

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

**CASE NO: 7955/21**

In the matter between

**ORGANISATION UNDOING TAX ABUSE NPC**

Applicant

And

**SOUTH AFRICAN NATIONAL ROAD AGENCY SOC  
LIMITED**

First Respondent

**THE MINISTER OF TRANSPORT N.O.**

Second Respondent

**SKHUMBUZO MACOZOMA N.O.**

Third Respondent

(In his capacity as Information Officer)

**BAKWENA PLATINUM  
CONCESSIONAIRE (PTY) LTD**

**CORRIDOR** Fourth Respondent

---

**FOURTH RESPONDENT'S REJOINDER AFFIDAVIT IN RESPONSE TO  
THE APPLICANT'S REPLYING AFFIDAVIT**

---

I, the undersigned,

**SIMON EVERITT**

do hereby state under oath as follows: -

1. I am an adult male and the Chief Executive Officer of Bakwena Platinum Corridor Concessionaire (Pty) Ltd, the Fourth Respondent in the matter ("**BAKWENA**").
2. I am duly authorised to depose to this affidavit on behalf of the Fourth Respondent.



3. The facts contained in this affidavit are, unless the context indicates otherwise, within my personal knowledge and are to the best of my belief, both true and correct.
4. Where I make submissions of a legal nature, I do so based on the advice of BAKWENA's legal representatives, which advice I accept as being correct. Any reference to advice received, is a reference to legal advice received from BAKWENA's legal representatives.
5. Where I make use of headings in this affidavit I do so for the purposes of convenience only and do not thereby intend to limit any facts stated under a particular heading only to the topic covered by such heading.
6. For the sake of convenience, I will adopt the same nomenclatures and abbreviations that was adopted in the answering affidavit.

#### **PURPOSE OF AFFIDAVIT**

7. I have read the Applicant's replying affidavit and BAKWENA seeks leave to respond to certain allegations made therein. I do not address each and every averment set out in the replying affidavit, as I have been advised that it would be improper to do so. My failure to do so should not be construed as either an admission or concession thereof, and any allegations in the replying affidavit that are not consistent with the contents of BAKWENA's answering affidavit should be deemed to be denied.



8. In an effort to be succinct, I will not repeat the allegations contained in the affidavits already filed of record and ask that my responses be read together with the affidavits filed of record.
9. I accordingly intend to only respond to those allegations in the replying affidavit that should not have been include, or are new, and to deal with events that have occurred subsequently to the filing of the answering affidavit that are clearly relevant to the application.
10. In this affidavit, I will deal with the following core topics:
  - 10.1 Correspondence exchanged between the parties;
  - 10.2 Inconsistency regarding the relief sought by OUTA;
  - 10.3 Failure to set out a case in the founding affidavit;
  - 10.4 Pre-litigation discovery;
  - 10.5 Obtaining the documents of a private body through a public body;
  - 10.6 Alleged secrecy surrounding BAKWENA's profits;
  - 10.7 "Transparency is the cost of doing business with state-owned entities";
  - 10.8 "OUTA and SANRAL are *ad idem* that the impugned decision be reviewed and set aside"; and
  - 10.9 Conclusion.

A handwritten signature in black ink, consisting of a stylized, cursive script that appears to be the name 'B. B.' followed by a flourish.

## CORRESPONDENCE EXCHANGED BETWEEN THE PARTIES

11. Subsequent to the delivery of the respondents' answering affidavits, on 17 September 2023, OUTA addressed a letter to SANRAL and BAKWENA in which it recorded certain statements and a proposal:

11.1 OUTA contends that OUTA and SANRAL are *ad idem* that the impugned decision should be reviewed and set aside;

11.2 OUTA will not persist with prayer 3 of its notice of motion (directing SANRAL to provide the requested records to OUTA within 15 days of the granting of the order);

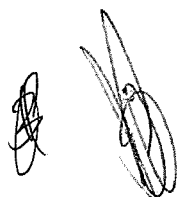
11.3 SANRAL would be afforded an opportunity to comply with Chapter 5 of PAIA; and

11.4 SANRAL should pay the costs of the Application to date.

A copy of this letter is attached hereto and marked "**RRA1**".

12. It was not clear from OUTA's proposal whether SANRAL would also pay the costs of BAKWENA.

13. On 3 October 2023, BAKWENA wrote a letter to OUTA in which it rejected OUTA's proposal contained in its letter dated 17 September 2023, and invited OUTA to withdraw the Application and tender BAKWENA's costs. The content of BAKWENA's letter illustrates a mischief on the part of OUTA in the formulation of its less than competent relief and its attempts to circumvent the consequences arising therefrom. A copy of this letter is attached hereto and marked "**RRA2**".

Two handwritten signatures in black ink, one to the left of the other, located at the bottom right of the page.

14. In a letter dated 6 October 2023, OUTA responded to BAKWENA's letter ("RRA2"), denying the allegations therein and, among others, indicating that OUTA would instruct counsel to prepare heads of argument. A copy of this letter is attached hereto and marked "**RRA3**".
15. On 16 October 2023, BAKWENA wrote to OUTA, recording OUTA's rejection of BAKWENA's proposal contained in the letter dated 3 October 2023 ("RRA2") and notifying OUTA of its intent to seek a punitive costs order in view of the manner in which the matter has been conducted. A copy of this letter is attached hereto and marked "**RRA4**".
16. In view of amongst others the mischaracterisation of the relief and the attempt to re-interpret the relief sought as set out in the exchange of correspondence, BAKWENA seeks to have the application heard, and will ask for the dismissal of the Application, which is canvassed and addressed below and with reference to what has been set out in the correspondence referred to above.

