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 CORRIDOR CONCESSIONAIRE (PTY) LTD	Fourth Respondent

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FILING SHEET: FOURTH RESPONDENT'S HEADS OF ARGUMENT – MAIN APPLICATION

PRESENTED HEREWITH FOR FILING:

FOURTH RESPONDENT'S HEADS OF ARGUMENT IN THE MAIN APPLICATION

Signed at Johannesburg on 10th June 2024

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5550466 v1

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

Case No.: 7955/2021

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ORGANISATION UNDOING TAX ABUSE NPC	Applicant
and	
SOUTH AFRICAN NATIONAL ROAD AGENCY SOC LIMITED	First Respondent
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SKHUMBUZO MACOZOMA N.O.	Third Respondent
BAKWENA PLATINUM CORRIDOR CONCESSIONAIRE (PTY) LTD	Fourth Respondent

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FOURTH RESPONDENT'S HEADS OF ARGUMENT- MAIN APPLICATION

INTRODUCTION

1. These heads of argument are filed on behalf of the fourth respondent ("BAKWENA") in the main application.

2. The applicant ("OUTA") essentially seeks access to certain information and documents in terms of section 78(2)(c) read together with section 82 of the

Promotion of Access to Information Act 2 of 2000 ("PAIA"), where the relief sought against the first respondent ("SANRAL") is as follows[1]:

2.1. That OUTA's non-compliance with the 180-day period referred to in section 78(2)(c) of PAIA is condoned;

2.2. Setting aside the deemed refusal of OUTA's request for access to the records of SANRAL in its request for information in terms of PAIA and 8th June 2020 ("the request");

2.3. Directing SANRAL to provide the requested records to OUTA within 15 (fifteen) days of the granting of this order;

2.4. *Alternatively* to prayer 3, directing SANRAL 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; and

2.5. Directing SANRAL to pay the costs of this Application;

2.6. Further and/or alternative relief.

[1] Notice of Motion, Caselines, pp 004-1 – 004-2

3. Firstly, in these heads of argument, for ease of reference, the applicant shall be referred to as OUTA, the first respondent shall be referred to as SANRAL and the fourth respondent shall be referred to as BAKWENA.

4. In these heads of argument, we will firstly deal with the relevant background facts which will lend context to BAKWENA's position and the interest it holds in protecting the information sought by OUTA. We will then deal with the point *in limine* as raised in the answering papers as to why the application is defective and flawed as a result of OUTA's application demonstrating no cause of action, the abuse of process adopted by OUTA and the lack of authority of OUTA in this application. We will then make submissions regarding the relevant and salient features of the applicable legislative framework pertaining to BAKWENA's mandatory right to refuse the information sought by OUTA. Finally, we will make submissions on costs and then concluding remarks and submissions.

RELEVANT BACKGROUND FACTS

5. On 21 November 2016, OUTA addressed a letter to BAKWENA in which it requested access, purportedly in terms of section 53(1) of PAIA to certain information from BAKWENA pertaining to the Concession Contract concluded between SANRAL and BAKWENA. OUTA's request for access to information also included a request for information relating to the commercial affairs of BAKWENA, including financial, governance and business information.[2]

6. OUTA sought information relating to, *inter alia*[3]:

[2] Fourth Respondent's Answering Affidavit, para 11, Caselines page 039-9; Annexure "AA1", Caselines pages 0039-71 – 0039-79
[3] Fourth Respondent's Answering Affidavit, para 12, Caselines pp 039-9 – 039-11

6.1. Statements and/or documentation reflecting BAKWENA's maintenance costs, from 2000 to date;

6.2. Statements and/or documentation reflecting tariff increases and decreases per vehicle category from 2000 to date;

6.3. Statements and/or documentation reflecting annual revenue received by BAKWENA from 2000 to date;

6.4. Statements and/or documentation reflecting expenditure incurred by BAKWENA relating to projects from 2000 to date;

6.5. Statements and/or documentation reflecting changes in BAKWENA's shareholders from 2000 to date;

6.6. Statements and/or documentation reflecting projects related to SANRAL;

6.7. Statements and/or documentation reflecting annual turnover for each managed toll plaza from 2000 to date;

6.8. Statements and/or documentation reflecting annual payments made to SANRAL from 2000 to date;

6.9. BAKWENA's Annual Reports from 2000 to date;

6.10. All agreements between BAKWENA and SANRAL;

6.11. Statements and/or documentation reflecting detailed traffic volume (numerical breakdown) for each managed toll plaza from 2000 to date;

6.12. Construction Progress Reports;

6.13. Initial Construction Works Records from 2000 to date;

6.14. Upgrade, repair and replacement records from 2000 to date;

6.15. Maps and diagrams;

6.16. Asset records from 2000 to date;

6.17. Tender submission Files from 2000 to date;

6.18. All technical drawings from 2000 to date;

6.19. Q & A Files from 2000 to date;

6.20. Credit Rating Reports from 2000 to date; and

6.21. All financial closure correspondence from 2000 to date.

7. On 21 December 2016, BAKWENA sent a letter to OUTA in which it responded to OUTA's letter of 21 November 2016. In its response BAKWENA invited OUTA to, *inter alia*, specifically identify the right it sought to exercise and protect. OUTA was further requested to identify the right, in respect of each of the listed items of information that were requested, and how the information would assist with the exercise and protection of such a right.[4]

8. It is evident that OUTA realised that there was no legal basis or entitlement to seek the information from BAKWENA, as it did not respond to BAKWENA's letter. OUTA also failed to pursue its request for access to information from BAKWENA in any manner.[5]

9. However, on 8 June 2020, (about three and a half years later), OUTA addressed a letter to SANRAL, by way of an e-mail, with a formal request for access to information, purportedly in terms of section 53(1) of PAIA.[6]

10. On 22 July 2020, OUTA addressed an email informing SANRAL that as no response was forthcoming, the 30 day period as prescribed for a response having lapsed and the absence of response could be considered as a deemed refusal. In the same email OUTA informs SANRAL that as a courtesy it will extend the period to receive the reply until 29 July 2020.[7]

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[4] Fourth Respondent's Answering Affidavit, para 13, Caselines page 039-11; Annexure "AA2", Caselines pages 039-80 – 039-81
[5] Fourth Respondent's Answering Affidavit, para 14, Caselines page 039-11
[6] Fourth Respondent's Answering Affidavit, para 15, Caselines page 039-11; Annexure "SF3", "SF4" and "SF5", Applicant's Founding Affidavit, Caselines pages 005-23 – 005-32
[7] Fourth Respondent's Answering Affidavit, para 16, Caselines pages 039-11 – 039-12

11. On 30 July 2020, SANRAL responded to the request from OUTA, pointing out that the information sought related to BAKWENA, and referred OUTA to BAKWENA's request that it identify the right that OUTA seeks to exercise and protect, as set out in annexure "AA2". Given that OUTA had not responded its request could not be considered further.[8]

12. On 22 February 2021, OUTA issued this Application against the First to Third Respondents for access to information belonging to or relating directly to BAKWENA, without citing BAKWENA as a party to the Application. In view of the facts set out above, it is rather strange that OUTA elected to exclude BAKWENA from the Application.[9]

13. At the time of instituting the Application, OUTA also failed to take the Honourable Court into its confidence by disclosing the fact that prior to making the request to SANRAL on 8 June 2021, OUTA had previously made a similar request to BAKWENA on 21 November 2016, which OUTA abandoned when it was requested to identify the right it sought to exercise and protect and asked to indicate how such information would assist in the exercise and protection of such a right.[10]

14. OUTA appears to have purposefully sought to exclude BAKWENA from this Application, and continued to proceed with the relief sought without joining BAKWENA, in respect of the disclosure of information which belonged to

[8] Fourth Respondent's Answering Affidavit, para 17, Caselines page 039-12; Annexure "AA3", Caselinespages 039-82 – 039-84
[9] Fourth Respondent's Answering Affidavit, para 18, Caselines page 039-12
[10] Fourth Respondent's Answering Affidavit, para 19, Caselines page 039-12

BAKWENA, whilst OUTA ought to have been fully aware that BAKWENA should have been a party to this Application.[11]

15. As a consequence, on or about 25 June 2021, BAKWENA instituted an Application to Intervene which was subsequently heard by the Honourable Madam Justice Potterill on 26 May 2022, following which BAKWENA was granted leave to intervene in this Application.[12]

16. Having been joined as a Fourth Respondent to the Application, BAKWENA delivered its Notice of Intention to Oppose on or about 6 June 2022.[13]

17. Subsequently, on or about 1 July 2022, BAKWENA delivered a Notice in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court and filed a founding affidavit in support thereof in terms of which BAKWENA raised a point of law to the effect that the Application discloses no cause action, alternatively discloses insufficient averments to sustain a cause of action that would justify the relief sought ("the *In Limine* Application").[14]

18. On or about 31 August 2022, OUTA delivered a notice in terms of Rule 30 and 30A of the Uniform Rules of Court for the setting aside of BAKWENA's *In Limine* Application on the basis that BAKWENA's filing of a separate self-standing application is irregular. The complaint raised by OUTA was of a procedural and

[11] Fourth Respondent's Answering Affidavit, para 20, Caselines pages 039-12 – 039-13
[12] Fourth Respondent's Answering Affidavit, para 21, Caselines page 039-13
[13] Fourth Respondent's Answering Affidavit, para 22, Caselines page 039-13
[14] Fourth Respondent's Answering Affidavit, para 23, Caselines page 039-13

technical nature, which avoided dealing with the merits of the *in limine* aspect raised by BAKWENA.[15]

19. OUTA subsequently instituted an application in terms of Rules 30 and 30A of the Uniform Rules of Court ("the Rule 30 Application") on 30 September 2022. The Rule 30 Application was heard on 26 April 2023 before Honourable Acting Justice De Beer AJ and judgment was handed down on 9 May 2023, in terms of which BAKWENA's *In Limin*e Application was set aside.[16]

