

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

**CASE NO: 32095/2020**

In the matter between:

**ORGANISATION UNDOING TAX ABUSE NPC**

**APPLICANT**

**And**

**SOUTH AFRICAN NATIONAL ROADS AGENCY LTD**

**FIRST RESPONDENT**

**THE MINISTER OF TRANSPORT**

**SECOND RESPONDENT**

**NAZIR ALLI**

**THIRD RESPONDENT**

**DANIEL MOTAUNG**

**FOURTH RESPONDENT**

**SKHUMBUZO MACOZOMA N.O**

**FIFTH RESPONDENT**

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

**SIXTH RESPONDENT**

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**APPLICANT'S HEADS OF ARGUMENT**

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**INTRODUCTION**

1.

The applicant approaches this court in terms of the Promotion of Access to Information

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Act (“*PAIA*”) seeking certain relief against the respondents. Principally, the applicant, Organisation Undoing Tax Abuse (“*OUTA*”) seeks orders directing the respondents to furnish it with their tendered records, as well as additionally requested records, which remains opposed in this application. This application is brought in terms of section 78(2) read with section 82(2) of the *PAIA*. *OUTA* seeks the following order:

- 1.1. Declaring that the South African National Road Agency (“*SANRAL*”) deemed refusal of *OUTA*'s request for access to information, dated 25 September 2019 is unlawful and in conflict with *PAIA*;
- 1.2. Directing *SANRAL* to supply *OUTA* with a copy of the records requested in *OUTA*'s request for access to information, dated 25 September 2019 within fifteen (15) days of service of the court order.
- 1.3. Alternatively to the paragraphs 1.1 and 1.2 above;
- 1.4. Declaring that *SANRAL*'s refusal of access to the record is unlawful and in conflict with the provisions of *PAIA*;
- 1.5. Reviewing and setting aside *SANRAL*'s refusal to grant *OUTA* access to information requested;
- 1.6. Directing *SANRAL* to supply *OUTA* with a copy of the requested information

within fifteen (15) days of service of the court order.

2.

From the onset it is important to note that the applicant in this application is a civil action organisation (civil society) that through its various methodologies aims to hold government to account by challenging the abuse of authority, challenging, irrational policy and legislation, as well as engaging with the community and authorities in resolving issues pertaining to administration and service delivery within all spheres of government.

3.

The starting point in a PAIA application to section 11 of PAIA which reads:

*“11. Right of access to records of public bodies.*

*(1) A requester must be given access to a record of a public body if –*

*(a) that requester complies with all the procedural requirements in this act relating to a request for access to that record; and*

*(b) access to that record is not refused in terms of any grounds for refusal contemplated in chapter 4 of this part.*

*(2) A requester contemplated in subsection (1) includes a request for access to a record containing personal information about the*

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*requester.*

(3) *A requester's right of access contemplated in subsection (1) is, subject to this act, not affected by –*

(a) *any reasons the requester gives for requesting access;*

(b) *the information officers believe as to what the requested reasons are for requesting access.”*

4.

One of the things which stands out in section 11 is that compliance with the procedural requirements of PAIA is not optional. If any of the procedural requirements is not complied with, the requester is not entitled to the record. Procedural compliance has not been placed in issue by the respondents. Further, the reasons provided by the requester does not affect its rights to the access of the requested records as set out in subsection 3. Such subsections finds great relevance in the current matter as the basis of the respondent's objection to supplying the information which will be set out in greater detail below, relates to the entitlement and reasons provided by OUTA to the requested records. Further SANRAL objects on the basis of its believe as to what the requested reasons are for requesting access. In **President of the Republic of South Africa v M and G Media LTD 2011 (2) SA 1 (SCA)** the Constitutional Court explained the provisions of section 11 in the following terms:

*“As is evident from its long title, PAIA was enacted “to give effect to the constitutional right of access to information held by the state and the formulation of section 11 casts the exercise of this right to pre-empt the terms – the requester must be given access to the report, so long as the request complies with the procedures outlined in the act and the record requested is not protected from disclosure by one of the exemptions set forth herein. Under our law, therefore, the disclosure of information is the rule and exemption from disclosure is the exception.”*

*As simple a matter as whether the correct request in the prescribed form was sent to the correct information officer at the correct address can easily turn into a complicated argument in court that does not bring the requester any closer to accessing the required record and increases, unnecessarily, the costs of litigation. These features may well limit access to justice, a constitutional imperative. In order to reduce the occurrence of such barriers, the legislator impose certain obligations on public bodies to direct their information officers to make available clear guidelines to members of the public on how the information they hold is to be availed to requesters.”*

5.

