so in the context of tender bids submitted by the contractors.

18.6 Lastly, as to OUTA's reliance on the provisions of section 46 of PAIA to contend that SANRAL ought to grant it access to the requested records, N3TC stated that the provisions of section 46 of PAIA do not find application in relation to the requested records. Furthermore, there is no reason to unreasonably expose the financial, commercial and/or confidential information of N3TC and/or the counterparties to OUTA or the general public, which will compromise the financial and/or

commercial interests of N3TC and/or the counterparties, in the absence justifiable reasons for doing so.

- 19 By the time of the hearing, it was only the commercial and financial records that remained in issue. N3TC had consented to the disclosure to OUTA of all the other documentation that was in SANRAL's possession.
- 20 Importantly, the evidence that was put up by N3TC in relation to its commercial and financial records was not dealt with substantively by OUTA. There was no credible denial, from OUTA, of the allegations by N3TC that harm would befall it or third parties if disclosure was made. Instead, OUTA resorted to generalised and unsubstantiated statements about irregularities—still not identifying what they were or why they justified overriding N3TC's rights under PAIA.
- 21 Whatever OUTA says, in its founding affidavit in this application for leave to appeal, about the legal test that should be applied to the PAIA request, it is constrained by its failure properly to make out a case for the relief that it claimed or to deal with the answering case made out by N3TC. Insofar as OUTA suggests that the court *a quo* misconstrued the test regarding who bears the onus, the simple fact remains that even if N3TC or SANRAL bore the onus in all respects they would have discharged it, because there were no countervailing facts or evidence put up by OUTA.
- 22 At the time of the hearing, OUTA also sought an order compelling production by SANRAL of those records that were not in fact in SANRAL's possession—

because N3TC does and is not required to provide them to SANRAL. SANRAL confirmed, under oath, that the documents are not in its possession. OUTA sought an order that SANRAL be directed to obtain the records from N3TC for the specific purpose of handing them over to OUTA.

23 OUTA was granted an indulgence by the court *a quo* to make further written submissions, based on the concession agreement, as to the specific point of SANRAL not being in possession of certain records. In its written submissions, OUTA referred to various clauses in the concession agreement to contend that SANRAL ought to be in possession of certain records.

24 Both N3TC and SANRAL responded to OUTA's written submissions, demonstrating that the concession agreement does not, in fact, dictate that N3TC should make the records that were confirmed not to be in SANRAL's possession available to SANRAL. As such and as a fact, those records were not and cannot be deemed to be under SANRAL's control or in SANRAL's possession, for purposes of the application of the provisions of PAIA. Nor is N3TC SANRAL's agent for purposes of the possession of those records.

#### OUTA'S GROUNDS OF APPEAL

25 OUTA raises the following grounds of appeal -

25.1 the court *a quo* failed to consider or apply the principles set out in *Ericsson South Africa (Proprietary) Limited v City of Johannesburg Metropolitan Municipality and Two Others* ("the Ericsson matter"). It

argues 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 the *Ericsson* matter was distinguishable on the basis that OUTA invoked the public interest override provision contained in section 46 of PAIA;

25.2 The court *a quo* erred in placing greater weight on *Centre for Social Accountability v Secretary of Parliament and Others* (the *Centre for Social Accountability* matter) than it did on the *Ericsson* matter. Furthermore, the court erred in its judgment by not recognising the legal principles set out in the *Centre for Social Accountability* matter in totality;

25.3 There exist reasonable prospects that an appeal court would not attribute the same weight to SANRAL and N3TC's contentions relating to the possession of the requested documents, in correctly applying the principles set out in the *Ericsson* matter as well as the provisions of section 23 of PAIA; and

25.4 OUTA was substantially successful in respect of the documents requested in Part A of the PAIA request, which ought to have had an impact on costs and the costs order could be varied by a different court.

26 Save for OUTA's contentions on costs, I deal with these grounds of appeal below. I don't deal with costs, because my understanding is that appeals

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generally don't lie in respect of costs orders alone, so this won't carry the day for OUTA.

27 First, by way of general comments, I note that OUTA did not, in the main application, mount a challenge to PAIA. It did not assert that PAIA offended the Constitutional right to access to information or that it fell to be read down or even that provisions in it should be struck down. It brought its claim squarely within the corners of and by relying on PAIA. It is therefore bound by the principle of subsidiarity.

28 Secondly, OUTA's grounds of appeal are essentially directed at the reasoning of the court *a quo*. As evident from paragraph 7 of its founding affidavit, it argues that another court would arrive at a different conclusion on the issues it lists there. These criticisms of the court's reasoning don't translate into the conclusion that there are reasonable prospects of another court changing the order of the court *a quo*. There are no reasonable prospects of another court coming to a different conclusion, because the case OUTA made out in its affidavits in the main application were so poor. For that reason alone this application should be refused.