20. In delivering the judgment in the Rule 30 Application, AJ De Beer did not engage with the merits of the *In Limine* Application but found that the point *in limine* should be dealt with as part of BAKWENA's answering affidavit. The issues raised in the *In Limine* Application accordingly stand to be dealt with herein and must be heard and determined by this Honourable Court.[17]

POINT *IN LIMINE* – NO CAUSE OF ACTION

21. BAKWENA's point *in limine* arises from the fundamental misconception upon which the Application is premised. This factual misconception or material inaccuracy (which OUTA should certainly be aware of at the time) leads to the inevitable consequence that no cause of action for the relief sought by OUTA has been established in the Application.[18]

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[15] Fourth Respondent's Answering Affidavit, para 24, Caselines page 039-13
[16] Fourth Respondent's Answering Affidavit, para 25, Caselines pages 039-13 – 039-14
[17] Fourth Respondent's Answering Affidavit, para 26, Caselines page 039-14
[18] Fourth Respondent's Answering Affidavit, para 28, Caselines page 039-14

22. In particular this relates to the BRICS National Development Bank Loan ("**BRICS Loan**"), which OUTA has raised as its "cause of action" in an attempt to justify the relief it seeks, in order to obtain access to BAKWENA's confidential documents.[19]

23. OUTA contends that it seeks to exercise its 'constitutional right in terms of section 32 of the Constitution' to "*establish whether the [BRICS Loan] is going towards the GFIP bonds (e-tolled roads) or other SANRAL's managed toll roads that are supposed to be self-funding*". To this end, OUTA premises its cause of action on the BRICS Loan having been granted and moreover, 'received' by SANRAL and partially allocated to BAKWENA.[20]

24. The Public Private Partnership which culminated in the conclusion of a concession contract and the BRICS Loan are poles apart and constitute two separate and distinct methods of funding. These methods of funding are exclusive to their respective purpose and can never be diluted and used other than for the purpose for which they have been earmarked. OUTA would be aware of such a distinction and restriction, and on its own version states that the Toll Roads are intended to be self-funding.[21]

25. In the absence of evidence, rather than a vague and unsubstantiated allegation no cause of action has been set out by OUTA.[22]

26. BAKWENA also addressed the following in turn in its point *in limine* argument:

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[19] Fourth Respondent's Answering Affidavit, para 29, Caselines pages 039-14 – 039-15
[20] Fourth Respondent's Answering Affidavit, para 30, Caselines page 039-15
[21] Fourth Respondent's Answering Affidavit, para 31, Caselines page 039-15
[22] Fourth Respondent's Answering Affidavit, para 33, Caselines page 039-15

26.1. Methods of Funding/Financing Government Infrastructure Projects;

26.2. The Basis upon which the relief is sought in the Application and the BRICS National Development Bank Loan; and

26.3. Abuse of Process.

Methods of Funding/Financing Government Infrastructure Projects

27. In order to further explain the basis for the legal point raised, it is necessary to briefly explain the methods of funding available to the Executive Authority or State-Owned Entities such as SANRAL.[23]

28. The explanation will cover two methods of funding and or financing, which are applicable and relevant to the Application and the Parties.[24]

29. The first method being a Private Public Partnership and the second method being the BRICS Loan.[25]

30. Public Private Partnerships are defined by National Treasury in National Treasury Regulation 16 as –

"*an agreement between an institution and a private party in terms of which:–*

(a) the private party undertakes to perform an institutional function on behalf of the institution for a specified or indefinite time;

[23] Fourth Respondent's Answering Affidavit, para 35, Caselines page 039-16
[24] Fourth Respondent's Answering Affidavit, para 36, Caselines page 039-16
[25] Fourth Respondent's Answering Affidavit, para 37, Caselines page 039-16

(b) the private party receives a benefit for performing the function, either by way of:

(i) compensation from a revenue fund;

(ii) charges or fees collected by the private party from users or customers of a service provided to them; or

(iii) a combination of such compensation and such charges or fees;

(c) the private party is generally liable for the risks arising from the performance of the function, subject to paragraph 16.13.1; and

(d) depending on the specifics of the agreement, state facilities, equipment or other state resources may be transferred or made available to the private party."[26]

31. The terms of a Public Private Partnership, and in particular the funding mechanisms differ from project to project and more so, industry. However, as published by National Treasury, "*PPPs are guaranteed by the Minister of Finance and create a contingent liability. Government incurs contingent liabilities only when a contract is terminated…. PPP agreements can also impose other fiscal obligations on government that are not defined as contingent liabilities. For example, where the private sector collects user charges from the public, government usually guarantees the minimum revenue…."*[27]

32. The applicable Public Private Partnership relating to BAKWENA culminated in the conclusion of a Concession Contract between SANRAL and BAKWENA in respect of the N1/N4 Toll Road. In this regard, it must be noted that the national road

[26] Fourth Respondent's Answering Affidavit, para 38, Caselines pages 039-16 – 039-17
[27] Fourth Respondent's Answering Affidavit, para 39, Caselines page 039-17

network, which SANRAL is responsible for in terms of the development, improvement, maintenance and management thereof, is divided into two categories, namely, non-toll roads and toll roads. It is well known and published by SANRAL that non-toll roads are funded by a grant from Treasury and toll roads are funded by toll revenue.[28]

33. Almost half of SANRAL's entire portfolio of toll roads is managed directly by SANRAL and half by private companies and/or concessionaires, as in the case of BAKWENA. It is therefore important to point out the distinction between toll roads directly managed by SANRAL and toll roads that are 'under a concession' in terms of a Public Private Partnership.[29]

34. The toll roads under a concession in terms of a Public Private Partnership are funded and operated by the private party concessionaire, and in this instance, BAKWENA. The operating risk and/or profit and losses are all borne by the concessionaire with no 'external' funding or government grant being provided. In the event of any loss, alternatively, any capital requirements for the construction, improvement, rehabilitation or operation of the toll road arising, it is a cost and/or liability not to SANRAL, but in fact, the concessionaire, or at the very least, in this particular instance in terms of the N1/N4 Toll Road, BAKWENA.[30]

35. Funding mechanisms and/or loans such as the BRICS Loan are completely distinct to funding and mechanisms associated and/or relevant to Public Private Partnerships and/or concession contracts.[31]

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[28] Fourth Respondent's Answering Affidavit, para 41, Caselines page 039-18
[29] Fourth Respondent's Answering Affidavit, para 42, Caselines page 039-18
[30] Fourth Respondent's Answering Affidavit, para 43, Caselines pages 039-18 – 039-19
[31] Fourth Respondent's Answering Affidavit, para 44, Caselines page 039-19

36. In terms of the BAKWENA Concession Contract all risk, whether in terms of technical, financial or operational aspects, as specified in the concession contract are to be borne by BAKWENA. Toll roads under a concession contract with SANRAL are accordingly self-funded. No external funding or loan is provided by SANRAL for the maintenance, improvement, operation and/or any other obligation under the concession contract.[32]

37. Whilst it is noted that the alleged BRICS Loan was approved by the National Development Bank ("NDB") for the 'rehabilitation of the pavement for the existing toll sections of national roads, construction of additional lanes to widen such roads, and rehabilitation of related infrastructure, such as bridges and intersections,' there is a clear distinction between toll roads managed by SANRAL, and toll roads 'under a concession'.[33]

38. Toll roads managed by SANRAL still require funding for operating costs, and moreover, capital costs, should any improvement, rehabilitation or expansion works be required.[34]

39. Whilst funding for such capital costs associated with improvement, rehabilitation and expansion works are still required for toll roads managed under a concession, such costs are however costs to the private concessionaire and not costs to SANRAL and/or the State.[35]

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[32] Fourth Respondent's Answering Affidavit, para 45, Caselines page 039-19
[33] Fourth Respondent's Answering Affidavit, para 46, Caselines page 039-19
[34] Fourth Respondent's Answering Affidavit, para 47, Caselines page 039-19
[35] Fourth Respondent's Answering Affidavit, para 48, Caselines page 039-20

40. There is accordingly a clear distinction between the various funding mechanisms for certain infrastructure projects and moreover, the composition of the national road network being divided into non-toll roads and toll roads, and moreover, toll roads managed by SANRAL and toll roads under concession.[36]

41. It is therefore apparent that the BRICS loan, even if it had been granted (which it was factually not), would have been granted to SANRAL, and not BAKWENA.[37]

42. Consequently, the purported cause of action relied on by OUTA, based on the BRICS Loan, in order to seek relief granting access to BAKWENA's documents is entirely misconceived. No cause of action has been set out to justify the disclosure of BAKWENA's documents on the basis of the BRICS Loan and OUTA's Application should be dismissed.[38]

The Basis Upon which the Relief is Sought and the Brics Loan

43. In this Application, OUTA seeks access to certain information and documents in terms of section 78(2)(c) read together with section 82 of PAIA.[39]

44. OUTA's cause of action for the relief sought, is premised upon and revolves around the purported BRICS Loan of approximately R7 billion granted to SANRAL.[40]

45. OUTA seeks to exercise its 'constitutional right in terms of section 32 of the Constitution' to "*establish whether the* [BRICS Loan] *is going towards the GFIP*

[36] Fourth Respondent's Answering Affidavit, para 49, Caselines page 039-20
[37] Fourth Respondent's Answering Affidavit, para 50, Caselines page 039-20
[38] Fourth Respondent's Answering Affidavit, para 51, Caselines page 039-20
[39] Fourth Respondent's Answering Affidavit, para 52, Caselines page 039-20
[40] Fourth Respondent's Answering Affidavit, para 53, Caselines page 039-21

bonds (e-tolled roads) or other SANRAL's managed toll roads that are supposed to be self-funding" (paragraph 23 of the Founding Affidavit). It is on this basis that it appears that OUTA submitted its Request for Access to Information in terms of PAIA on 8 June 2020, and moreover, it is the very same basis upon which it now seeks the relief sought in this Application.[41]

46. In so doing, OUTA makes the following averments in its Founding Affidavit[42] –

46.1. "*SANRAL received a loan of R7 billion from the Brics National Development Bank. The loan is payable over a period of fifteen years* (Paragraph 17);

46.2. *OUTA is concerned that SANRAL has taken out another R7bn loan….*(Paragraph 20); and

46.3. *Since the loan involves the use of public finances, SANRAL as a state organ is obliged to be transparent with Public Finances. OUTA wants to establish whether this loan was used to further fund the concessionaire agreements* (Paragraph 21)".

