

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

GP CASE NO: 32095/2020

APPEAL CASE NO:

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC

APPELLANT

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

NOTICE OF APPEAL: TO FULL COURT

TAKE NOTICE THAT the above-named Appellant hereby notes its appeal to the Full Court of the Gauteng Division, Pretoria, against the whole of the judgment and order (including the order for costs) of the Gauteng Division, Pretoria (Coram Millar J) delivered on 14 November 2023.

TAKE FURTHER NOTICE THAT the Supreme Court of Appeal ("The SCA") has granted leave to appeal to the Full Court of the Gauteng Division, Pretoria. A copy of the order of the SCA granting such leave is attached hereto as Annexure "A".

TAKE NOTICE FURTHER THAT the appellant seeks the following relief on appeal:

1. Upholding the appeal with costs;
2. Setting aside the whole judgment and order of the Court a quo and substituting it with an order in the following terms;
 - 2.1. The appellant is granted condonation for non-compliance with the 180-day period referred to in s 78 (2)(c)(i) of Promotion of Access to Information Act 2 of 2000 ("PAIA");
 - 2.2. Declaring that the first respondents deemed refusal of access to the records is unlawful and in conflict with the provisions of PAIA;
 - 2.3. Setting aside the deemed refusal by the first respondent to the appellant's request;
 - 2.4. Directing the first respondent to supply the appellant with a copy of the requested information within 15 (fifteen) days of granting of this order;
 - 2.5. The first and sixth respondents who opposed the application are ordered to pay the costs of the application, such costs to include the cost consequent upon the employment of two counsel, on scale c.

TAKE NOTICE FURTHER THAT the grounds on which the application is based are the following:

1. The learned judge, having correctly found that:
 - 1.1. It is not in issue between the parties that Organisation Undoing Tax Abuse ("OUTA") is entitled to request access to information in terms of PAIA.
 - 1.2. It is not necessary for the purposes of the Request in terms of PAIA to furnish any reasons for which the information is required.

- 1.3. Condonation, insofar as it may be required, should be granted.
- 1.4. SANRAL did not refuse the Request in express terms or provide reasons and hence the failure to communicate its decision resulted in it being a deemed refusal.
2. The learned judge erred in coming to the legal conclusion that the Respondents laid the necessary basis to conclude that public interest finds no application in respect of the disputed documents and accordingly the application failed.
3. Upon an objective and proper interpretation of the facts presented on paper and PAIA, the Court a quo should have found that the Appellant did make out a case which justifies the production of the disputed requested records and ought to have ordered the production of the consented documents.
4. The learned judge erred in failing to place reliance on relevant case authority or address the issues raised by the parties.
5. The learned judge having found that for the purpose of PAIA it is not necessary to furnish any reasons for which the information is required, the learned judge erred in then interrogating the reasons provided by OUTA throughout the judgment and further makes a negative inference that OUTA has substantial parts of the main contract in its possession an aspect not canvassed in the papers before the Court. In addition, it was an irrelevant matter which the Court should have avoided deciding.

6. The learned judge recognised that it was a deemed refusal but erred in adjudicating the matter as if OUTA ought to have knowledge of the reasons and provide adequate justification thereto in its founding papers. The learned judge erred in not recognising that the legislative roadmap starts with an initial application for access to information being made to an information officer in advance of a court application even being conceptualised.
7. The learned judge erred in finding that SANRAL was not in possession of specific documents, on the papers the concessionaire expressed having no knowledge if SANRAL was in possession of certain records and SANRAL was uncertain if the documents were ever in its possession and only on the eve of the hearing of the matter did SANRAL's attorney provide vague clarity in respect of certain documents which the judge erred in applying it to all the documents opposed on the grounds that it is not in its possession.
8. The learned judge erred in placing such weight on SANRAL's attorney affidavit. The learned judge erred in allowing SANRAL to shift the goalpost from the Respondents' answering affidavits, which changed and was settled in the joint practice note to which SANRAL ought to have been bound by which stance changed again in the attorney's affidavit to the clear prejudice to the case presented by OUTA.
9. Ultimately on this aspect the learned judge erred in failing to apply the principles as set out in section 23 of PAIA relating to records that cannot be found. The affidavit fails to address:

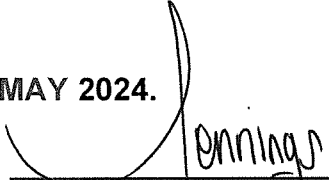
1. The reasonable steps taken to find the records requested;
 2. The reasonable grounds for believing that the records are in SANRAL's possession but cannot be found or does not exist.
 3. The information officer must depose to the affidavit not an attorney who had over a year to present that evidence but elected only to do so the day before the main hearing without adhering to the requirements of section 23. No confirmatory affidavit was attached to the affidavit since this is SANRAL's case and not that of its attorney.
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10. The legislative provisions of PAIA must be respected and complied with, the learned judge erred in allowing such clear non-compliance by SANRAL.
 11. The learned judge erred in basing the concessionaire's commercial harm insofar as its financial records are concerned, that these records relate to the day-to-day operations, its financial model is incorporated into its financial records so disclosure would cause it financial harm in its negotiations. The appeal court can invoke section 80 (1) and examine if the requested records contain the day-to-day detail which the concessionaire basis its harm on.
 12. The learned judge erred in placing profit over the public interest. The making of profit, in a private company, might be an everyday commercial consequence however the appeal court would find that profit exclusively funded by the collection of tolls by the public, subjects that profit to the interest of the public and is itself a matter which requires disclosure in the public interest. The Court a quo erred in not applying the principle as set out in

Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) at [55].

13. The learned judge erred in not applying the principles as set out in *Ericsson South Africa (Pty) Ltd v Johannesburg Metro and Others* 2023 (5) SA 219 (GJ).
14. The correct focus should have been that the evidentiary burden must be discharged on a balance of probabilities. By approaching the matter in the fashion elected by the Court a quo, the learned judge erred in shifting the onus to the appellant when the state is required to put forward sufficient evidence for a court to conclude that, on the probabilities, the information withheld falls within the exemption claimed.
15. Further the court a quo erred in placing the onus on the appellant when it is for the State to show that the harm contemplated from disclosure outweighs the public interest in disclosure.
16. The learned judge erred in dismissing the application in totality, even until the supplemented argument of SANRAL and the concessionaire continued to consent to provide now redacted records to exclude certain financial information. Specifically, the learned judge ought to have ordered the production of all those consented to records.
17. The learned judge erred in failing to have regard to SANRAL's statutory duties in reaching its factual and legal conclusions.

18. The learned judge erred in finding against the ultimate goal of PAIA being to promote transparency, accountability and effective governance of all public bodies and limited the right of the public to effectively scrutinise and participate in decisions made by public bodies to ensure openness which gives effect to the right to access information in a speedy and inexpensive manner.

DATED AT PRETORIA ON THIS THE 20th DAY OF MAY 2024.

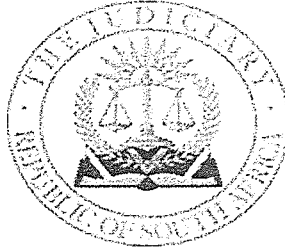

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Date: 24 APRIL 2024

Ref: 145/2024

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Mr/Ms

**APPLICATION FOR LEAVE TO APPEAL
ORGANISATION UNDOING TAX ABUSE NPC v SA
NATIONAL ROADS AGENCY LTD & OTHERS**

With reference to the application lodged in this office on 26 FEBRUARY 2024 this Court
ordered on 18 APRIL 2024 that the application be granted as per attached order:-

Yours faithfully

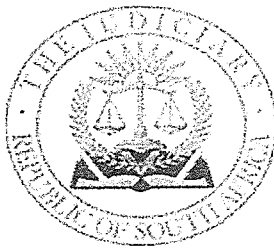

C L DE WEE (Ms)
REGISTRAR

REGISTERED POST

(H/B/D/O)

YOUR REF: 32095/2020 Millar J (Court a quo)

Registrar of the High Court
Private Bag X 67
PRETORIA
0001



SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 145/2024
GP CASE NO: 32095/2020

BEFORE THE HONOURABLE JUSTICES MOCUMIE JA AND KOEN AJA

On the 18th APRIL 2024

In the application between:

ORGANISATION UNDOING TAX ABUSE NPC	Applicant
and	
SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	1st Respondent
THE MINISTER OF TRANSPORT	2nd Respondent
NAZIR ALLI	3rd Respondent
DANIEL MOTAUNG	4th Respondent
SKHUMBUZO MACOZOMA N.O.	5th Respondent
N3 TOLL CONCESSION (RF) (PTY) LTD	6th Respondent

Having considered the Notice of Motion and the other documents filed.

IT IS ORDERED THAT:

- 1. Leave to appeal is granted to the Full Court of the Gauteng Division of the High Court, Pretoria.**
- 2. The costs order of the court *a quo* in dismissing the application for leave to appeal is set aside AND the costs of the application for leave to appeal in this court and the court *a quo* are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is to pay the costs.**

BY ORDER OF THIS COURT

COURT REGISTRAR
C L DE WEE (Ms)