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The application of the principles set out in the *Ericsson* matter and the *Centre for Social Accountability* matter

29 OUTA argues 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 provision contained in section 46 of PAIA.

30 Section 46 of PAIA provides that "*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) ...; and

(b) *the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question" (emphasis added).*

31 Section 81 of PAIA, in turn, reads as follows -

"(1) *For the purposes of this Chapter proceedings on application in terms of section 78 are civil proceedings.*

(2) *The rules of evidence applicable in civil proceedings apply to proceedings on application in terms of section 78.*

(3) *The burden of establishing that -*

(a) *the refusal of a request for access; or*

(b) *any decision taken in terms of section 22, 26 (1), 29 (3), 54, 57 (1) or 60,*

*complies with the provisions of [PAIA] rests on the party claiming that it so complies" (emphasis added).*

32 OUTA's position is based on the incorrect interpretation or application of the principles set out in the *Ericsson* matter.

32.1 The *Ericsson* matter is, as the court *a quo* correctly found, distinguishable from this matter. The respondents in that matter, the Johannesburg Metro, relied on section 46 to contend that it was not in the public's interest to disclose certain records to the requester, Ericsson. Thus, it was the public body who held the records that sought to rely on section 46(b) of PAIA to justify a refusal for access to the requested records.

- 32.2 The court in the *Ericsson* matter, at paragraphs 79 to 81, dealt with the application of section 46 and the Johannesburg Metro's reliance on it. The court identified the harm requirement in section 46(a) that was to set off against the public interest in section 46(b), which it referred to as the balance requirement. These two requirements, the court said, are interlinked, and the Johannesburg Metro—as the party relying on section 46—had to satisfy both requirements. In relying on the section, this meant it bore the onus in respect of both the balance requirement *and* the harm requirement. But it had failed to put up evidence in relation to the latter.
- 32.3 At [12] of the judgment for leave to appeal, Millar J restated the distinction between OUTA's case and the *Ericsson* matter as being that in the latter it was the public body who relied on section 46 as a shield against disclosure; in OUTA's instance, it relied on section 46 as a sword. It was therefore OUTA that had to show balance. There is no prospect of another court finding differently, because the facts cannot sustain a different finding.
- 32.4 SANRAL, in the answering affidavit it filed in the main application, stated that the requested records "will not reveal any contravention of laws or regulations". As such, SANRAL's position under oath is that, upon consideration of the requested records, the provisions of section 46(a) do not find application in this matter, as the requested records would not reveal evidence of a contravention of or non-compliance with the law.

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SANRAL did not, as was the case with the respondents in the *Ericsson* matter, seek to rely on the provisions of section 46 of PAIA to justify a refusal of the requested records that remained in contention.

32.5 In following the dictum in the *Ericsson* matter, there was no need for SANRAL to conduct an assessment under the 'balancing' requirement set out in section 46(b) of PAIA, as the records did not satisfy the 'harm' requirement set out in section 46(a) of PAIA.

32.6 Furthermore, in applying the principles set out in the *Ericsson* matter and the provisions of section 46, read together with section 81(2) of PAIA, it is OUTA which seeks to rely on section 46 to allege that the disclosure of the requested records would reveal evidence of a contravention of the law. In fact, OUTA goes to some level of detail (*albeit* that the allegations are scanty and unfounded) in its affidavit filed in the court *a quo* to support this allegation, as required in terms of section 81(2) PAIA.

32.7 The well-established principles of civil proceedings, as contemplated in section 81(2) of PAIA, dictate that the party making a particular allegation provides the necessary facts to prove that allegation.

32.8 An argument that the onus and an evidentiary burden to place facts before the court rested with SANRAL to show that a disclosure of the requested records to OUTA would reveal evidence of a contravention or non-compliance with the law, in circumstances where SANRAL has both

stated under oath that the disclosure will not reveal such contravention or non-compliance and has not relied on the provisions of section 46 to refuse access to the requested records, cannot be sustained. It contradicts the very principles on which OUTA seeks to rely.

- 32.9 SANRAL and N3TC placed sufficient facts before the court *a quo* (as outlined above), as to why the refusal for access of certain of the records is justified, with reference to specific provisions of PAIA as well as specific examples of how N3TC would be prejudiced by the disclosure. As such, both SANRAL and N3TC discharged their respective obligations in terms of section 81(3)(b) of PAIA and under the civil law.
- 32.10 It follows that OUTA, in seeking to rely on section 46 to allege that a disclosure of the requested records would reveal a contravention of the law, was required to place facts before the court, to sustain this allegation, which OUTA failed to do. This is in line with the principles set out in the both the *Ericsson* matter, as well as in the *Centre for Social Accountability* matter.
- 32.11 In the *Centre for Social Accountability* matter, the court at [90] to [94] dealt with what a requester must prove. The court made it plain that, in accordance with the requirements of section 46 read with section 81 of PAIA, the requester must put up the facts on which it bases its case. This is to be weighed, on the balance of probabilities, with all of the evidence before the court. There is no suggestion that the public body alone must

put up facts and evidence and that the requester is discharged from any responsibility to do so.

- 33 The court *a quo* correctly found that OUTA failed to aver the necessary facts to sustain its allegation that a disclosure of the requested records would reveal a contravention of or non-compliance with the law. The correct onus was applied by the court *a quo*. The correct test was applied. More importantly, the court *a quo* drew attention to the absence of facts from OUTA.
- 34 There exists no reasonable prospect that a different court would reach a different conclusion on the basis of the facts and allegations made by OUTA in the main application.