47. These allegations presuppose, without any proof that SANRAL has **already** received the BRICS Loan of R7 billion from the NDB. The allegation is however made in the face of public media releases and/or statements confirming that SANRAL has, in fact, **not** received the BRICS Loan, with the Loan having been refused or rejected by National Treasury.[43]

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[41] Fourth Respondent's Answering Affidavit, para 54, Caselines page 039-21
[42] Fourth Respondent's Answering Affidavit, para 55, Caselines pages 039-21 – 039-22
[43] Fourth Respondent's Answering Affidavit, para 56, Caselines page 039-22

48. To this end, it has been well publicised that on or about 12 September 2019 the Board of Directors of the NDB approved four infrastructure and sustainable development projects, which included a R7 billion loan to SANRAL and guaranteed by the Government of the Republic of South Africa.[44]

49. Following the NDB's press release, a number of media publications publicised various articles in regard to the alleged BRICS Loan, many of which presupposed that SANRAL had indeed received the R7 billion loan following the NDB Bank's approval. This is however incorrect.[45]

50. Indeed, SANRAL, following the NDB's announcement clarified the position in that although the NDB Bank had approved the loan to SANRAL, it was nonetheless still subject to the approval of both the Minister of Transport and the Minister of Finance. This was so given that the 'caveat' to the BRICS Loan was that it would be 'guaranteed' by Government, and effectively, National Treasury. This would mean that any approval by National Treasury of the BRICS Loan would require approval of the loan and guarantee agreements.[46]

51. This was furthermore made clear in SANRAL's Integrated Report 2020 which covered the period from 1 April 2019 to 31 March 2020 ("the 2020 Integrated Report"). In terms of the 2020 Integrated Report, the following was set out in respect of the BRICS Loan[47] –

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[44] Fourth Respondent's Answering Affidavit, para 57, Caselines page 039-22; Annexure "AA5", Caselines pages 039-19 – 039-92
[45] Fourth Respondent's Answering Affidavit, para 58, Caselines page 039-22
[46] Fourth Respondent's Answering Affidavit, para 59, Caselines pages 039-22 – 039-23
[47] Fourth Respondent's Answering Affidavit, para 60, Caselines page 039-23; Annexure "AA6", Caselines pp 039-93 – 039-99

"SANRAL is currently pursuing a loan to be guaranteed by the Multilateral Investment Guarantee Agency of World Bank for R7 000 million. Half of this loan, R3 500 million, may be used for the refinancing of maturing debt. If successful, this amount will cover the cash requirements of the 2021 financial year as well as enable SANRAL to proceed with the toll-road projects proposed to MIGA with the other half of the loans. The application was made to the Minister of Transport which will require the concurrence of the Minister of Finance." (our emphasis added)

52. What the 2020 Integrated Report undoubtedly confirms apart from the purpose of the loan is that SANRAL, notwithstanding any approval by the NDB, was only **pursuing** the loan and moreover, that an application was made to the Minister of Transport which furthermore requires the approval by the Minister of Finance. At the time of the release of the 2020 Integrated Report, there was no claim by SANRAL that it had actually received the BRICS Loan of R7 billion as stated by OUTA. To the contrary, it is clear that it had not been receiving, but was being pursued.[48]

53. For the same period, namely for the year ended 31 March 2020, National Treasury made no mention of the R7 billion BRICS Loan to SANRAL in its 2020 Annual Financial Statements. In fact, National Treasury from a government guarantees perspective had recorded the following in its 2020 Annual Financial Statements[49] –

"*The explicit contingent liabilities of government consist mainly of government guarantees issued to state-owned enterprises….*

[48] Fourth Respondent's Answering Affidavit, para 62, Caselines pages 039-23 – 039-24
[49] Fourth Respondent's Answering Affidavit, para 63, Caselines page 039-24

> *The explicit contingent liability portfolio of government exposes government to credit risk, in that, should the guaranteed entities fail to settle their government guaranteed financial obligations; government as the guarantor will have to settle the obligations in default on behalf of the entities.*
>
> *As at 31 March 2020, guarantees to public institutions decreased by R3.3 billion,…. This is mainly due to decreases in the guarantees issued to the… South African National Roads Agency Limited….* (our emphasis)

54. National Treasury's 2019/2020 Annual Financial Statements makes it abundantly clear that no government guarantee was approved to SANRAL, which in turn, would increase the total guarantees to public institutions (inclusive of SANRAL); but that the total government guarantee had in fact decreased as a result of *decreases* in guarantees issued to entities, such as SANRAL. National Treasury's reporting of the decrease in SANRAL's issued guarantees comes in the same period as the NDB's preliminary approval of the R7 billion BRICS Loan to SANRAL in September 2019.[50]

55. In the subsequent reporting year ending 31 March 2021, National Treasury, once again, made no mention of any approval of the BRICS Loan and/or approval of any government guarantee in favour of SANRAL for the BRICS Loan.[51]

56. What National Treasury did record in no uncertain terms in its Annual Report 2020/21 is that "*Government guarantee requests for the South African National*

[50] Fourth Respondent's Answering Affidavit, para 64, Caselines pages 039-24 – 039-25; Annexure "AA7", Caselines pp 039-100 – 039-103
[51] Fourth Respondent's Answering Affidavit, para 66, Caselines page 039-25

Roads Agency SOC Ltd (SANRAL) and the Sedibeng Water Board <u>was not concurred with</u>."[52]

57. In November 2021, following an article first published by Moneyweb, the alleged R7 billion BRICS Loan came under the spotlight again, where OUTA, once again, in founding papers in separate proceedings, alleged that SANRAL received the BRICS Loan. In response to such allegations, SANRAL made it abundantly clear through its Chief Financial Officer, Inge Mulder, that SANRAL "*did not receive any loan, of any amount, from the BRICS' New Development Bank at all."*[53]

58. SANRAL further pointed out that it had received a letter from the Minister of Transport, Fikile Mbalula, on 12 February 2020 informing SANRAL of National Treasury's rejection of the request for the guarantee for the BRICS Loan. National Treasury had indeed confirmed that it had taken such a decision, to reject SANRAL's request for the guarantee, in December 2019.[54]

59. BAKWENA was advised that once such information came to OUTA's knowledge, it should have retracted its Request for Information, and should have withdrawn its Application.[55]

60. BAKWENA has not been privy to the aforementioned documents, as firstly, such correspondence and/or confirmation of National Treasury's decision is between National Treasury, the Minister of Transport and SANRAL, and secondly, as the

[52] Fourth Respondent's Answering Affidavit, para 67, Caselines page 039-25; Annexure "AA8", Caselines pages 039-104 – 039-107
[53] Fourth Respondent's Answering Affidavit, para 68, Caselines page 039-25
[54] Fourth Respondent's Answering Affidavit, para 69, Caselines page 039-26
[55] Fourth Respondent's Answering Affidavit, para 70, Caselines page 039-26

BRICS Loan was never intended to be utilised for toll roads operated by concessionaires.[56]

61. The inaccurate reporting of the alleged R7 billion BRICS Loan received by Moneyweb was again criticised by SANRAL in a further media statement published by SANRAL on 3 March 2022, which recorded that Moneyweb had published further factually incorrect statements similar to that of the BRICS Loan[57] –

> *"Sometimes, though, there is no other side. In the case of SANRAL, the other side was there and had been in touch with Moneyweb's journalist – not for the first time. He knows we always honour our commitment to respond to his questions. But this time around the facts might have gotten in the way of his innuendos dressed up as journalism.*
>
> *Worse still, his effectiveness as a hired gun might have been blunted. This is also not the first time this journalist has published a factually incorrect statement, which after checking with SANRAL was proven to be inaccurate. We refer to the article published in November 2021 regarding SANRAL allegedly taking a loan from the New Development Bank of R7 billion*." (our emphasis)

62. Following BAKWENA's Intervention Application and the order of Her Honourable Madam Justice Potterill on 26 May 2022 granting BAKWENA leave to intervene, BAKWENA sought to engage with SANRAL in order to ascertain, definitively, whether or not the BRICS Loan was ever received by SANRAL.[58]

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[56] Fourth Respondent's Answering Affidavit, para 71, Caselines page 039-26; Annexure "AA9", Caselines pp 039-108 – 039-112
[57] Fourth Respondent's Answering Affidavit, para 72, Caselines pages 039-26 – 039-27; Annexure "AA10", Caselines pages 039-113 – 039-115
[58] Fourth Respondent's Answering Affidavit, para 74, Caselines page 039-27

63. In this regard, the Chief Financial Officer of SANRAL, Inge Mulder, addressed a letter dated 28 June 2022 to BAKWENA, stating in no uncertain terms that "*SANRAL did not obtain a loan from the New Development Bank (NDB) of any amount, currently or since the inception of the NDB."*[59]

64. The letter goes further and confirms that "*Even though the NDB approved, from their side, that a loan of R7 billion could be granted to SANRAL…, this loan was never approved by the Minister of Finance, as required by the Public Finance Management Act."* [60]

65. It is accordingly clear, whether it be from media releases from SANRAL, press publications, the Annual Financial Statements or Annual Reports of Treasury (which OUTA ought to have ascertained from such publicly available documents), and moreover SANRAL itself, that SANRAL did **not** receive the R7 billion loan from NDB despite the NDB having approved the loan amount in September 2019.[61]

66. In order to obtain and receive the loan amount from the NDB, SANRAL required the approval of the Minister of Transport and the Minister of Finance. With no such approval being granted by the Minister of Finance, and National Treasury, no amount was ever received from the NDB as confirmed by SANRAL in its letter dated 28 June 2022.[62]

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[59] Fourth Respondent's Answering Affidavit, para 75, Caselines page 039-27
[60] Fourth Respondent's Answering Affidavit, para 76, Caselines page 039-28; Annexure "AA11", Caselines pages 039-116
[61] Fourth Respondent's Answering Affidavit, para 78, Caselines page 039-28
[62] Fourth Respondent's Answering Affidavit, para 79, Caselines page 039-28

67. Despite this, OUTA's application, and moreover, OUTA's entire cause of action as alleged in its founding papers, is premised upon the BRICS Loan **having been granted** and moreover, 'received' by SANRAL. It is based on such incorrect assumption of the alleged loan being 'received' that [63]–

67.1. OUTA is allegedly 'concerned' with SANRAL '*entrenching itself into more debt', and where the 'loan involves the use of public finances*';

67.2. *"OUTA wants to establish whether this loan was used to further fund the concessionaire agreements*;

67.3. *It is important for OUTA and it will be in the best interest of the public for SANRAL to be transparent on the purpose of the loan, …* where *OUTA needs to know whether loan amounts were allocated to the concessionaire tolled routes*; and

67.4. *OUTA would like to establish whether the abovementioned loan is going towards the GFIP bonds or other SANRAL managed toll roads that are supposed to be self-funding*."