#### **INCONSISTENCY REGARDING THE RELIEF SOUGHT BY OUTA**

17. In accordance with the notice of motion, OUTA seeks the following relief:
- 17.1 *That the Applicant's non-compliance with the 180-day period referred to in section 78(2)(c) of the Promotion of Access to Information Act, 2000, ("PAIA"), is condoned;*
- 17.2 *Setting aside the deemed refusal of the Applicant's request for access to the records of the First Respondent in its request for*



*information in terms of the PAIA and dated 8<sup>th</sup> June 2020 ("the request");*

17.3 *Directing the First Respondent to provide the requested records to the Applicant within 15 (fifteen) days of the granting of this order;*

17.4 *Alternatively to prayer 3, directing the First Respondent to notify any third party of the request concerning records relating to them in accordance with section 47 of PAIA within 10 calendar days after service of this order on them, and thereafter to comply with the time periods and provisions in chapter 5 of PAIA.*

17.5 *Directing the First Respondent to pay the costs of this application;*

17.6 *Further and/or alternative relief.*

18. In summary, it is evident that OUTA seeks an order, *inter alia*, for the following from the Honourable Court:

18.1 condonation of the late application in so far as the PAIA provisions are concerned;

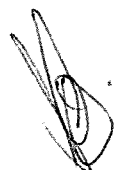
18.2 that SANRAL's deemed refusal be set aside;

18.3 that SANRAL be directed to provide OUTA with all the requested documents in terms of the Request; and

18.4 in the alternative, that SANRAL be directed to execute the process set out in section 47 of PAIA.

A handwritten signature in black ink, consisting of a stylized 'B' followed by a large, sweeping flourish.

19. If one considers the order in which the relief is sought, it is evident that OUTA firstly sought to set aside SANRAL's "deemed refusal" (*prayer 2*) and then secondly obtain the documents as per its Request (*prayer 3*) (including BAKWENA's financial and commercial documents, which would in the ordinary cause be protected by the grounds of refusal in terms of PAIA).
20. It is clear from prayer 3 of the notice of motion (and the contents of the founding affidavit filed in support thereof) that the primary objective of the relief sought by OUTA is an order directing SANRAL to furnish OUTA with a copy of all the records as requested in its Request for information dated 8 June 2020.
21. In its replying affidavit, OUTA now alleges that the relief in prayer 4 of the notice of motion should be interpreted to mean that the matter be referred back to SANRAL for purposes of notifying any affected third parties in accordance with section 47 of PAIA. It must be stressed that paragraph 4 of the notice of motion is relief that is only sought as an alternative to the relief contained in paragraph 3 of the notice of motion, and only in the event of the relief sought in paragraph 3 not being granted.
22. Paragraph 4 of the notice of motion cannot be interpreted as requiring a remittal of the request for information to SANRAL as OUTA now conveniently and opportunistically seeks to allege. It simply contemplates SANRAL being ordered to notify third parties of OUTA's



request for information in respect of information relating to such third parties. There is no reference in OUTA's founding affidavit to a remittal of the request for information to SANRAL.

23. Additionally, OUTA seeks, as part of the alternative relief, an order directing SANRAL to comply with the provisions of Chapter 5 of PAIA. I am advised that Chapter 5 of PAIA does not make any reference to the remittal of matters for reconsideration. Instead, it sets out the process in terms section 47 of PAIA in relation to third party notification and intervention. It is clear that the alternative prayer only contemplates the invocation of section 47 of PAIA in respect of documents that SANRAL are ordered to provide in terms of prayer 3, that relate to third parties.
24. Subsequent to SANRAL and BAKWENA filing comprehensive answering affidavits opposing the relief sought, OUTA then belatedly (and opportunistically) wished to amend its relief by way of an agreed order. Such conduct reinforces BAKWENA's submission that OUTA's conduct and the manner in which it has instituted this Application amounts to an abuse of process and an attempt to secure documents and information without following proper process.

#### **FAILURE TO SET OUT A CASE IN THE FOUNDING AFFIDAVIT**

25. OUTA states that substantial parts of BAKWENA's answering affidavit have been rendered irrelevant for purposes of this Application given that OUTA and SANRAL are apparently *ad idem* that the "decision" be



“reviewed and set aside”.<sup>1</sup> Moreover, OUTA states that its “application is premised on a Constitutionally entrenched right of access to information held by a public body”.<sup>2</sup>

26. Whether or not OUTA and SANRAL are *ad item* on relief that should be granted, such approach does not affect other parties to a matter and cannot be forced on such parties.
27. I am advised that it is trite that an applicant is required to make its case out in a founding affidavit which must contain sufficient facts in itself upon which a court may find in the applicant’s favour. Furthermore, given that an applicant is to stand or fall by the facts alleged in the founding affidavit, an applicant is not allowed to make out or raise new grounds for the application in its replying affidavit.
28. OUTA’s position on its “*entitlement to the documents*” is set out in its founding affidavit and BAKWENA comprehensively put forward its responses to the averments made in the founding affidavit. Having set out this factual framework—the nucleus of which is the BRICS Loan—OUTA then, at paragraph 20, states that it submitted its request for information in terms of section 18(1) of PAIA. It is therefore undeniable that OUTA’s request for information was precipitated by the BRICS Loan.
29. At no point, whether it be in the notice of motion or the founding affidavit, did OUTA seek the relief of the decision to be “reviewed” nor is there any

---

<sup>1</sup> Paragraph 24 of the replying affidavit, CaseLines page 040-10.

<sup>2</sup> Paragraph 88 of the replying affidavit, CaseLines page 040-26.

Handwritten signature and initials in the bottom right corner of the page.

reference to a remittal of the Request to SANRAL. The contention that the "decision" be reviewed and set aside is inappropriate, as it is alleged that there was no "decision" by SANRAL that can be construed as being a "decision" susceptible to review under the Promotion of Administrative Justice Act 3 of 2000. OUTA cannot therefore seek to "review" and set aside any "decision", because on its version no such "decision" exists. In any event section 82 of PAIA does not contemplate a review but rather the setting aside of a decision.