**The documents not under SANRAL's possession or control**

- 35 OUTA alleges that the court *a quo* erred in its application of the principles set out in the *Ericsson* matter as well as the provisions of section 23 of PAIA in regard to SANRAL's and N3TC's respective contentions regarding the possession of certain documents.
- 36 At the outset, it is to be noted that the facts are distinguishable as between the main application and the *Ericsson* matter. In the latter, the report that was not in the possession of the Johannesburg Metro was in the possession of the party with whom it contracted to investigate and provide the report. The report had thus been commissioned by the public body and the third party effectively held it on behalf of that public body.

- 37     OUTA is referring to records which N3TC, in its answering affidavit filed in the main application, confirmed are not in SANRAL's possession or under its control. N3TC did not generate those records for SANRAL and the concession agreement did not provide that N3TC held the records for SANRAL or that it was obliged to provide them to SANRAL.
- 38     The records in question, that were not provided to SANRAL, were the operation and maintenance contracts entered into between N3TC and the O&M contractors, relating to the concession agreement; construction work contracts entered into by N3TC relating to the concession agreement; Performance Certificates issued, relating to the construction works contracts entered into by N3TC; and all Taking Over Certificates that have been issued in terms of the concession agreement.
- 39     N3TC confirmed that there is no record in N3TC's possession reflecting that N3TC gave these documents to SANRAL. Moreover, there is no reason, be it under the concession agreement or at all, why N3TC would be required to give these documents to SANRAL.
- 40     As stated above in paragraphs 23 and 24, OUTA was granted an indulgence by the court *a quo* to make further written submissions, relying on the provisions of the concession agreement, on the specific point of SANRAL not being in possession of certain records. Both N3TC and SANRAL responded to OUTA's written submissions, demonstrating that the concession agreement does not,

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in fact, dictate that N3TC should make the records that were confirmed not to be in SANRAL's possession available to SANRAL.

- 41 Section 23 of PAIA does not dictate that a public body must take all the necessary steps to obtain records which are not considered, in terms of section 4 of PAIA, to be under its possession or control.
- 42 At most, section 23 of PAIA requires a public body that has taken all reasonable steps to find a record that is, by law, regarded as being in its possession or under its control and if it does not find it, to depose to an affidavit explaining the steps taken to obtain such record. This would be so if, for example, the concession agreement dictated that SANRAL was to be provided with access to the relevant documents, in which case the documents would be regarded as being under the control or in the possession of SANRAL, as contemplated in section 4 of PAIA.
- 43 There is no prospect that another court could come to a different conclusion in these respects: the concession agreement is what it is and OUTA cannot change that; section 23 of PAIA is clear in its meaning and application; there was no challenge made out in respect of PAIA and no basis for interpreting it in a manner that warrants a public body seeking out the production of records by third parties so that they can be provided to a requester. That is not an interpretation that finds support in the Constitution: it is not information held by the state.



## **AD SERIATIM RESPONSES**

44 I now turn to deal with the averments made in the founding affidavit *ad seriatim*.

Where I do not specifically deal with a specific allegation and where appears from the context, such allegation must be considered as denied. I will not repeat what I have already stated above but ask that it be read as if specifically incorporated below.

45 **Ad paragraphs 1.1 to 2.7**

Save to deny that the contents of the founding affidavit are correct, the contents of these paragraphs are noted.

46 **Ad paragraphs 2.8**

The contents of this paragraph are admitted.

47 **Ad paragraph 8.4**

The reasons for SANRAL's refusal to grant OUTA access to the requested records are set out in SANRAL's answering affidavit filed in the main application.

48 **Ad paragraphs 8.7 and 8.8**

It is specifically denied that OUTA convincingly rebutted SANRAL's refusal to grant OUTA access to the records or that SANRAL's reliance on section 36(1)(b) and (c) of PAIA is at odds with SANRAL's duty in terms of sections 195 and 217 of the Constitution. SANRAL advanced valid reasons why access to the requested records is refused.

49 **Ad paragraphs 9.1 to 11.10**

The contents of these paragraphs are denied for reasons advanced above.

50 **Ad prayer for relief**

I deny that OUTA is entitled to or has set out a basis for the relief it seeks in terms of the notice of application.

**WHEREFORE** N3TC prays for an order dismissing the application with costs, including the costs of two counsel.



**BOITUMELO DORCAS MOTI**

I certify that this affidavit was signed and sworn to before me at Sandton on this the 22 day of March 2024, by the deponent after she declared that she knew and understood the contents of this declaration, that she had no objection to taking the prescribed oath and has taken the prescribed oath which she considered binding on her conscience, having complied with regulations contained in Government Notice R1258 of 21 July 1972, as amended.



**COMMISSIONER OF OATHS**

Thulisile Mokoena  
Commissioner of Oaths in terms of Section 5(1),  
Justice of Peace and Commissioner of Oaths Act, 1963  
(Act 16 of 1963) RO-39/03/2021 Randburg 14/4/2021  
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