68. The very purpose and the cause of action upon which OUTA's Application is premised upon is based on the fundamental misconception that the BRICS Loan was received by SANRAL.[64]

69. Consequently, given the fact that the BRICS Loan of R7 billion was rejected by National Treasury, and never received by SANRAL (as alleged by OUTA), OUTA's

[63] Fourth Respondent's Answering Affidavit, para 80, Caselines pages 039-28 – 039-29
[64] Fourth Respondent's Answering Affidavit, para 81, Caselines page 039-29

application discloses no cause of action, and lacks averments which are necessary to justify the granting of the relief sought in this Application.[65]

70. The allegation that SANRAL received a loan of R7 billion, through the BRICS Loan is simply wrong, and is unsupported by any factual basis. OUTA has made such allegations without providing any evidence to substantiate the allegations. What has been established is that the BRICS Loan was not granted.[66]

71. It follows that the Application is entirely misconceived, and must fail. Moreover, it is clear from OUTA's own allegations that the BRICS Loan had nothing to do with any of the concessionaires, at least in respect of BAKWENA, as such tolls roads are self-funding.[67]

72. OUTA's request for information in regard to the Concession Contract with BAKWENA based on the alleged funds received by SANRAL from the NDB is fundamentally flawed when the BRICS Loan was in fact never granted or received by SANRAL; nor was the purpose for which it was sought relevant to toll roads managed by concessionaires, nor did it relate to the Concession Contract involving BAKWENA.[68]

73. Moreover, SANRAL in an application filed for rescission of an order taken by OUTA in default against SANRAL in the Honourable Court under case number 7954/2021 for disclosure of another Concessionaires' documents, being Trans

[65] Fourth Respondent's Answering Affidavit, para 82, Caselines page 039-29
[66] Fourth Respondent's Answering Affidavit, para 83, Caselines page 039-29
[67] Fourth Respondent's Answering Affidavit, para 85, Caselines page 039-30
[68] Fourth Respondent's Answering Affidavit, para 86, Caselines page 039-30

African Concessionaires (Pty) Ltd ("TRAC"), also on the basis of the alleged BRICS Loan, stated the following[69]:

> "*Finally, it is noted that the application is devoid of merit ex facie the founding affidavit. OUTA seeks to make out a case that the loan from the Brics National Development Bank is being used in order to fund the concessionaire agreements (FA paragraphs 14 and 15, CaseLines 005-5).*
>
> *However, the information OUTA seeks has absolutely nothing to do with the alleged Brics Loan, nor would it be possible to establish the uses of the Brics Loan from the documents which OUTA has actually requested. It stands to reason that even if TRAC were prepared to disclose the requested documents to OUTA (which it is of course is not willing to do) the information sought would demonstrate only amounts generated by TRAC from the concessionaire contract, it would not demonstrate the allocation of the Brics Loan funds."*

74. This again illustrates that even if the BRICS Loan was received (which it clearly was not) the funding/financing methods or mechanism are separate, distinct and cannot be diluted, and the documents sought would not provide OUTA with the information it seeks. The alleged BRICS Loan is simply a smokescreen and an attempt to justify the unjustifiable conduct of OUTA and to procure documents it simply was not entitled to.[70]

75. On this basis, not only does the application disclose no cause of action, but the allegations relating to the BRICS Loan are completely irrelevant and fail to

[69] Fourth Respondent's Answering Affidavit, para 87, Caselines page 039-30; Annexure "AA12", Caselines page 039-117
[70] Fourth Respondent's Answering Affidavit, para 88, Caselines page 039-31

establish any cause of action relating to BAKWENA and the N1/N4 Toll Road concession.[71]

76. OUTA's Founding Affidavit clearly does not set out any cause of action at all, to sustain the relief sought. Consequently, we respectfully submit that OUTA's Application should be dismissed with costs.[72]

77. In ***Lawyers for Human Rights v Minister in the Presidency and Others***[73] the Constitutional Court held as follows:

"[19] What is "vexatious"? In Bisset the Court said this was litigation that was "frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant". And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious.

"[20] Whether an application is manifestly inappropriate depends on whether the application was so unreasonable or out of line that it constitutes an abuse of the process of court. In Beinash, Mahomed CJ stated there could not be an all encompassing definition of "abuse of process" but that it could be said in general terms "that an abuse of process takes place where the procedures permitted by the rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective".

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[71] Fourth Respondent's Answering Affidavit, para 89, Caselines page 039-31
[72] Fourth Respondent's Answering Affidavit, para 90, Caselines page 039-32
[73] (CCT120/16) [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) (1 December 2016)

Abuse of Process adopted by OUTA

78. It appears that OUTA's intentions amount to nothing more than a fishing expedition through the mechanisms of the Court.[74]

79. OUTA, as already mentioned, sought to circumvent obtaining the information from BAKWENA, once faced with the hurdle of setting out a right to the information, but then rather sought to obtain information indirectly from SANRAL, a public body, as a conduit to obtain such information and to avoid identifying the existence of a right entitling it to the information requested. This is an abuse of process.[75]

80. In the circumstances, the conduct and manner in which the Application has been instituted by OUTA amounts to an abuse of process and an attempt to secure documents and information without following proper process.[76]

81. To illustrate this, OUTA sought to secure documents relating to a third party, being BAKWENA, without even citing BAKWENA as a party to the proceedings.[77]

82. When BAKWENA called upon OUTA to join it to the proceedings OUTA refused to do so, leaving BAKWENA with no choice but to incur the costs to intervene and launch a formal intervention application. This has been fully captured in BAKWENA's intervening application and we ask the Honourable Court to take cognizance of that application.[78]

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[74] Fourth Respondent's Answering Affidavit, para 92, Caselines page 039-32
[75] Fourth Respondent's Answering Affidavit, para 93, Caselines page 039-32
[76] Fourth Respondent's Answering Affidavit, para 94, Caselines page 039-32
[77] Fourth Respondent's Answering Affidavit, para 96, Caselines page 039-33
[78] Fourth Respondent's Answering Affidavit, para 96, Caselines page 039-33

83. The manner in which OUTA approached the Application to gain access to BAKWENA's documents, without BAKWENA being in a position to put its case forward to a court, and even worse, without a court having the full facts presented to it, is mischievous and improper.[79]

84. As an illustration of OUTA's conduct, under case number 7954/2021, OUTA obtained a default order for documents relating to TRAC, another third party who was not cited as a respondent in that application. Although a rescission application has since been granted, a third party's right could have been severely prejudiced by not having had the opportunity to oppose relief which directly impacts on it.[80]

85. This Application is structured in such a manner that it simply constitutes a fishing expedition. OUTA's conduct in such regard cannot be countenanced, as OUTA has failed to illustrate its rights or entitlement to the documents sought.[81]

86. Having regard to the conduct of OUTA and moreover, the manner in which the Application has been instituted, and the events that transpired following the Application, whether taken separately or cumulatively, it is submitted that the Application amounts to an abuse of process.[82]

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[79] Fourth Respondent's Answering Affidavit, para 97, Caselines page 039-33
[80] Fourth Respondent's Answering Affidavit, para 98, Caselines page 039-33
[81] Fourth Respondent's Answering Affidavit, para 99, Caselines page 039-33
[82] Fourth Respondent's Answering Affidavit, para 100, Caselines pages 039-33 – 039-34

OUTA'S Lack of authority

87. As a desperate catch-all, OUTA alleges that "*irrespective of whether the [BRICS] loan had been allocated to BAKWENA, OUTA intends to conduct an analysis on whether the funding generated by BAKWENA is in excess to the funds required to maintain the toll road*".[83]

88. This statement is completely vague and framed so broadly, as to be meaningless.[84]

89. OUTA is however not an empowered body entitled to regulate the governance of private bodies, neither does OUTA have any authorisation to conduct any investigations into a private entities financial affairs. Such conduct of OUTA is not only a complete disregard to commercial sensitivity, but it also unlocks a danger, which limits a company's ability from competing fairly in the market but even worse such scrutiny allows for abuse, the long term effect being the lack of investment for much needed infrastructure projects and economic downturn, if companies are harassed into disclosing *amongst others* commercially sensitive information in relation to its business operations, which can then be accessed by competitors.[85]

90. OUTA has no entitlement or right to "*conduct an analysis*" of a private entity's financial affairs. OUTA has not made out any case at all, but more importantly OUTA has no authority to conduct any analysis.[86]