Now that the foundation of a PAIA application has been set I turn to the facts as set out by the parties in their respective affidavits.

**THE APPLICANT'S FOUNDING AFFIDAVIT:**

## 6.

The applicant, in its founding affidavit, deposed to *inter alia* the following:

- 6.1. On 30 July 2019 OUTA, acting in accordance with the provisions of PAIA, requested from SANRAL, a set of records pertaining the content of a concession contract, entered into between SANRAL and N3 Toll Concession (Pty) Ltd (“N3TC”). (Paragraph 19).
- 6.2. On 25 September 2020 a further request for access to information was transmitted by OUTA to SANRAL and it was marked for the intention of the Information Officer Mr Alli. To date, SANRAL has failed to respond to the request for information. (Paragraph 20).
- 6.3. PAIA is the national legislation envisioned in section 32(2) of the Constitution. It was enacted in order to give effect to access to information and to promote the values of openness, transparency, accountability and good governance - principles foundational to the constitution. (Paragraph 27).
- 6.4. Further, OUTA submitted the following:
  - 6.4.1. In terms of PAIA, public bodies are under a duty to promote access to

a requested record, a part of it, unless refusal to the request is permitted or required on one or more of the grounds listed in PAIA;

6.4.2. Everyone's request for access to information in terms of PAIA is an invocation of section 36 right in the Constitution and entitles the requester to access to the requested record or part thereof if that requester complies with all procedural and statutory requirements set out in the statute, unless there is a valid ground of refusal which a private or public body may rely on; and

6.4.3. The Constitutional Court has repeatedly made it clear that the right of access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. (Paragraph 30).

## 7.

7.1. Without elaborating on the merits of the concession agreement, OUTA has established that the agreement will lapse during the course of May 2029. Notwithstanding, SANRAL has continued to implement the agreement, in the absence of justifiable extension to that effect, potentially, in contravention of the Public Finance Management Act, 1999 (“*PFMA*”). (Paragraph 34).

7.2. OUTA submitted, however, that the legality of the agreement entered into between SANRAL and N3TC can only be established upon consulting all relevant

annexures and addendums to such agreement. (Paragraph 35).

7.3. OUTA submitted that on 25 September 2019 may be construed as the date that SANRAL had received OUTA's request. Consequently, SANRAL's information officer ought to have made a decision on the request and accordingly informed OUTA thereof by 25 October 2019. OUTA confirmed that to date it had not enjoyed the courtesy of being notified of the decision of its request. (Paragraph 40)

7.4. As a result of SANRAL's failure to respond to OUTA's repeated requests for access of information, its failure in terms of section 27 of PAIA, regarded as a deemed refusal. (Paragraph 41)

## 8.

8.1. Section 46 of PAIA provides that access to information must be granted if the disclosure of the record would reveal evidence of a substantial contravention of, or a failure to comply with, the law, and the public interest in the disclosure of the record outweighs the harm contemplated in the ground of refusal. (Paragraph 58).

8.2. OUTA wishes to evaluate the legality of an agreement that is of public interest, however, OUTA will only be in a position to do so upon the production of the records referred to in its request. Should OUTA determine that SANRAL had



acted unlawfully in the implementation of its agreement with N3TC, OUTA ultimately wishes to institute the relevant proceedings in a court of law. (Paragraph 59).

8.3. This matter falls rightfully under the provisions of section 46, as the production of the records in question would reveal whether or not SANRAL complied with the provisions of the PFMA and essentially, sections 181 and 182 of the Constitution. (Paragraph 60)

8.4. It is for this reason, that OUTA wishes to be granted access to the records in question, as such records will prove pivotal in determining whether the PFMA and/or other relevant legislation has been contravened. (Paragraph 62).

## 9.

9.1. Section 80(1) of PAIA makes provision for what our courts have termed “*a judicial peak*”, it provides:

*“Despite this act and any other law, any court hearing an application, or an appeal against a decision on that application, may examine any record of a private or public body to which this act applies, and no such record may be withheld from the court on any grounds.”*

9.2. Should this court wish to examine the records concerned with the view to determine whether there has been any basis for refusing access to the records

concerned, it is empowered to do so *mero moto*. (Paragraph 71 to 72).

**THE FIRST, FOURTH AND FIFTH RESPONDENT'S ANSWERING AFFIDAVIT –  
GROUNDS FOR OPPOSITION:**

10.