30. What is instead evident from OUTA's founding papers is, *inter alia*, that:

30.1 it would allegedly be in the best interest of OUTA including the public to know whether the BRICS Loan was allocated to BAKWENA;

30.2 irrespective of the BRICS Loan, OUTA intends to conduct an analysis on whether the funding generated by BAKWENA is excessive in relation to the funds required to maintain a toll road;

30.3 it would allegedly be in the public interest that the Honourable Court makes an order that the requested records be disclosed to OUTA;

30.4 OUTA ultimately intends instituting proceedings in a court of law; and

30.5 that SANRAL's deemed refusal stands to be set aside.

31. As stated in paragraph 68 of BAKWENA's answering affidavit, SANRAL never received the BRICS Loan. Therefore, OUTA's request was

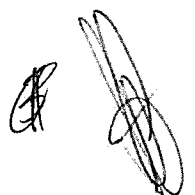


motivated by and premised upon a false factual framework. OUTA concedes that it had erred in its founding affidavit: *"The references to the BRICS loans were made as part of the background information provided in my founding affidavit in the bona fide but mistaken belief the loan was granted to SANRAL."*

32. The BRICS loan certainly did not feature as *"background"* facts as OUTA seeks to belatedly allege, but it was the entire basis relied on to justify its entitlement to the documents.
33. OUTA retorts that the Application is *"premised on a constitutionally entrenched right of access to information held by a public body as contained in section 32 of the Constitution read with section 11 of PAIA, and its right to a lawful and valid decision of the request following a proper consideration thereof by SANRAL"*<sup>3</sup>. This is clearly an attempt to broaden the basis upon which to request the information. Therefore, on OUTA's version, the factual matrix involving the BRICS Loan operated as the factual backdrop or the context of the Application. Consequently, in the absence of a concrete factual basis on which to ground its concern for the public interest, OUTA's Application is reduced to a misguided fishing expedition.
34. Moreover, I am advised that despite the constitutionally entrenched right of access to information, OUTA must be mindful that such right is not absolute and may be limited in terms of section 36 of the Constitution.

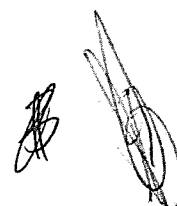
---

<sup>3</sup> Paragraph 88 of the replying affidavit, CaseLines page 040-26.

Handwritten signature and initials in the bottom right corner of the page.

PAIA recognizes the limitation clause in the Constitution and devotes an entire chapter to grounds for refusal of access to information. Therefore, although a requester is not required to identify the right it seeks to exercise or protect when requesting access to a document from a public body, the public body is not barred from upholding one of the grounds of refusal. Moreover, once a third-party notification process unfolds involving private entities, the question in relation to what right or interest is being sought to be protected becomes a material consideration.

35. OUTA's attempt to belatedly re-engineer its case before the Honourable Court by way of varying its position in its replying affidavit is simply opportunistic. OUTA's conduct is a clear indication that its case, as per its founding papers, does not adequately support the relief it seeks from the Honourable Court. This is presumably as OUTA has realized that its purported cause of action, and the basis for the cause of action, being the BRICS Loan never existed and is flawed in law and it has therefore failed to advance any exceptional circumstances that could possibly justify prayer 3 of its notice of motion. This constitutes an abuse of process and has resulted substantial waste of costs on account of OUTA.
36. OUTA has had knowledge of the fact that the BRICS Loan was not received by SANRAL at best, since July 2022 when BAKWENA launched its *In Limine* Application. In that application, BAKWENA attached a letter

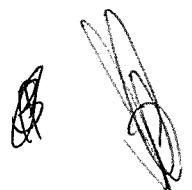
Two handwritten signatures in black ink, one to the left of the other, located at the bottom right of the page.

from SANRAL, in which SANRAL unequivocally stated that it did not receive the BRICS Loan.<sup>4</sup>

37. BAKWENA invited OUTA to withdraw its Application, in the light of such information, which OUTA elected not to do but instead proceeded with an interlocutory Application to set aside BAKWENA's *In Limine* Application. Despite being successful with the interlocutory application, the concession now belatedly made by OUTA brings the entire merits of its Application into question, particularly given that BAKWENA would not have intervened in the proceedings but for the relief sought in prayer 3 of its notice of motion, which OUTA has persisted with until recently. However, OUTA has never sought to amend the relief by deleting prayer 3. As matters stand prayer 3 remains part of the relief as contained in the notice of motion.
38. Prayer 4 is flawed and contrary to the provisions of PAIA, and was only introduced through an amendment in April 2021 as an alternative to prayer 3. At that stage OUTA could have easily amended its notice of motion to delete prayer 3 but instead persisted with the relief. It did so despite the media reports that the BRICS Loan had not been granted.
39. It is now however convenient for OUTA to change its approach belatedly as to what formed its cause of action, when OUTA's founding affidavit is clear that it is relying on the BRICS Loan that is as the cause of action, for the purpose of securing access to the concessionaire's information.

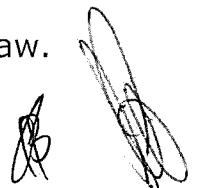
---

<sup>4</sup> Letter can be located on CaseLines, page referencing 019-77.



**PRE-LITIGATION DISCOVERY**

40. OUTA alleges that it has a right to access to records held by a public body by virtue of section 32 of the Constitution and section 11 of PAIA.
41. I am advised that section 7 of PAIA sets out the restrictions to the application of PAIA and provides that PAIA does not apply to records, irrespective of whether it is a record from a public or private body where the production of or access to that record for the purpose of legal proceedings is already provided for in any other law. Accordingly, obtaining access to relevant documents by way of PAIA amounts to pre-litigation discovery. I am further advised that PAIA was never meant to be invoked as a replacement of the discovery procedure.
42. Having considered the provisions of section 7 of PAIA, OUTA's pursuit of the documents appears to be no more than a pre-litigation discovery as OUTA unequivocally stated in its founding affidavit and more plainly in its replying affidavit that it ultimately intends on instituting the relevant proceedings after having obtained the requested documents.
43. OUTA states that:
- 43.1 It will only be in a position to conduct an analysis upon production of the record referred to in the Request;
- 43.2 Should OUTA determine that SANRAL acted unlawfully in the implementation of the concession contract with BAKWENA and/or failed to act in accordance with the provisions of the PFMA, it intends instituting the relevant proceedings in a court of law.