[83] Fourth Respondent's Answering Affidavit, para 102, Caselines page 039-34
[84] Fourth Respondent's Answering Affidavit, para 103, Caselines page 039-34
[85] Fourth Respondent's Answering Affidavit, para 104, Caselines pages 039-34 – 039-35
[86] Fourth Respondent's Answering Affidavit, para 105, Caselines page 039-35

91. BAKWENA in submitting its bid to SANRAL has already participated in a substantive and rigorous bidding process which was tantamount to an analysis of BAKWENA's technical and financial capability in respect of managing the project and to ensure that the procurement is done in such a manner that value for money is obtained. This process eventually resulted in, BAKWENA concluding a Concession Contract to design, build, finance, operate and maintain the BAKWENA N1/N4 toll road with SANRAL. [87]

92. Moreover, it should be pointed out that SANRAL being a state owned entity is subject to an annual audit process by the Auditor-General. As such it begs the question on what basis and authority OUTA believes it can conduct such an audit as it does not have the wherewithal and appreciation for understanding a Concession mechanism. In fact OUTA's agenda in requesting information pass and present is spurious and directed to create a misconception to the public as regards to tolling as a mechanism for funding road networks which are critical assets and investments to the South African economy.[88]

93. In operating the N1/N4 toll road, BAKWENA takes on the funding, maintenance, development, management and operation of the toll road, and as such is entitled to receive a benefit as clearly appears from the Treasury Regulation quoted above. BAKWENA is not a non-profit organisation, and is clearly entitled to make a profit, as is every other commercial corporate entity.[89]

[87] Fourth Respondent's Answering Affidavit, para 106, Caselines page 039-35
[88] Fourth Respondent's Answering Affidavit, para 107, Caselines pages 039-35 – 03-36
[89] Fourth Respondent's Answering Affidavit, para 109, Caselines page 039-36

94. The profit that BAKWENA makes is capped in terms of the Highway Usage Fee. There are accordingly sufficient checks and balances in place, and OUTA's unauthorized meddling is not only unnecessary, but totally unwarranted.[90]

95. If OUTA did have such an entitlement or right (which it clearly does not), the Request for Information, and the relief sought in the Application, would have to be directed at BAKWENA, and not SANRAL. OUTA is aware of such requirement, as evidenced by its initial request to BAKWENA.[91]

LEGAL FRAMEWORK

The requirements of section 50 of PAIA have not been met

96. In terms of section 50 of PAIA, a "*requester*" must be given access to any record of a private body if, *inter alia*[92]:

96.1. the record is required for the exercise or protection of any rights; and

96.2. the person complies with the procedural requirements in PAIA relating to a request for access to that record.

97. OUTA recorded that the "rights" it seeks to exercise or protect, is the right of "*access to information*" and the right to "*just administrative action*".[93]

98. It is clear that such vague and generalised allegations of rights, without any substantiation, are not compliant with what PAIA requires.[94]

[90] Fourth Respondent's Answering Affidavit, para 110, Caselines page 039-36
[91] Fourth Respondent's Answering Affidavit, para 111, Caselines page 039-36
[92] Fourth Respondent's Answering Affidavit, para 113, Caselines page 039-37
[93] Fourth Respondent's Answering Affidavit, para 114, Caselines page 039-37
[94] Fourth Respondent's Answering Affidavit, para 115, Caselines page 039-37

99. In addition, in respect of the provision of an explanation as to why the information is required, OUTA recorded that it is "*To justify the relationship between yourself and SANRAL to our members*". The allegation does not set out any basis for the exercise of an alleged right, and is not only vague, but meaningless. The "relationship" between SANRAL and BAKWENA is based on contractual obligations, and there is no reason for OUTA to seek to justify such relationship.[95]

100. It is clear that no proper right has been set out by OUTA, and that no proper and adequate explanation was provided, as required by the provisions of PAIA. The PAIA request as received from OUTA is clearly defective, and does not comply with the provisions of PAIA. BAKWENA was perfectly within its rights to seek clarity. OUTA failed to respond.[96]

101. The only inference that can be drawn from OUTA's conduct in this regard is that OUTA does not have any particular right that it wishes to protect, and that this Application is simply spurious, and a fishing expedition.[97]

102. OUTA previously sought the documents from BAKWENA and are now seeking the same documents from SANRAL subsequent to OUTA's failure to meet the applicable threshold when requesting documents from a private body. The mere fact that OUTA is now seeking the documents in relation to BAKWENA from SANRAL does not transpose. the ownership of the documents.[98]

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[95] Fourth Respondent's Answering Affidavit, para 116, Caselines pages 039-37 – 039-38
[96] Fourth Respondent's Answering Affidavit, para 118, Caselines page 039-38
[97] Fourth Respondent's Answering Affidavit, para 119, Caselines page 039-38
[98] Fourth Respondent's Answering Affidavit, para 120, Caselines page 039-38

103. The intention of seeking the documents of a private body through a public body does not relieve it from the obligation of meeting the PAIA thresholds for a private body.[99]

Grounds of refusal in terms of PAIA

104. In terms of section 9(b)(i) of PAIA, the right to access to information, although fundamental, is subject to justifiable limitations, including limitations aimed at reasonable protection of privacy and commercial confidentiality.[100]

105. Section 36 of PAIA stipulates that an information officer of a public body must refuse a request for access to a record of the body if the record contains financial, commercial, scientific or technical information other than trade secrets of a third party, the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party.[101]

106. Section 45 of PAIA provides that the information officer of a public body may refuse a request for access to a record of the body if the request is manifestly frivolous and/or vexatious, or if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.[102]

107. Section 68 of PAIA requires the head of a private body to refuse a request for access to a record of the body if the record contains financial, commercial information of the body, the disclosure of which would be likely to be cause harm

[99] Fourth Respondent's Answering Affidavit, para 121, Caselines page 039-38
[100] Fourth Respondent's Answering Affidavit, para 123.1, Caselines page 039-39
[101] Fourth Respondent's Answering Affidavit, para 123.2, Caselines page 039-39
[102] Fourth Respondent's Answering Affidavit, para 123.3, Caselines page 039-39

to the commercial or financial interests of the body, information, the disclosure of which could reasonably be expected to put the private body at a disadvantage in contractual or other negotiations or prejudice the body in commercial competition.[103]

108. OUTA has sought the following records in respect of upgrade of the N1/N4 route from Tshwane northwards towards Bela – Bela(N1) and the N4 route running from Tshwane westwards through Rustenburg and Zeerust to the Botswana border (N4) in Part A and B as follows[104]:

108.1. A copy of the Concession Contract in respect of the route described in paragraph 107;

108.2. A copy of all Annexures and Addenda to the Bakwena Concession Contract;

108.3. A copy of all Amendments and Addenda to the Bakwena (if any) to the Bakwena Concession Contract;

108.4. A copy of all Operation and Maintenance contracts entered into between the Concessionaire and the O&M Contractors, relating to the Bakwena Concession Contract;

108.5. A copy of the Operational and Maintenance Manual pertaining to the Bakwena Concession Contract;

[103] Fourth Respondent's Answering Affidavit, para 123.4, Caselines pages 039-39 – 039-40
[104] Fourth Respondent's Answering Affidavit, para 124 and sub-paragraphs, Caselines page 039-40

108.6. A copy of the contracts entered into with the Independent Engineer(s), pertaining to the Bakwena Concession Contract;

108.7. A copy of all the Independent Engineer(s) Reports submitted to SANRAL, pertaining to the Bakwena Concession Contract;

108.8. A copy of all the Construction Work contracts entered into by the Concessionaire relating to the Bakwena Concession Contract;

108.9. A copy of all “Performance Certificates” issued, relating to the Construction Works contracts entered into by the Concessionaire;

108.10. A copy of “Taking Over certificates” that have been issued in terms of the Bakwena Concession Contract;

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

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

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

108.14. Copies of the lists, submitted to SANRAL in terms of the Bakwena Concession Contract (as from 1999 to present), of Bakwena's lenders and creditors to which Bakwena owes a sum in excess of the equivalent of R 10 000 000 (ten million Rand), including the amounts due to each of them.

109. BAKWENA submits that OUTA is not entitled to the information sought in this Application for *inter alia* the following reasons[105]:

109.1. These are documents which are not even in SANRAL's possession. Moreover there is no basis for disclosure of such documents.

109.2. The documents sought from SANRAL contain financial, commercial, and or technical information of a third party (BAKWENA, Contractors, Shareholders) and the disclosure thereof will cause serious harm to commercial and financial interests of BAKWENA and its Stakeholders in negotiations, contractual or otherwise and prejudice BAKWENA and its Stakeholders in their ability to compete financially and commercially. Consequently, the documents sought fall strictly within the ambit of

[105] Fourth Respondent's Answering Affidavit, para 125 and sub-paragraphs, Caselines pages 039-42 – 039-43

commercially sensitive information, which ought to be protected from disclosure;

109.3. Disclosure would compromise other third party rights such as BAKWENA's contractors which would also amount to a breach of a duty of confidence owed to such third parties by BAKWENA;

109.4. OUTA has failed to demonstrate any entitlement to the documents. As such, OUTA's conduct in seeking such information is frivolous, vexatious and/or without merit and constitutes nothing more than a fishing expedition. Moreover the rights as set out in the Application does not warrant the disclosure of BAKWENA's documents.

109.5. There is no public interest that would be served in the disclosure of BAKWENA's documents. No basis, reason or any evidence has been set out to justify disclosure for public interest.

110. Notwithstanding OUTA's failure to follow proper procedure, BAKWENA has substantive reasons as set out above, of which OUTA has been aware of for a considerable period of time, to refuse the documents requested in this Application. Hence OUTA's attempt to circumvent the requirements by law to obtain documents of a private body.[106]

[106] Fourth Respondent's Answering Affidavit, para 126, Caselines page 039-43

111. Moreover it is imperative for BAKWENA to protect its documents given that OUTA has[107]:

111.1. not hesitated to publish or cause to be published in the media information provided to it by SANRAL in connection with the proposed toll roads; and

111.2. shown that it is implacably opposed to the tolling of the relevant roads as a matter of principle and had consequently not limited itself to legal attacks.