These respondents, in their opposing affidavit, deposed to *inter alia* the following:

- 10.1. Section 36 of the act provides for the protection of commercial information of third parties, in terms of section 36(1)(b) and (c), SANRAL is therefore entitled and justified to refuse to grant access to the information requested by the applicant. The requested information contained general and specific commercial, financial and technical information of a highly confidential nature belonging to the concessionaire. The information requested, specifically relates to the revenue generated by the concessionaire throughout the term of the N3TC concessionary contract. (Paragraphs 10 to 12).
- 10.2. The concessionary did, however, consented to the disclosure of the N3TC concessionary contract, all annexures, and addenda to the N3TC concessionary contract.
- 10.3. We, therefore, tender this information (in respect of which the concessionaire granted consent) to the applicant. The applicant will have to arrange with

SANRAL for this information to be made available to it. (Paragraphs 16 and 17).

- 10.4. As stated in the concessionaire's response to the request for consent, the information it has objected to SANRAL disclosing will cause sufficient harm to the commercial and financial interest of the concessionaire. (Paragraphs 18).
- 10.5. The information is confidential, and the disclosure of such confidential information will put the concessionaire at a disadvantage in its contractual negotiations, both in relation to similar contractual arrangements and prejudice it in commercial competition. (Paragraph 19)
- 10.6. If SANRAL discloses the documents relating to the formula or manner of the price determination, SANRAL will be in breach of a duty of confidence owed to the concessionaire.
- 10.7. The concessionaire will suffer prejudice as a result of the disclosure of the information requested by the applicant. Providing access to the requested information will be in breach of confidentiality provisions in the agreement between SANRAL and the concessionaire. (Paragraphs 20 to 21)

## 11.

- 11.1. The information requested by the applicant will not reveal any contravention of law or regulations.

- 11.2. The N3TC concession contract was legally concluded in May 1999.
- 11.3. The PFMA was assented to in March 1999, and commenced on 1 April. 2000.
- 11.4. It is therefore unclear why the applicant wishes to ensure that the agreement is compliant with the PFMA. The PFMA is not relevant, the PFMA commenced or applied after the agreement was concluded.
- 11.5. The PFMA does not apply retrospectively. (Paragraph 49 to paragraph 53)
- 11.6. SANRAL has a lawful basis. (In terms of section 36(1) (b) and (c) of the act for refusing the request of information. (Paragraph 60).

**THE APPLICANTS REPLYING AFFIDAVIT:**

The applicant, in its replying affidavit, deposed to *inter alia* the following:

12.

- 12.1. The only financial information, which includes revenue generated by the concessionaire is the financial information requested in part B of the request. (Paragraph 19)
- 12.2. The remainder of the request does not concern itself with financial information, nor with revenue generated by the concessionaire throughout the term of the

contract. (Paragraph 21).

- 12.3. SANRAL simply deals with the entire request on the basis that the request only relates to financial information. (Paragraph 24).
- 12.4. SANRAL has not set out any adequate reasons required by section 25 of PAIA for refusing access to the records requested in items 4 to 10 of part A.
- 12.5. Accordingly, these records should be furnished in terms of PAIA. (Paragraphs 29 to 30).
- 12.6. Most importantly, although the PMFA does not find application to the concessionary contract there can be no debate that SANRAL is an organ of state and that the provisions of section 195, 216 and 217 of the Constitution of the Republic of South Africa, finds application to SANRAL and to the concessionaire contract. (Paragraph 34)
- 12.7. Section 195 of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the constitution, including, *inter alia*, the following principles:
- 12.7.1. a high standard of professional ethics must be promoted and maintained;
  - 12.7.2. efficient, economic and effective use of resources must be promoted;

- 12.7.3. services must be provided impartially, fairly, equitably and without bias;
  - 12.7.4. public administration must be accountable;
  - 12.7.5. transparency must be fostered by providing the public with timely, accessible and accurate information. (Paragraph 37).
- 12.8. Section 127 of the Constitution which deals with procurement provides *inter alia*, that when an organ of state in the national, provincial or local sphere of government, or any other institution defined in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. (Paragraph 38)

### 13.

- 13.1. The astronomical profit made by the concessionaire cannot be said to be cost effective. The motoring public are not furnished with timeously accessible and accurate information, and yet they have to pay these increases on the say-so of SANRAL, whom, 99% of the time, accepts the recommendation given to them by the consultant.
- 13.2. SANRAL's reliance on section 36(1)(b) and (c) of PAIA based on the aforesaid is at odds with SANRAL's duty in terms of section 195 and 217 of the Constitution.