- 43.3 SANRAL is a public company subject to the provisions of the PFMA and non-compliance may potentially amount to financial misconduct as contemplated in section 81 of the PFMA.
44. The approach by OUTA can be summed up as nothing more than a fishing expedition. As a matter of law, our courts do not tolerate fishing expeditions and pre-litigation discovery. OUTA alleges that it needs this information to uncover some form of impropriety, irrationality, or other infringement. However, it has not set out any exceptional circumstances that would justify the grant of such relief. In any event, pre-litigation discovery is not permissible under PAIA.
45. Further legal argument will be advanced in relation to this point at the hearing of this matter.

#### **OBTAINING THE DOCUMENTS OF A PRIVATE BODY THROUGH A PUBLIC BODY**

46. OUTA makes a number of abrasive statements regarding BAKWENA's position on disclosure of its information, and accuses it of flouting the principles of openness and transparency. BAKWENA has done no such thing. In fact, BAKWENA has in accordance with the provision of PAIA set out a basis for why the information requested cannot be disclosed.
47. Furthermore, I deny the implication flowing from this allegation, namely, that private entities which conduct business with state-owned entities are completely deprived of their right to privacy simply because they are doing business with state-owned entities, which, I have been advised, is



not correct, otherwise why would there be a justification for mandatory grounds of refusal of information.

48. BAKWENA's concern has always been the avenue that OUTA has taken in order to indirectly obtain documents belonging to a private entity from a public entity, especially after OUTA's attempt to obtain similar documents from BAKWENA.<sup>5</sup>
49. OUTA has misinterpreted BAKWENA's allegation in paragraphs 112 to 122. In claiming that the documents sought by OUTA belong to BAKWENA, BAKWENA sought to draw attention to the commercial and financial information, as well as the trade secrets of BAKWENA linked to the concession contract that can appropriately be considered to be the proprietary information of BAKWENA.
50. Furthermore, I have been advised that, as mentioned above, this information enjoys protection from disclosure in terms of PAIA.
51. In fact from OUTA's responses in reply it is evident that it lacks the understanding of the workings and structure of a PPP and the purpose of and importance of the funding infrastructure development (which is for the benefit of the public) yet it seeks, without any authority or legal basis, to undertake a process of auditing BAKWENA's financial records.

---

<sup>5</sup> Paragraph 11 – 14 of BAKWENA's answering affidavit, CaseLines page 039-9 to 039-11.

Handwritten signature and initials in the bottom right corner of the page.

**ALLEGED SECRECY SURROUNDING BAKWENA'S PROFITS**

52. OUTA alleges that if there is a cap on BAKWENA's profits in terms of the Highway Usage Fee, *"there should be no reason for BAKWENA's profits to be clouded in secrecy."* I have been advised that in terms of section 68(1) of PAIA, the financial or commercial information of a private body is protected from disclosure if its release would cause harm to the commercial or financial interests of a private body, or if its disclosure would disadvantage that private body in contractual or other negotiations or prejudice that body in commercial competition.
53. This protection of the commercial or financial information of private bodies' commercial or financial information is further entrenched in section 36(1) of PAIA, which requires a public body's information officer to refuse access to financial or commercial information of a third party if its release would cause harm to the commercial or financial interests of that third party, or if its disclosure would disadvantage that third party in contractual or other negotiations or prejudice it in commercial competition.
54. There are therefore sufficient reasons for BAKWENA's profits to be appropriately covered by mandatory grounds of refusal and not secrecy as is inappropriately described by OUTA. BAKWENA has commercial and financial interests that need to be safeguarded, and disclosure of its profits may jeopardise such interests. Therefore, OUTA's assertion that

Handwritten signature and scribble in the bottom right corner of the page.

there is no reason for such information to be "clouded in secrecy" is entirely baseless.


55. OUTA further states that it is "simply concerned that the public who use the toll roads may pay excessive fees to private contractors operating the toll roads on behalf of SANRAL, which allow for disproportionate profits at the expense of the road-using public." Contrary to OUTA's allegation that BAKWENA may be making disproportionate profits at the expense of the road-using public, BAKWENA, as a concessionaire, has expended colossal amounts in the construction, maintenance and operation of toll roads, and it has, in partnership with SANRAL, done so for the benefit of the road-using public.
56. OUTA states at the tail end of paragraph 184 that: "*Without the road and the toll- paying public, BAKWENA would have no business*". Once again this illustrates OUTA's lack of appreciation of how a PPP works in respect of infrastructure development. If it were not for private investment coming to the aid of public entities, there would be no road. Without the road there will be a lack of sustainable economic growth. To ensure economic growth, there needs to be adequate infrastructure, in particular road infrastructure. Roads play a crucial role in contributing to economic development as well as growth – which results in - improving employment, health care, society, and the education system. Consequently, the ecosystem regarding development, maintenance and sustainability of roads is not only about profits but the benefits that flow to the public.



57. Throughout the duration of the contract and to date, BAKWENA has ensured that the maintenance, including the collection of the tolls, maintenance of roadside furniture and repair of potholes, periodic rehabilitation and upgrading of the road, line painting, grass cutting, vegetation management and maintenance of the drainage system and collection of refuse along the Bakwena routes is done diligently ensuring that the N1N4 toll road is kept in good order.
58. Furthermore, I have been advised that our courts have held that there are no provisions in our law which prohibit a private body which contracts with the State from making a profit. If this were so, no private body would be prepared to render any services to the State. Notwithstanding, as stated in paragraph 110 of BAKWENA's answering affidavit, the profit that BAKWENA generates is capped in terms of the Highway Usage Fee.
59. Additionally, as stated in paragraph 43 of BAKWENA's answering affidavit, the operating risk and losses related to toll roads are borne by the concessionaire. Thus, the profits made by BAKWENA are not disproportionate, as alleged by OUTA, but are reasonable and proportionate in view of the enormous risk it shoulders in respect of the operation of toll roads.