112. Such refusal is important to protect the integrity and commercially sensitive or any proprietary trade information of BAKWENA, its Contractors and its Stakeholders, which it would not wish to be made known to its competitors.[108]

113. Disclosure of BAKWENA and its stakeholder's information will inevitably disadvantage us in contractual and other commercial negotiations[109] -

113.1. in an oligopolistic market such as this, the release of documents is likely to restrict competition;

113.2. the release of sensitive information, especially price information, in such a concentrated market will be more likely to be anti-competitive than in a more competitive market, and may facilitate collusion and price fixing; and

113.3. the release of price information is particularly problematic, as it makes it possible for business entities to monitor the behaviour of their competitors.

114. Permitting the disclosure of documents for a project that has been awarded does in no way detract from the fact that the information is commercially sensitive in that it contains trade secrets, financial, commercial and technical information, the disclosure of which will harm BAKWENA, its Contractors and its Stakeholders from

[107] Fourth Respondent's Answering Affidavit, para 127, Caselines pages 039-43 – 039-44
[108] Fourth Respondent's Answering Affidavit, para 128, Caselines page 039-44
[109] Fourth Respondent's Answering Affidavit, para 129, Caselines page 039-44

a commercial and financial perspective in contract negotiations on other projects. Such information has a market value and is and is fundamental to the profitability and viability of the commercial operation of BAKWENA, its funders and stakeholders. The disclosure will destroy and diminish the value of the commercial operation in the industry. As such information that reveals BAKWENA's profit margin simply cannot be disclosed as competitors would be able to accurately calculate its future bids and pricing structure from information relating to its profit rate, actual loss, general and administrative expenses.[110]

115. In putting together the technical information significant effort, time and money has been invested and the disclosure of which would allow a competitor to make use of the information for free, which would be fundamentally prejudicial.[111]

116. Moreover such disclosure could not only be promoting anti-competitive practices and market collusion, but as there is a concentrated market, the access by competitors to each other's respective bids could result in less competition for future tenders as the pricing and strategy of competing tenders will be shared.[112]

117. The market in which SANRAL operates and any successful Contractors will lose confidence in SANRAL's ability to protect confidential information handed over to it during any tender process.[113]

118. Overall public disclosure will discourage companies from submitting commercially sensitive information during a bid process and consequently undermine the ability

[110] Fourth Respondent's Answering Affidavit, para 130, Caselines pages 039-44 – 039-45
[111] Fourth Respondent's Answering Affidavit, para 131, Caselines page 039-45
[112] Fourth Respondent's Answering Affidavit, para 132, Caselines page 039-45
[113] Fourth Respondent's Answering Affidavit, para 133, Caselines page 039-45

of SANRAL to procure best value for its future projects and to conduct a fair tender competition in the future. Insofar as OUTA seeks to claim its entitlement to the information on the basis of a public interest override, no case has been set out for such justification. There is no contention of breach of law or evidence of an imminent and serious public safety or environmental risks that warrant the disclosure of BAKWENA's information.[114]

119. This holds true for BAKWENA who in procuring goods and services from Contractors, also conducts rigorous tender process. During this process the bidders submit information such as business strategy, project lists, pricing, commercial and financial commitments, personal information. Disclosure of such information would harm and prejudice the Contractors in other bidding opportunities and compromise its ability to compete fairly in an already saturated market because of insight into pricing, rates and strategies. As a consequence, Contractors would be hesitant to submit bids to BAKWENA for reasons of breach of duty of confidence, which in turn harms BAKWENA's ability to secure services and goods at fair and competitive value.[115]

120. As regards financial information, most private toll roads are undertaken on a project finance basis, whereby investors rely on the performance of the project for payment rather than the credit of the sponsor. This arrangement is also referred to as limited recourse financing, which indicates that lenders have limited recourse to the sponsors for payment if the project fails to generate adequate returns. A primary benefit of project finance structures, is that they allow sponsors to leverage their resources and expertise with outside capital in order to undertake projects

[114] Fourth Respondent's Answering Affidavit, para 134, Caselines pages 039-45 – 039-46
[115] Fourth Respondent's Answering Affidavit, para 135, Caselines page 039-46

that they otherwise would not be able to finance on the strength of their own balance sheet. In addition, project finance allows sponsors to share project risks with lenders and maintain the project debt off their balance sheet. Governments also seek to limit the recourse of investors to their credit.[116]

121. Toll road project financing normally involves detailed studies by engineering experts and financial advisers, including traffic and revenue projections, construction cost estimates, design documents for the project, and financial feasibility studies.[117]

122. This information plays a role in the development of a financial model which contains project costs, construction costs, traffic projection, equity raised, debt servicing, revenue and dividends.[118]

123. The financial model developed for the project is specialized and requires significant investment, research and expertise, It is not static and has to be reviewed and continuously updated on account of amongst others traffic projection and market and economic volatility.[119]

124. The financial model is and constitutes BAKWENA's intellectual property and is inextricability linked into BAKWENA's operation and financial projections and cannot under any circumstances be disclosed. Disclosure will destroy BAKWENA's business operations as regards its design, operational and construction costs, traffic and financing projection and make it difficult if not

[116] Fourth Respondent's Answering Affidavit, para 136, Caselines pages 039-46 – 039-47
[117] Fourth Respondent's Answering Affidavit, para 137, Caselines page 039-47
[118] Fourth Respondent's Answering Affidavit, para 138, Caselines page 039-47
[119] Fourth Respondent's Answering Affidavit, para 139, Caselines page 039-47

impossible for its Contractors, Stakeholders to participate in an already saturated market and industry.[120]

125. It will be extremely unfair for a competitor to have information such as the financial model which BAKWENA has spent years developing and updating just so another competitor can improve their business case having had sight of highly commercial, technical and sensitive financial information, which is otherwise not readily available in the free market space.[121]

126. In ***Walter MC Naughtan (Pty) Ltd v Schwartz and Others***[122]. Per Van Reenen J at 388J-389B:- "*Whether the information constitutes a trade secret is a factual question (see Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd [l9991 3 All SA 321 (W) at 3330. For information to be confidential, it must (a) be capable of application in trade or industry, that is, it must be useful; not be public knowledge and property; (b) it must be known only to a restricted number of people or a closed circle, and (c) be of economic value to the person seeking to protect it (see Townsend Productions (Pty) Ltd V Leech and Others (supra at 53J-54B)).*"

127. In ***Earthlife Africa Johannesburg and Another v Minister of Energy and Others***[123] , the Honourable Court held:

[120] Fourth Respondent's Answering Affidavit, para 140, Caselines pages 039-47 – 039-48
[121] Fourth Respondent's Answering Affidavit, para 141, Caselines page 039-49
[122] 2004 (3) SA 381 (CPD)
[123] (19529/2015) [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) (26 April 2017)

[17] Section 14 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the "Constitution") provides that everyone has the right to privacy which includes the right not to have the privacy of their communications infringed.

[18] On the other hand, section 32(l)(b) of the Constitution provides everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights. In terms of section 32(2) of the Constitution, national legislation must be enacted to give effect to this right.

[19] Section 36(1) of the Constitution deals with the limitation of rights to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the following:- "the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose."

[20] The Information Act, in the long title, records that it is passed in order to give effect to the constitutional right of access to information held by a person and which is required for the exercise or protection of any rights. The preamble recognises that the right of access to any information held by a public or private body may be limited to the extent set forth in section 36 of the Constitution.

[21] The Information Act refers to private bodies and two types of public body. A "private body" includes any former or existing juristic person. Paragraph (a) of the definition of a "public body" includes any department of state or administration in

the national or provincial sphere of government or any municipality in the local sphere of government. The matter which is the subject-matter of this application does not concern such a public body and no further reference will be made to public bodies of the type referred to in paragraph (a) of the definition. However, paragraph (b) of the definition includes any functionary or institution when exercising a public power or performing a public function in terms of any legislation.

[22] The respondent is a public body in terms of paragraph (b) of the definition insofar as it performs important public function of providing 95% of the electricity requirements of the Republic of South Africa.

[23] Section 8 of the Information Act provides as follows:- "8. Part applicable when performing functions as a public or private (1) For the purpose of this Act, a public body referred to in paragraph (b)(ii) of the definition of public body' in section 1, or a private body - (a) may be either a public body or a private body in relation to a record of that body; and (b) may in one instance be a public body and in another instance be a private body, depending on whether that record relates to the exercise of a power or performance of a function as a public body or as a private body. (2) A request for access to a record held for the purpose or with regard to the exercise of a power or the performance of a function - (a) as a public body must be made in terms of section 11; or (b) as a private body, must be made in terms of section 50.

[25] The Information Act is divided into seven Parts, each dealing with a specific topic. Thus, Part 2 deals with "Access to records of public bodies" while Part 3

deals with "Access to records of private bodies". Each Part is divided into chapters. Part 2 Chapter 3 (sections 17-32) deals with the manner of access while Chapter 4 sets forth the grounds for refusal of access in respect of public bodies. Similarly, Part 3 Chapters 3 and 4 deal with the access and refusal provisions relating to private bodies.

[73] The respondent submits further that any ***deliberations and discussions involving the various components of the trade secrets are, by reason of the fact that they expose the very trade secrets, not subject to disclosure.*** *There is merit in this submission but I am satisfied from the explanations given by Dr Lennon, that what the applicant seeks is confidential information and trade secrets of the respondent. As such, they are not subject to disclosure. The determination, in any particular case, as to whether information constitutes a trade secret or confidential information, is a question of fact. (Mac Naughton (supra) 53J.) (our emphasis)*

[79] The applicant has quoted a considerable body of authority which establishes the right of access to information but subject to the statutory provisions contained in the Constitution and the Information Act. In my view, there is little or no dispute as to the existence of such rights. ***What is in issue in this matter is whether, on the factual information available to the court, the respondent is entitled to refuse access by virtue of the statutory provisions contained in the Information Act.*** *This is essentially a question of fact and I reiterate that there appears to be little or no dispute as to questions of law.* (our emphasis)

128. In ***De Lange And Another V Eskom Holdings Ltd And Others***[124] the Honourable Court stated, partially in favour of the applicant regarding the justification for a refusal of disclosure on the grounds of the pricing formulas and the duty of confidence owed to third parties.:

"[81] Billiton's argument in turn rests on the premise that the pricing information requested is ordinarily unavailable to its competitors. It fears that disclosure would harm its financial and commercial interests by informing other industry participants of the production costs of the smelters. It concluded that that was the reason why all aluminium producers vigorously protect information relating to their electricity costs.

