

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 36337/17

In the application between:

**ORGANISATION UNDOING TAX ABUSE**

Applicant/  
Intervening Party

and

**PASSENGER RAIL AGENCY OF  
SOUTH AFRICA**

First Respondent

**DIRECTORATE FOR PRIORITY CRIMES  
INVESTIGATION**

Second Respondent

**NATIONAL PROSECUTING AUTHORITY**

Third Respondent

In the matter between:

**PASSENGER RAIL AGENCY OF  
SOUTH AFRICA**

Applicant

and

**DIRECTORATE FOR PRIORITY CRIMES  
INVESTIGATION**

First Respondent

**NATIONAL PROSECUTING AUTHORITY**

Second Respondent

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FOUNDING AFFIDAVIT

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I, the undersigned,

**STEFANIE FICK**

do hereby make oath and state:

1. I am an adult businesswoman. I am currently the Head of Legal at the Organisation Undoing Tax Abuse NPC ("OUTA"), the applicant in this application. I am authorised to bring this application and depose to this affidavit.
2. The facts contained herein are, unless expressly stated or otherwise indicated by the context, within my personal knowledge, and are to the best of my belief, both true and correct.

**The Parties**

3. The applicant in this application is OUTA, a non-profit company, duly incorporated in terms the company laws of the Republic of South Africa, with its registered address at 318 Oak Avenue, Randburg.



4. The first respondent is the Passenger Rail Agency of South Africa ("PRASA"), a legal person established in terms of section 22 of the Legal Succession to the South African Transport Services Act, 9 of 1989 ("SATSA"), with its principal place of business at Prasa House, 1040 Burnett Street, Hatfield, Pretoria.
  
5. The second respondent is the Directorate of Priority Crime Investigation ("DPCI"), established as an independent directorate within the South African Police Service in terms of section 17C of the South African Police Act 68 of 1995 ("the SAPS Act"), as amended, and with its head office is at A5 Promat Building, Cresswell Road, Silverton, Pretoria.
  
6. The third respondent is the National Prosecuting Authority ("the NPA"), established in terms of section 179 of the Constitution of the Republic of South Africa and governed by the National Prosecuting Act 32 of 1998 ("the NPA Act"), with its head office at VMG Building (Corner Westlake & Hartley) 123 Westlake Avenue, Weavind Park, Silverton, Pretoria.

#### **The Purpose of the Application**

7. The purpose of this application is to obtain leave to intervene as a second applicant in the application under the above-mentioned case number between PRASA, as the applicant, the DPCI, as the first respondent, and the NPA, as the second respondent.



### The Grounds for the Relief

8. I am advised that OUTA may be permitted to intervene, if the entitlement to the relief sought by OUTA depends on the determination of substantially the same question of law or fact. I respectfully submit that OUTA satisfies those requirements, for the simple reason that OUTA seeks the same relief on substantially the same facts and for substantially the same reasons.
9. OUTA seeks the relief set out in the notice of motion filed by PRASA. The facts on which the relief is founded are set out in the founding affidavit that OUTA wishes to place before the Court in the main application. A copy of that affidavit is attached hereto as annexure "SF/Main".
10. The affidavit to a large extent repeats facts that are contained in the founding affidavit or the documents attached as annexures to the founding affidavit filed by PRASA. The extent to which the questions of law and fact are substantially the same is plain from a comparison of the two founding affidavits.
11. Furthermore, the intervention is convenient to both the Court and the parties. The refusal of permission to intervene will compel OUTA to bring separate proceedings. The duplication of proceedings will add to the burden of the courts, create an opportunity for contradiction and increase the parties' costs.





12. In addition, the proceedings brought by PRASA raise issues of public interest in relation to which OUTA, and its members, have a direct a substantial interest.

#### **The Foundation for the Relief**

13. The foundation for the relief sought in this application is contained in the affidavit that OUTA seeks to place before the Court in the main application (annexure "SF/Main") and to which the Court is respectfully referred.
14. The affidavit sets out a *prima facie* case. In the paragraphs below, I summarise, for convenience, the content of the affidavit.
- 14.1. The Auditor General has discovered and reported on irregular and unauthorised expenditure at PRASA in an amount of approximately R500 million for the 2014/2015 financial year and approximately R14 billion for the 2014/2015 financial year.
- 14.2. The Public Protector has investigated and reported on numerous corporate governance failures and suspected corruption.
- 14.3. The board of control of PRASA conducted more extensive investigations into the affairs of PRASA with the assistance of forensic investigators and forensic auditors, which uncovered suspicious conduct that appears to constitute offences that are a national priority and other offences that fall within the remit of the

DPCI, including corruption involving large amounts of public funds.

14.4. PRASA filed complaints and reported offences with the South African Police Services ("SAPS"), including criminal complaints regarding the so called Siyangena and Swifambo tenders and contracts. The SAPS referred the complaints to the DPCI for investigation. The DPCI is an independent body that has been tasked with fighting *inter alia* corruption as required by the Constitution and other legislation. Although the investigations got off to a good start in late 2015, they stalled soon thereafter.

14.5. The complaints were first made in July 2015 and, despite the lapse of nearly two years, the investigations have not been completed and no criminal charges have been brought against anyone involved.

14.6. PRASA further approached the Court to review set aside the decisions to award and conclude contracts in the Siyangena and Swifambo matters. The Court found in the Swifambo matter that enough evidence had been placed before it to prove, on a balance of probabilities, that the arrangement between Swifambo and Vossloh, constituted fronting. In particular, because the arrangement undermines the object of the B-BBEE Act. The core of the B-BBEE Act is viable, effective participation in the economy through ownership of productive assets and the

development of advanced skills. The B-BBEE Act creates an offence where any person engages in a fronting practice. I respectfully submit that fronting is a national priority offence.