**"TRANSPARENCY IS THE COST OF DOING BUSINESS WITH STATE-OWNED ENTITIES"**

60. OUTA has misconstrued certain paragraphs of BAKWENA's answering affidavit relating to the confidentiality of BAKWENA's documents. The

Handwritten signature and initials in the bottom right corner of the page.

clear point that BAKWENA sought to make is that disclosure of the type of information being requested by OUTA may promote anti-competitive behaviour and collusion in this market. In fact, it illustrates OUTA's complete lack of understanding of commercial sensitivity and the protection afforded under the mandatory grounds of refusal.

61. OUTA responds by alleging that transparency "*is the cost of doing business with state-owned entities in South Africa.*" While this may be correct for the state-owned entities who are regulated in such regard, it is essential that attracting and retaining beneficial private partnerships such as concession contracts in respect of toll roads requires that the commercial, financial, and other proprietary information of private entities be safeguarded. Companies must be assured that in entering into partnerships with state-owned entities, their financial, commercial, scientific, or technical information will be adequately protected, which ensures that their competitive advantage is secured in relation to future projects.

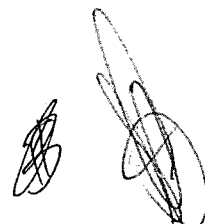
62. I am advised that such information, as I have stated above, enjoys protection in terms of section 68(1) of PAIA.

**"OUTA AND SANRAL ARE *AD IDEM* THAT THE IMPUGNED DECISION BE REVIEWED AND SET ASIDE"**

63. I deny that "OUTA and SANRAL are *ad idem* that the impugned decision ought to be reviewed and set aside"<sup>6</sup>. In fact, SANRAL, in paragraph 5 of

---

<sup>6</sup> Paragraph 24 and 245 of the replying affidavit, CaseLines page 040-10 and 040-66.

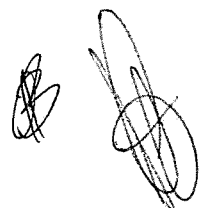
Handwritten signature and initials in the bottom right corner of the page.

its answering affidavit, describes the relief sought by OUTA as “*flawed*” and sets out the reasons why. Furthermore, in paragraph 6 of its answering affidavit, SANRAL states that “*the only competent relief in the circumstances, is for OUTA’s request for access to information to be remitted back to SANRAL for proper consideration and decision*”. This is simply SANRAL’s submission, and cannot bind BAKWENA.

64. Additionally, with reference to paragraph 48 of SANRAL’s answering affidavit, it is clear that what SANRAL contemplates in its answering affidavit is merely that in the event that a court sets aside SANRAL’s decision, the court ought to remit the matter to SANRAL for proper consideration.

## **CONCLUSION**

65. It was only once the deficiencies in OUTA’s case, and the distinct paucity of actual evidential material, was raised in BAKWENA’s answering affidavit, that OUTA attempted to remedy its defective case by amending its case in reply and grasping at a submission made in SANRAL’s answering affidavit.
66. In light of the abovementioned facts, I therefore respectfully submit that OUTA’s Application lacks the required substance necessary for the relief sought as there is no basis therefore which would entitle it the information requested.
67. OUTA’s entire Application and conduct constitutes an abuse of process as regards:



- 67.1 the formulation of the relief which is clearly not competent,
- 67.2 the lack of a cause of action;
- 67.3 the lack of factual and evidentiary averments to sustain its entitlement to the requested documents; and
- 67.4 its persistence to proceed given the deficiency of its Application.

68. Wherefore I pray that OUTA's Application be dismissed with costs ordered on a punitive scale.



**SIMON EVERITT**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Pretoria on this the 27<sup>th</sup> day of May 2024, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

**CHIARA BHANA**  
 COMMISSIONER OF OATHS  
 EX OFFICIO PRACTICING ATTORNEY  
 SUITE 1, GROUND FLOOR,  
 SOUTHDOWNS RIDGE OFFICE PARK  
 CNR NELLMAPIUS AND JOHN FOSTER AVE  
 IRENE EXT 54, 0157



**COMMISSIONER OF OATHS**

#5535967v1



ATTORNEYS, NOTARIES, CONVEYANCERS & COST CONSULTANTS

OUR REFERENCE: A JENNINGS/MCL121  
YOUR REFERENCE: LETTER OF DEMAND  
DATE: 17 September 2023

---

TO: FASKEN (INCORPORATED AS BELL DEWAR INC.)  
BY EMAIL: [Hsiao@fasken.com](mailto:Hsiao@fasken.com)  
[rbhoora@fasken.com](mailto:rbhoora@fasken.com)  
[Jrajpal@fasken.com](mailto:Jrajpal@fasken.com)

REF: Rakhee Bhoora / Jessica Rajpal / Roy Hsiao / 151486.00004

COPIED: WERKSMANS ATTORNEYS  
BY EMAIL: [SMoerane@werksmans.com](mailto:SMoerane@werksmans.com)  
[Smagadlela@werksmans.com](mailto:Smagadlela@werksmans.com)

REF: Ms S Moerone / Ms S Magadlela / SOUT3114.192 / #7889403v1

Sirs,

ORGANISATION UNDOING TAX ABUSE // SANRAL & OTHERS - CASE NO: 7955/2021



1. As you are aware, we act on behalf of the Organisation Undoing Tax Abuse NPC ("OUTA") in the above matter where both SANRAL and Bokweno Platinum Corridor Concessionaire (Pty) Ltd ("Bokweno") have opposed the PAIA review application brought by our client.
2. We address this letter to you following the filing of all the affidavits in the application. This letter is by no means intended to litigate the matter but is addressed to the parties in a *bona fide* attempt to curb costs prior to the filing of heads of argument and the setting down of the matter for hearing.
3. From the affidavits filed it is clear that SANRAL does not dispute OUTA's contention that the request for access to information brought in terms of PAIA was never considered by SANRAL in accordance with the provisions of PAIA.