[82] Billiton has proved that pricing structures of major aluminium producers can be purchased from the company Brook Hunt for around R200 000 and the respondents also attached to their papers a report and spreadsheet prepared by Deutsche Bank commenting on fair value in the aluminium industry. It has also shown that the said Brook Hunt which is a specialist service provider in the aluminium industry continually update their information about the costs of aluminium smelters and allegedly does costing for 99% of global aluminium production, giving detailed costs analysis of nearly all the world's aluminium smelters, as well as providing comprehensive plant-by-plant information of cost inputs from energy through raw materials and labour, providing a clear assessment of each operation within the industry cost-curve.

[83] Instead of refuting the above assertions the applicants only countered by stating that they, as SA media players, just like the average member of the South African public, cannot afford to purchase this kind of information from firms like Brook Hunt.

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[124] 2012 (1) SA 280 (GSJ)

[84] Where a party seeks to rely on s 36(1)(b) of PAIA to resist disclosure, it does not have to prove a certainty of harm. It is sufficient if it proves a probability of harm. ***Proof of a probability, or to be more precise, proof of a likely result on a balance of probability, is something courts and litigants deal with on a daily basis.*** (our emphasis)

[85] Billiton bore the onus to put forward evidence that it is probable that it will suffer the harm contemplated in ss (b) and (c) of s 36. Should disputes of fact arise, same must be dealt with by looking at Billiton's version, on the Plascon-Evans test. Only where such a version is so far-fetched or clearly untenable that the court would be justified in rejecting it merely on the papers may the respondents fail in their bid to refuse to disclose.

[108] In relation to s 36(1)(c) Billiton has put up facts establishing reasonable grounds to show a probability that knowledge of its production costs ***would enable competitors to alter their commercial behaviour to take advantage of the knowledge of Billiton's position. There are also probabilities that Billiton's suppliers and customers would also be able to use this knowledge or information to calculate its cost of production and/or use this information in their negotiations with them.***

[109] ***On the papers before this court it cannot be seriously said that Billiton's version on the pricing structures is so far-fetched or clearly untenable that this court could justifiably reject them merely on the papers.***

[110] It is so that business concerns are in constant competition with one another and would normally keep their pricing structures confidential. However, it has been demonstrated in the papers herein as well as argued in this court that the pricing structures of almost all aluminium players the world over are readily available upon payment of a fee of about R200 000. Deutsche Bank has aluminium values in respect of all role players and even Hillside Smelter is regarded as being too small a player to attract

any envious competition or competitors. The Brook Hunt brochure also has data of almost all pricing structures for aluminium producers.

[111] The applicants challenged the above contention. The applicants complain about the steep price for accessing this information as they plead poverty in relation to the Billiton Group.

[112] ***Billiton's gripe with the disclosure of the pricing formulae is that their competitors would have been let in through the back door, to the inner sanctum of their trade secrets. They contend further that the disclosure will cause or prompt their competitors to alter their commercial behaviour and to take advantage of the knowledge they would have gained of Billiton's pricing structures.***

[113] ***It is not uncommon that a business player would feel uncomfortable with its inner workings falling into the hands of its competitors. Such discomfort may be adequate justification for the trade-secret holder to resist a request for access to a document or information, relying on s 37(1)(a) of PAIA.***

[114] The applicants aver that the respondents' fears as aforementioned are unjustified as their pricing structures are in the public domain as same can be accessed through Brook Hunt.

[115] In any competitive environment, competition may be all about input costs. It is so that should Billiton's electricity costs be publicly available, the possibility and probability of its competitors being able to use same to calculate and adjust their own production costs cannot be said to be remote. Their competitors may then be enabled to predict and calculate accurately Billiton's responses to fluctuations in the LME prices, thus gaining an unfair advantage. ***They could also be in a position to engage in competitive behaviour with the advantage of knowledge which Billiton on the other hand did***

not have of them. Billiton's ability to generate a return on, and to recoup, the substantial capital investment required for expansion projects may be prejudiced.

[116] ***On the facts placed before me I am satisfied that Billiton has established that it can justly rely on sections of PAIA to resist the request for the pricing formulas. It has shown that knowledge of its costs of production could enable its competitors to alter their commercial behaviour to take advantage of their knowledge of Billiton's position. These competitors would then be able to engage in competitive behaviour with the advantage of this knowledge, which advantage Billiton would not have, as it would be in the dark about their (competitors') state of affairs. The competitors may also use such knowledge to calculate Billiton's costs of production and then use the information in their negotiations with it.*** (our emphasis)

REJOINDER AFFIDAVIT

129. On 27 May 2024, BAKWENA served a rejoinder affidavit in response to several allegations in OUTA's replying affidavit that needed to be addressed. BAKWENA does intend to seek the leave of this Honourable Court to allow the rejoinder affidavit. Should this Honourable Court grant BAKWENA leave to supplement, we make the following submissions.

130. The rejoinder affidavit dealt with 9 issues:

130.1. Correspondence exchanged between the parties;

130.2. Inconsistency regarding the relief sought by OUTA;

130.3. Failure to set out a case in the founding affidavit;

130.4. Pre-litigation discovery;

130.5. “Transparency is the cost of doing business with state-owned entities”;

130.6. “OUTA and SANRAL are *ad idem* that the impugned decision be reviewed and set aside”.

The correspondence exchanged

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

131.1. OUTA contents that are *ad idem* that the impugned decision should be reviewed and set aside;

131.2. 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);

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

131.4. SANRAL should pay the costs of this Application to date.[125]

[125] Fourth Respondent’s Rejoinder Affidavit, para 11, Caselines page 046-7; Annexure “RRA1”, Caselines pp 046-26 – 046-27

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

133. 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 this 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.[126]

134. In a letter dated 6 October 2023, OUTA responded to BAKWENA's letter, denying the allegations therein and, among others, indicating that OUTA would instruct counsel to prepare heads of argument.[127]

135. On 16 October 2023, BAKWENA wrote to OUTA, recording OUTA's rejection of BAKWENA's proposal contained in the letter dated 3 October 2023, and notifying OUTA of its intent to seek a punitive costs order in view of the manner in which the matter has been conducted.[128]

136. 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,

[126] Fourth Respondent's Rejoinder Affidavit, para 13, Caselines page 046-7; Annexure "RRA2", Caselines pages 046-28 – 046-34
[127] Fourth Respondent's Rejoinder Affidavit, para 14, Caselines page 046-8; Annexure "RRA3", Caselines pages 046-35 – 046-36
[128] Fourth Respondent's Rejoinder Affidavit, para 15, Caselines page 046-8; Annexure "RRA4", Caselines pages 046-37 – 046-38

BAKWENA seeks to have the application heard, and will ask for the dismissal of this Application based on the further submissions below.[129]

Inconsistency regarding the relief sought by OUTA

137. 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).[130]

138. 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.[131] This is the very nature of why BAKWENA seeks to oppose this matter.

139. 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. 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.[132]

[129] Fourth Respondent's Rejoinder Affidavit, para 16, Caselines page 046-8
[130] Fourth Respondent's Rejoinder Affidavit, para 19, Caselines page 046-10
[131] Fourth Respondent's Rejoinder Affidavit, para 20, Caselines page 046-10
[132] Fourth Respondent's Rejoinder Affidavit, para 21, Caselines page 046-10

140. 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.[133] There is a clear *modus operandi* which OUTA seeks to achieve.

141. Additionally, OUTA seeks, as part of the alternative relief, an order directing SANRAL to comply with the provisions of Chapter 5 of PAIA. 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 in respect of documents that SANRAL are ordered to provide in terms of prayer 3, that relate to third parties.[134]

142. 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 of BAKWENA without following proper process.[135] This is the exact information which BAKWENA seeks to protect.

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[133] Fourth Respondent's Rejoinder Affidavit, para 22, Caselines pages 046-10 – 046-11
[134] Fourth Respondent's Rejoinder Affidavit, para 23, Caselines page 046-11
[135] Fourth Respondent's Rejoinder Affidavit, para 24, Caselines page 046-11

Failure to set out a case in the founding affidavit

143. 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". Moreover, OUTA states that its "application is premised on a Constitutionally entrenched right of access to information held by a public body".[136]

144. 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, especially BAKWENA.[137]

145. It is trite law 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.[138]

146. In ***Director of Hospital Services v Mistry***[139] Diemont JA remarked that " When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J in ***Pountas' Trustee v Lahanas***[140] at 68 and as has been said in many other cases:

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[136] Fourth Respondent's Rejoinder Affidavit, para 25, CaseLines pages 046-11 – 046-12
[137] Fourth Respondent's Rejoinder Affidavit, para 26, CaseLines p 046-12
[138] Fourth Respondent's Rejoinder Affidavit, para 27, CaseLines p 046-12
[139] 1979 (1) SA 626
[140] 1924 WLD 67

"... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny". "Since it is clear that the applicant stands or falls by his petition and the facts therein alleged - "it is not permissible to make out new grounds for the application in the replying affidavit" according to Van Winsen J in SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board 1953 (3) SA 256 (C).