- 14.7. PRASA has proposed and made an application through Werksmans Attorneys for the appointment of forensic accountants, Horwath Forensics SA (Pty) Ltd ("Horwath"), to provide all necessary forensic auditing services to assist DPCI on the basis that the investigation is of a complex nature and extensive, involving a number of entities and individuals (including employees of PRASA).
- 14.8. PRASA supplied the DPCI with the sufficient and relevant information to conduct the investigations. However, the DPCI team allocated the PRASA investigations has not applied its mind to the documents supplied or has no intention to ensure that the investigations are finalised.
- 14.9. The DPCI's conduct in conducting the investigations is contrary to its Constitutional and statutory obligations.
- 14.10. In seeking the relief in the main application, OUTA acts in own interest as an organisation that is primarily concerned with the principles of democracy, constitutionalism and the rule of law. OUTA also acts in the public interest more generally, which, it is contended, is indisputably present in this case.



- 14.11. OUTA is an organisation that seeks to promote a prosperous South Africa with effective, practical and enforceable taxation policies, and corrupt free conduct in the use of the taxes collected.
- 14.12. The primary objectives of OUTA is the promotion, protection and advancement of the Constitution in matters relating to policy, laws or conduct that offend the rights, values and principles enshrined in the Constitution.
- 14.13. In order to achieve its primary objective and meet those challenges, OUTA conducts a broad range of activities that includes where necessary, approaching the Courts and using legal processes to advance OUTA's values and to contribute to a strong civil society that holds private interests, government, individuals and itself accountable.
- 14.14. In terms of the Constitution, everyone is equal before the law and has the right to equal protection and benefit of the law (section 9), everyone has a right to dignity (section 10), to freedom and security of the person (section 12), to administrative action that is lawful, reasonable and procedurally fair (section 33).
- 14.15. Section 7(2) of the Constitution makes it plain that the state is obliged to respect, promote and fulfil those rights. In particular, the DPCI as a public entity is required to respect , promote and



fulfil those rights when initiating their function in terms of section 205 (3) of the Constitution.

- 14.16. The Constitution also provides that public administration must be governed by the democratic values and principles contained therein (section 195).
- 14.17. When an organ of the state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods and services, it must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective (section 217).
- 14.18. Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our constitution.
- 14.19. All South Africans have an interest in the rule of law, the requirements of a properly functioning constitutional democracy, and in particular the urgent steps necessary to eliminate corruption and organised crime in our nascent democracy. The Constitutional Court has unequivocally identified corruption as a threat to our constitutional order, which undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our country. The Constitutional Court has recognised that maladministration and public fraudulence imperils the capacity of the state to fulfil its

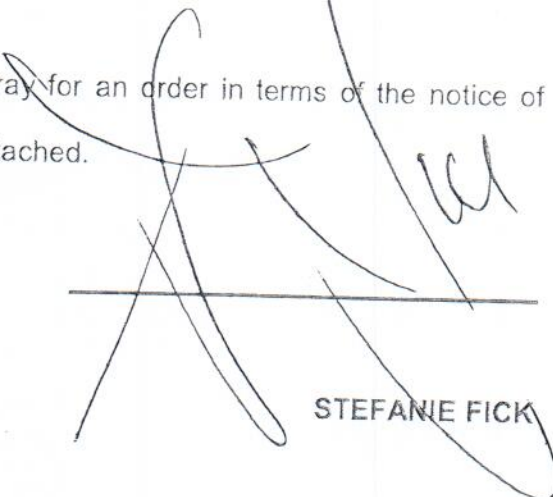
obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights, and that corruption and organised crime stunt sustainable development and economic growth, and put at risk stability and security of society.

14.20. OUTA brings the application firstly in its own interests in terms of section 38(a) of the Constitution. It is an organisation that is primarily concerned with the principles of democracy, constitutionalism and the rule of law. These principles are implicated and threatened if the DPCI fails to fulfil its constitutional obligation to fight organised crime and corruption in reasonably and efficiently.

14.21. OUTA also approaches the Court in the public interest in terms of section 38(d) of the Constitution. As correctly stated by Francis J in the Swifambo review, both the Siyangena and the Swifambo criminal complaints raise issues of fundamental public importance. They concern corruption by a public body concerning a tender that will affect the public for decades to come.

14.22. OUTA accordingly seeks mandatory relief aimed at ensuring that the investigation in PRASA's Siyangena and Swifambo complaints are conducted reasonably and brought to finality.

15. Accordingly, OUTA seeks leave from the Court to intervene in these proceedings as the second applicant.
16. I mention that OUTA has not considered the confidential file referred to in the man applicaiton. In the event that OUTA is permitted to intervene, OUTA seeks leave for its legal advisors to consider the confidential file and, if advised to do so, to file a supplementary founding affidavit and present legal argument on the contents of the confidential file, subject to the undertaking that such matter remains confidential.
17. In the premises, I respectfully pray for an order in terms of the notice of motion to which this affidavit is attached.



STEFANIE FICK

I hereby certify that the deponent declares that the deponent knows and understand the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at **RAUDBURG** on this the **31<sup>st</sup>** day of **JULY** 2017 and the regulations contained in Government Notice R1478 of 11 July 1980 as amended by Government Notice R774 of 20 April 1982 concerning taking an oath have been complied with.

**ANDREA KORFF**  
 PRAKTISERENDE PROKUREUR/PRACTISING ATTORNEY RSA  
 KOMMISSARIS VAN EDE/COMMISSIONER OF OATHS  
 1085 JUSTICE MAHOMED STREET  
 BROOKLYN  
 TEL: 087 701 5874



COMMISSIONER OF OATHS