4. OUTA and SANRAL are *ad idem* that the decision should be reviewed and set aside. From the papers it is also evident that the relief requested by OUTA in prayer 4 of its notice of motion entails that the matter be remitted back to SANRAL to duly inform interested third parties of the decision and comply with the provisions of Chapter 5 of PAIA (consisting of sections 47 – 49).
5. OUTA has indicated in its replying affidavit that it will not persist with prayer 3 of the notice of motion, given the concessions made by SANRAL in its answering affidavit.
6. We therefore hold the view that there is no real *bona fide* dispute on whether the impugned decision by SANRAL should be reviewed and set aside.
7. In the premises we propose that prior to further costs being incurred, the parties agree for SANRAL's impugned decision to be reviewed and set aside and that SANRAL be provided an opportunity to comply with the provisions of Chapter 5 of PAIA.
8. Furthermore, given the concession made by SANRAL that it did not comply with the provisions of PAIA, our client is of the view that such an agreement should include a provision for SANRAL to pay the costs of the application up until the date of the agreement. At this stage such costs do not yet include the costs of drafting heads of argument, preparation and attendance at the hearing.
9. We look forward to your response in this regard at your earliest convenience.

TRANSMITTED ELECTRONICALLY AND UNSIGNED

Kind regards,  
Andri Jennings  
Director



FASKEN

Bell Dewar Incorporated  
Attorneys, Notaries and Conveyancers

fasken.com

B-BBEE Level 2 | ISO 9001:2015

PHYSICAL Inanda Greens  
54 Wierda Road West  
Sandton  
2196  
South Africa

POSTAL PO Box 552057  
Benmore, 2010  
South Africa

T +27 11 586 6000  
F +27 11 586 6104

"RRA2"

By E-mail

**Rakhee Bhoora**  
Phone: +27 11 586 6076  
Fax: +27 11 586 6076  
[rbhoora@fasken.com](mailto:rbhoora@fasken.com)

To: Andri Jennings  
**Jennings Incorporated**

E-mail: [andri@jinc.co.za](mailto:andri@jinc.co.za) / [irene@jinc.co.za](mailto:irene@jinc.co.za) / [delia@jinc.co.za](mailto:delia@jinc.co.za)

And To: Sarah Moerane  
**Werksmans**

E-mail: [SMoerane@werksmans.com](mailto:SMoerane@werksmans.com) / [fsikhavhakhavha@werksmans.com](mailto:fsikhavhakhavha@werksmans.com) / [kradoo@werksmans.com](mailto:kradoo@werksmans.com)

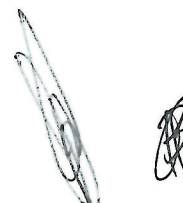
From: Rakhee Bhoora / Jessica Rajpal/ Barr-Mary Tyzack/151486.00004

Date: 3 October 2023

Subject: **Organisation Undoing Tax Abuse NPC / South African National Road Agency Limited and Others - Case No. 7955/2021**

Dear Madam

1. We refer to the above matter and your recent correspondence dated 17 September 2023 addressed to Fasken with Werksmans Attorneys copied in (your "**letter**").
2. We note that in terms of your letter, you raise the following contentions:
  - 2.1 OUTA and SANRAL are "*ad idem*" that the "*decision*" be reviewed and set aside (paragraph 4);
  - 2.2 The relief sought by OUTA in prayer 4 of its notice of motion entails that the matter be remitted back to SANRAL to "*inform interested parties of the decision*"



*and comply with the provisions of Chapter 5 of the Promotion of Access to Information Act 2000 (“PAIA”)* (paragraph 4);

- 2.3 OUTA will not persist with prayer 3 of its notice of motion (directing SANRAL to provide the requested records to OUTA within 15 [fifteen] days of the granting of the order) (paragraph 5); and
- 2.4 There is no real *bona fide* dispute on whether the decision by SANRAL should be reviewed and set aside (paragraph 6).
3. You then proceed to propose that:
  - 3.1 prior to further costs being incurred, the parties should agree that the “*decision be reviewed and set aside*” and that SANRAL be provided an opportunity to comply with the provisions of Section 5 of PAIA (paragraph 7); and
  - 3.2 SANRAL should pay the costs of the application (paragraph 8).
4. We have been instructed to respond to your letter as set out hereunder. We do not intend to deal with each and every statement or contention contended for in your letter at this stage and reserve BAKWENA’s rights to respond in more detail at the appropriate time and in the appropriate forum should that need arise.
5. In view of OUTA’s conduct in this matter, which is in our view unacceptable, as is evidenced by the contents of this response, we are instructed to inform you that the proposals set in your letter are not acceptable to BAKWENA.
6. It appears that OUTA is improperly and entirely opportunistically seeking to avoid dealing with the absolute defences raised by BAKWENA in response to OUTA’s application in terms of section 78(2)(c) read with section 82 of PAIA (the “**PAIA Application**”).

Handwritten signature and initials in the bottom right corner of the page.

**The First Contention: SANRAL and OUTA are *ad idem***

7. It appears from a reading of SANRAL'S Answering Affidavit that SANRAL is certainly not consenting to a review and setting aside of the decision , as suggested by OUTA.
8. In fact, in paragraph 6.2 of the Answering Affidavit it is recorded that the relief sought by OUTA in paragraphs 3 and 4 of the Notice of Motion "*is unsubstantiated and must be dismissed ...*".
9. In paragraph 5 of the Answering Affidavit it is recorded that the relief sought by OUTA "*is flawed...*"
10. What appears to be contemplated by SANRAL, is that in the event that a Court reviews and sets aside its decision it should refer the Request back to SANRAL for consideration and a decision.
11. In paragraph 6 of SANRAL's Answering Affidavit it is recorded that "*...the only competent relief ... is for OUTA's request ... to be remitted back to SANRAL...*"
12. SANRAL is certainly not in agreement with OUTA that SANRAL's deemed refusal, if it is indeed a deemed refusal, should be reviewed and set aside.
13. OUTA's Application appears to seek enforcement in terms of the provisions of PAIA.