147. 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 24, 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.[141]

148. 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 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

[141] Fourth Respondent's Rejoinder Affidavit, para 28, CaseLines p 046-12

such “decision” exists. In any event section 82 of PAIA does not contemplate a review but rather the setting aside of a decision.[142]

149. What is instead evident from OUTA’s founding papers is, *inter alia*, that[143]:

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

149.2. 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;

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

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

149.5. that SANRAL’s deemed refusal stands to be set aside.

150. 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.*”[144]

[142] Fourth Respondent’s Rejoinder Affidavit, para 29, CaseLines pp 046-12 – 046-13
[143] Fourth Respondent’s Rejoinder Affidavit, para 30, CaseLines p 046-13
[144] Fourth Respondent’s Rejoinder Affidavit, para 31, CaseLines pages 046-13 – 046-14

151. 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.[145]

152. 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*". 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.[146]

153. Moreover, 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. 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.[147]

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[145] Fourth Respondent's Rejoinder Affidavit, para 32, CaseLines page 046-14
[146] Fourth Respondent's Rejoinder Affidavit, para 33, CaseLines page 046-14
[147] Fourth Respondent's Rejoinder Affidavit, para 34, CaseLines pages 046-14 – 046-15

154. 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.[148]

155. 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 from SANRAL, in which SANRAL unequivocally stated that it did not receive the BRICS Loan.[149]

156. 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

[148] Fourth Respondent's Rejoinder Affidavit, para 35, CaseLines page 046-15
[149] Fourth Respondent's Rejoinder Affidavit, para 36, CaseLines pages 046-15 – 046-16

prayer 3. As matters stand prayer 3 remains part of the relief as contained in the notice of motion.[150]

157. 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.[151]

158. 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.[152]

Pre-Litigation Discovery

159. 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.[153]

160. 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

[150] Fourth Respondent's Rejoinder Affidavit, para 37, CaseLines page 046-16
[151] Fourth Respondent's Rejoinder Affidavit, para 38, CaseLines page 046-16
[152] Fourth Respondent's Rejoinder Affidavit, para 39, CaseLines p 046-16
[153] Fourth Respondent's Rejoinder Affidavit, para 40, CaseLines p 046-17

discovery. PAIA was never meant to be invoked as a replacement of the discovery procedure.[154]

161. Having considered the provisions of section 7, 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.[155]

162. OUTA states that[156]:

162.1. It will only be in a position to conduct an analysis upon production of the record referred to in the Request;

162.2. 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;

162.3. 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.

163. 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

[154] Fourth Respondent's Rejoinder Affidavit, para 41, CaseLines p 046-17
[155] Fourth Respondent's Rejoinder Affidavit, para 42, CaseLines p 046-17
[156] Fourth Respondent's Rejoinder Affidavit, para 43, CaseLines pages 046-17 -046-18

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.[157]

164. We have already set out the extensive legal position in this regard.

Obtaining the documents of a private body through a public body

165. 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.[158]

166. Furthermore, BAKWENA denies 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 is not correct, otherwise why would there be a justification for mandatory grounds of refusal of information.[159]

167. 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.[160]

[157] Fourth Respondent's Rejoinder Affidavit, para 44, CaseLines page 046-18
[158] Fourth Respondent's Rejoinder Affidavit, para 46, CaseLines page 046-18
[159] Fourth Respondent's Rejoinder Affidavit, para 47, CaseLines pages 046-18 – 046-19
[160] Fourth Respondent's Rejoinder Affidavit, para 48, CaseLines page 046-19

168. OUTA has misinterpreted BAKWENA's allegations. 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.[161]

169. 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.[162]

Alleged secrecy surrounding BAKWENA's profits

170. 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.*" 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.[163]

171. 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

[161] Fourth Respondent's Rejoinder Affidavit, para 49, CaseLines page 046-19
[162] Fourth Respondent's Rejoinder Affidavit, para 51, CaseLines page 046-19
[163] Fourth Respondent's Rejoinder Affidavit, para 52, CaseLines page 046-20

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.[164]

172. 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 there is no reason for such information to be "clouded in secrecy" is entirely baseless.[165]

173. 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.[166]

174. 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 PPP works in respect of infrastructure development. If it were not for private investment coming to the aid of public

[164] Fourth Respondent's Rejoinder Affidavit, para 53, CaseLines page 046-20
[165] Fourth Respondent's Rejoinder Affidavit, para 54, CaseLines pages 046-20 – 046-21
[166] Fourth Respondent's Rejoinder Affidavit, para 55, CaseLines page 046-21

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.[167]

175. 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 N1/N4 toll road is kept in good order.[168]

176. Furthermore, there is 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.[169]

177. 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.

[167] Fourth Respondent's Rejoinder Affidavit, para 56, CaseLines page 046-21
[168] Fourth Respondent's Rejoinder Affidavit, para 57, CaseLines page 046-22
[169] Fourth Respondent's Rejoinder Affidavit, para 58, CaseLines page 046-22

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.[170]

"Transparency is the cost of doing business with state-owned entities"

178. OUTA has misconstrued certain paragraphs of BAKWENA's answering affidavit relating to the confidentiality of BAKWENA's documents. The 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.[171]

179. 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.[172]

"OUTA and SANRAL are ad idem that the impugned decision be reviewed and set aside"

180. It is denied that "OUTA and SANRAL are *ad idem* that the impugned decision ought to be reviewed and set aside". In fact SANRAL, in paragraph 5 of its

[170] Fourth Respondent's Rejoinder Affidavit, para 59, CaseLines page 046-22
[171] Fourth Respondent's Rejoinder Affidavit, para 60, CaseLines pages 046-22 – 046-23
[172] Fourth Respondent's Rejoinder Affidavit, para 61, CaseLines page 046-23

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.*[173]

181. 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.[174]

COSTS AND CONCLUSION

182. For the various reasons already advanced, OUTA's entire application lacks the required substance necessary for the relief sought as there is no basis therefore which would entitle it the information requested.

183. OUTA's entire Application and conduct constitutes an abuse of process as regards:

183.1. the formulation of the relief which is clearly not competent,

183.2. the lack of a cause of action;

183.3. the lack of factual and evidentiary averments to sustain its entitlement to the requested documents; and

[173] Fourth Respondent's Rejoinder Affidavit, para 63, CaseLines pages 046-23 – 046-24
[174] Fourth Respondent's Rejoinder Affidavit, para 64, CaseLines p 046-24

183.4. its persistence to proceed given the deficiency of its Application.

184. This application should certainly not be entertained and permitted in circumstances where OUTA has failed to meet the requirements of any cause of action.

185. In the decision of *Health Justice Initiative v Minister of Health and Another*[175] this Division held, based on the particular facts of that matter, that a refusal to a request for documents based on confidentiality and prejudice to future commercial dealings is not meritorious and the respondents were accordingly ordered to grant access to the requested records.

186. It is our submission that this decision is distinguishable from the present matter, in that the decision related to a blanket refusal to provide documents and no basis was laid down other than the fact that the agreements referred to contained confidentiality and non-disclosure clauses. This is vastly different from the present matter as BAKWENA has provided extensive reasoning as to why its information should not be disclosed to OUTA. The commercial prejudice to BAKWENA is considerable as already set out hereinabove.

187. Furthermore, the Court in the Health Justice Initiative matter correctly held at paragraph 42 as follows:

188. BAKWENA have clearly, and without doubt, provided extensive facts and actualities of the commercial prejudice and concerns regarding their competitors should any disclosure occur. There is a clear disadvantage and prejudice to be suffered should its records be released. BAKWENA have placed sufficient justification for this commercial disadvantage and prejudice before this Court, and there is clear merit to their opposition.

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[175] (10009/22) [2023] ZAGPPHC 689 (17 August 2023)

[42] While it is permissible for the disclosure of information and documentation to be withheld in the event that it would put a third party at a disadvantage in contractual or other negotiations, or would cause prejudice in commercial competition, it is necessary for the respondents to show that disclosure would in fact result in a disadvantage or, alternatively, prejudice in commercial competition.

[43] There is nothing before this court to indicate that there would be any disadvantage in future negotiations or commercial prejudice to the Republic or to any of the other parties to the contracts concerned were the information and documentation to be disclosed. This basis for refusing disclosure is without any merit."

189. BAKWENA have clearly, and without doubt, provided extensive facts and actualities of the commercial prejudice and concerns regarding their competitors should any disclosure occur. There is a clear disadvantage and prejudice to be suffered should its records be released. BAKWENA have placed sufficient justification for this commercial disadvantage and prejudice before this Court, and there is clear merit to their opposition.

190. There can be no doubt that BAKWENA will be severely prejudiced if it is ordered to provide access to the documents belonging to, and relating to, BAKWENA, which would:

190.1. reveal trade secrets of BAKWENA;

190.2. disclose confidential commercial, technical and scientific information of BAKWENA,

190.3. prejudice BAKWENA in normal commercial and business competition, and

190.4. disadvantage BAKWENA in contractual and business negotiations.

191. BAKWENA submits that the present application falls to be dismissed with costs, including the costs of two counsel.

ADV G NEL SC

ADV A SALDULKER

FOURTH RESPONDENT'S LIST OF AUTHORITIES

1. *De Lange And Another v Eskom Holdings Ltd And Others* 2012 (1) SA 280 (GSJ)
2. *Director of Hospital Services v Mistry* 1979 (1) SA 626
3. *Earthlife Africa (Cape Town Branch) v Eskom Holdings Ltd (04/27514) [2005] ZAGPHC 129; [2006] 2 All SA 632 (W) (15 December 2005)*
4. *Health Justice Initiative v Minister of Health and Another* (10009/22) [2023] ZAGPPHC 689 (17 August 2023)
5. *Lawyers for Human Rights v Minister in the Presidency and Others* (CCT120/16) [2016] ZACC 45; 2017 (1) SA 645 (CC); 2017 (4) BCLR 445 (CC) (1 December 2016)
6. *Pountas' Trustee v Lahanas* 1924 WLD 67
7. *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C)
8. *Walter MC Naughtan (Pty) Ltd v Schwartz and Others* 2004 (3) SA 381 (CPD)