**The Second Contention: Relief sought entails a remittance**

14. The second contention raise by OUTA is that "*from the papers it is also evident ...*" that the relief sought in paragraph 4 of the Notice of Motion "*...entails that the matter be remitted to SANRAL*".
15. Paragraph 4 of the Notice of Motion is relief sought alternative to the relief sought in paragraph 3 of the Notice of Motion.

16. It is clear from paragraph 3 of the Notice of Motion (and the Founding Affidavit filed in support thereof) that the primary relief sought by OUTA is to obtain an order directing SANRAL to furnish OUTA with a copy of all the records as requested in the Request for Access to Information dated 8 June 2020 (“**Request for Access to Information**”).
17. Paragraph 4 of the Notice of Motion could never be inferred or interpreted as being a request for a remittal of the Request to SANRAL. Such contention is simply opportunistic and implausible. Paragraph 4 simply contemplates SANRAL being ordered to notify third parties of the Request.
18. There is no reference in OUTA’s Founding Affidavit to a remittal of the Request to SANRAL.
19. In addition, OUTA seeks an order directing SANRAL to comply with the provisions of Chapter 5 of PAIA. As you are no doubt aware, Chapter 5 of PAIA does not make reference to any form of remittance of the matter for reconsideration but instead sets out the process to be followed in relation to third party notification and intervention.
20. In the circumstances, there is no merit in the second contention raised by OUTA.

**Third Contention: Prayer 3 of the Notice of Motion**

21. OUTA contends that it will not persist with the relief sought in paragraph 3 of the Notice of Motion “...*given the concessions made by SANRAL ...*”.
22. SANRAL made no concessions in its Answering Affidavit in respect of the demand for the production of the documents requested by OUTA.
23. It is however not surprising that OUTA now seeks to avoid having the merits of the main relief sought by OUTA determined.

24. This is presumably as OUTA has realized that its purported cause of action, and the basis for the cause of action, being the BRICS Loan never existed and is flawed in law.
25. OUTA now belatedly states that the allegations made in respect of SANRAL receiving the BRICS loan was made on the basis of a *bona fide* but mistaken belief<sup>1</sup>.
26. OUTA was aware that the BRICS loan was not granted at best for it, in July 2022 when BAKWENA launched its *In Limine* Application. In that application, BAKWENA attached a letter from SANRAL, in which SANRAL unequivocally stated that it did not receive the BRICS loan<sup>2</sup>.
27. BAKWENA invited OUTA to withdraw its PAIA Application, in the light of such information, which OUTA elected not to do.
28. Instead OUTA proceeded with an interlocutory application to set aside BAKWENA's *In Limine* Application. Despite being successful with the interlocutory application, the concession now belatedly made by OUTA brings the entire merits of its PAIA Application into question, particularly given that BAKWENA would not have intervened in the proceedings but for the relief sought in paragraph 3, which OUTA has persisted with until now.
29. Substantial time and costs have been incurred and unnecessarily wasted in respect of OUTA's PAIA Application, which OUTA should have known at the time of launching, was without merit.
30. It is noted that OUTA is not withdrawing its PAIA Application or the relief sought in paragraph 3 of the Notice of Motion, but simply attempts to have such relief "disappear" by way of an agreed Order.

---

<sup>1</sup> Paragraph 133 and 137 at pages 35 and 26 of OUTA's replying affidavit

<sup>2</sup> Paragraphs 66 -69 at page 019-25 and SE10 at page 019 -77 of BAKWENA's *In Limine* application

31. BAKWENA has no intention of agreeing to the proposal contained in your letter, having regard to the substantial costs incurred by BAKWENA in resisting the main relief sought in paragraph 3 of your Notice of Motion.

**The Fourth Contention: No *bona fide* dispute**

32. OUTA contends that there is no “*real bona fide dispute on whether the impugned decision...should be reviewed and set aside*”.
33. At the outset it is clear that there is a dispute as to whether or not SANRAL made a “decision”. OUTA contends that no decision was made, therefore resulting in a “*deemed refusal*”, but now, in complete contradiction, suggests that a decision was made.
34. The contention that the “decision” be reviewed and set aside is inappropriate, as there was no “decision” by SANRAL that can be construed as being a “decision” susceptible to review under the Promotion of Administrative Justice Act (“PAJA”). OUTA cannot therefore seek to “review” and set aside any “decision”, because on its own version no such “decision” exists.

***Conclusion***

35. Having regard to what is set out above, BAKWENA rejects with the proposal contained in the letter and is of the view that OUTA has no grounds to seek a remittal of the matter back to SANRAL.
36. It appears that OUTA seeks to have the entire process commenced afresh, in circumstances where it is clear that it has no cause of action. OUTA will presumably in any new application seek to raise a new and different cause of action. This would implicitly constitute a fishing expedition.
37. We accordingly invite OUTA to formally withdraw the PAIA Application and tender BAKWENA’s costs on an attorney and client scale including the costs incurred by

Bakwena in relation to the *In Limine* Application, and the costs associated with the interlocutory application, which would naturally include OUTA abandoning the costs order obtained in respect thereof.

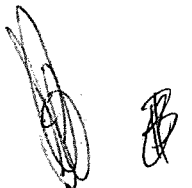
38. The suggestion that SANRAL should carry the costs of the Application is entirely baseless. We do however note that your letter is silent on the costs of BAKWENA.
39. Should OUTA elect not to withdraw the PAIA Application and tender BAKWENA's costs in respect thereto, as set out above, we are instructed to demand, that OUTA files its heads of argument on or before 9 October 2023, failing which, we will take the necessary steps to set the matter down for hearing.
40. All BAKWENA's rights remain reserved.

Yours faithfully

DocuSigned by:  
**Rakhee Bhoora**  
84D6CA94D7134BF..

**Fasken**

#5288844 v1

Handwritten signature and initials in the bottom right corner of the page.



OUR REFERENCE: A JENNINGS/OUT006  
YOUR REFERENCE: AS PER BELOW  
DATE: 06 October 2023

---

TO: FASKEN (INCORPORATED AS BELL DEWAR INC.)  
BY EMAIL: [Hsiao@fasken.com](mailto:Hsiao@fasken.com)  
[rbhoora@fasken.com](mailto:rbhoora@fasken.com)  
[Jrajpal@fasken.com](mailto:Jrajpal@fasken.com)

REF: Rakhee Bhoora / Jessica Rajpal / Roy Hsiao / 151486.00004

COPIED: WERKSMANS ATTORNEYS  
BY EMAIL: [SMoerane@werksmans.com](mailto:SMoerane@werksmans.com)  
[Smagadlela@werksmans.com](mailto:Smagadlela@werksmans.com)

REF: Ms S Moerane / Ms S Magadlela / SOUT3114.192 / #7889403v1

Sirs,

ORGANISATION UNDOING TAX ABUSE // SANRAL & OTHERS - CASE NO: 7955/2021

1. Your respective letters dated 3 October 2023 have reference.
2. Despite OUTA and SANRAL being in agreement that the matter should be reviewed and set aside and remitted back to SANRAL for proper consideration (with the issue of costs still in dispute), it is clear from Fosken's letter that Bokwena still intends to oppose the matter in its entirety and does not consent to the review and setting aside of SANRAL's decision.
3. The above leaves us with no choice but to instruct counsel to prepare heads of argument on the whole matter.
4. Although we disagree with the contentions advanced on behalf of Bokwena in Fosken's letter and those in relation to SANRAL's approach in opposing the matter and costs in Werskmon's letter, we believe



A handwritten signature in blue ink, appearing to be 'R' or 'B' followed by a flourish.

these are all matters for legal argument at the hearing. Therefore, save to deny the correctness of these contentions, we do not believe it prudent to engage in further correspondence in this regard.

5. We further hold the view that it is incumbent upon the parties to inform the court of the *consensus* reached between SANRAL and OUTA on the relief requested in prayers 1, 2 and 4 of the Notice of Motion and that SANRAL intends only to argue the issue of costs, whilst the application remains opposed in its entirety by Bakwena.
6. Accordingly, writer will upload OUTA's letter of 17 September 2023 together with Bakwena's and SANRAL's responses onto Caselines in order for it to form part of the court bundle so that it can be referred to by the parties where necessary.
7. All our client's rights remain reserved.

TRANSMITTED ELECTRONICALLY AND UNSIGNED

Kind regards,  
Andri Jennings  
Director



**FASKEN**  
Own tomorrow

Bell Dewar Incorporated  
Attorneys, Notaries and Conveyancers

fasken.com

B-BBEE Level 2 | ISO 9001:2015 | ISO 27001:2013

PHYSICAL Inanda Greens  
54 Wierda Road West  
Sandton  
2196  
South Africa

POSTAL PO Box 652057  
Benmore, 2010  
South Africa

T +27 11 586 6000  
F +27 11 586 6104

**"RRA4"**

**By E-mail**

**Rakhee Bhoora**  
Phone: +27 11 586 6076  
Fax: +27 11 586 6076  
[rbhoora@fasken.com](mailto:rbhoora@fasken.com)

To: Andri Jennings  
**Jennings Incorporated**

E-mail: [andri@jinc.co.za](mailto:andri@jinc.co.za) / [irene@jinc.co.za](mailto:irene@jinc.co.za) / [delia@jinc.co.za](mailto:delia@jinc.co.za)

And To: Sarah Moerane  
Werksmans

Email: [SMoerane@werksmans.com](mailto:SMoerane@werksmans.com) / [fsikhavhakhavha@werksmans.com](mailto:fsikhavhakhavha@werksmans.com)  
/ [kradoo@werksmans.com](mailto:kradoo@werksmans.com)

From: Rakhee Bhoora/Jessica Rajpal/Barr-Mary Tyzack/151486.00004

Date: 16 October 2023

Subject: **Organisation Undoing Tax Abuse NPC / South African National Road Agency Limited and Others - Case No. 7955/2021**

Dear Madam

1. We refer to our letter dated 3 October 2023 ("**our letter**"), in which we invited your client to:
  - 1.1 formally withdraw its application in terms of section 78(2)(c) read with section 82 of PAIA (the "**PAIA Application**"); and
  - 1.2 tender BAKWENA's costs on an attorney and client scale, including the costs incurred by Bakwena in relation to the *In Limine* Application and the costs



associated with the interlocutory application, which would naturally include OUTA abandoning the costs order obtained in respect thereof.

2. On 6 October 2023, in response to our letter your client, *inter alia*, denied the factual and legal submissions advanced in our letter.
3. Our client understands your letter to be a rejection of its invitation to OUTA to withdraw the PAIA Application and a refusal to tender BAKWENA's costs, as is evidenced by the filing of your client's heads of argument.
4. We record and will bring to the attention of the court the fact that despite OUTA's PAIA Application lacking merit from the outset and that the relief it sought therein not being competent, and in fact, being fundamentally mischaracterized (factors which OUTA is fully alive to), it has sought to proceed unremittingly with the matter. Because of that, OUTA has triggered costs for BAKWENA which would otherwise have not been incurred, which justifies a punitive costs order against OUTA.
5. We note that despite the opportunity afforded to your client, your client has elected to proceed with the application and file heads of argument, and our client has no choice but to continue to incur legal costs, and we will accordingly file our client's heads of argument in due course.
6. All BAKWENA's rights remain reserved.

Yours faithfully

DocuSigned by:  
PP *Barr-Mary Tyzack*  
Fasken OC85794EAE5F422...

5304674v1