- 13.3. The information requested, OUTA submits, would reveal evidence of either a substantial contravention of, or a failure to comply with section 195 and 217 of the Constitution. (Paragraphs 44 to 48)

**SIXTH RESPONDENT'S ANSWERING AFFIDAVIT AND OPPOSITION THERETO:**

The sixth respondent's grounds of opposition are a mere repetition of the grounds stated by the respondents above, accordingly reference will only be made to the relevant averments. The sixth respondent, in its opposing affidavit, deposed to *inter alia* the following:

14.

- 14.1. SANRAL did not respond in the prescribed 30 days. (Paragraph 12.4)
- 14.2. Following further requests and extensions of time by OUTA to SANRAL, specifically on 13 September 2019, 25 September 2019, no response was received from SANRAL by OUTA. (Paragraph 13)
- 14.3. On 17 February 2021 the above Honourable Court granted N3TC leave to intervene as the sixth respondent in this application. (Paragraph 20)
- 14.4. SANRAL is not in possession of all of the document that OUTA has requested. To the extent that OUTA is entitled to receive any records at all, OUTA may only

receive those records that are already in the possession of SANRAL. OUTA cannot seek disclosure of records, under a request made to SANRAL, that SANRAL does not have and therefore force SANRAL to go out and seek those records. (Paragraph 29)

14.5. N3TC has no knowledge of whether or not SANRAL still has certain documents in its possession, in circumstances where they were originally provided to SANRAL more than 23 years ago. If SANRAL no longer has these documents in its possession, then SANRAL cannot be compelled to give the documents to OUTA. N3TC, therefore, opposes the granting of order in respect of these documents on this ground alone. (Paragraph 31 to 32)

14.6. N3TC does not oppose a disclosure to OUTA of the following requested records:

14.6.1. the concession agreement records;

14.6.2. the contract entered into with the independent engineers related to the concession agreement; and

14.6.3. all the independent engineers report submitted to SANRAL related to the concession agreement, to the extent that such records do not contain financial, commercial, scientific or technical information, the disclosure of which would likely to cause harm to the financial,



commercial or technical interests of N3TC, as third party.

- 14.7. OUTA's application thus falls to be determined on the basis that it has access to, amongst others the concession agreement records and will enable OUTA to determine the validity of the concession agreement as well as the validity of any amendments to the concession agreement or renewals or extensions to the concession agreement. OUTA does not require any of the other records for those purposes. (Paragraph 34 to 35).

15.

- 15.1. The disclosure of the commercial records and financial records is opposed on the grounds that:

15.1.1. These records are not required by OUTA for any of the stated purposes for which they seek access to the records of N3TC held by SANRAL.

15.1.2. The disclosure of these records will:

15.1.2.1. amount to pre-litigation discovery;

15.1.2.2. likely cause harm to the commercial and or financial interests of N3TC and/or could reasonably be expected to

put N3TC at a disadvantage in contractual or other negotiations and/or prejudice N3TC in commercial competition; and

15.1.2.3. constitute an action for breach of a duty of confidence owed to third parties under agreement concluded by N3TC with such third parties. (Paragraph 37)

15.2. OUTA's request for access to the requested record is no more than a fishing expedition intended to force SANRAL and N3TC, as potential defendants, to disclose the respective cases before any action is launched. OUTA has not, however, disclose exceptional circumstances justifying the grant of any relief sought. (Paragraph 43)

15.3. In short, in terms of section 36(1) PAIA, the information officer of SANRAL is obligated to refuse a request for access to the requested records if the requested records contain financial, commercial, scientific or technical information, the disclosure of which would likely cause harm to the financial, commercial or technical interests of N3TC, as a third party or as the information supplied in confidence by N3TC, the disclosure of which would be reasonably expected to place N3TC at a commercial disadvantage when contracting in other negotiations. (Paragraph 46)

- 15.4. In terms of the concession agreement, N3TC is required to undertake and perform a competitive tender process on an arm's length basis, when procuring services and/or goods for, amongst others, the OCM contracts. (Paragraph 50.3).
- 15.5. The competitive tender process must be understood in the context of South Africa's small and competitive construction and toll operation sectors, particularly so when having regard to the recent demise of a number of participants, such as Group 5, and Basil Reid. (Paragraph 50.5).
- 15.6. Sharing N3TC's financial statements would be tantamount to sharing the financial model. This is so because, a competitor of N3TC will have access to the financial model, through the financial statements, will have in their possession, a financial history of 21 years which will make it easy for the competitors to recompute N3TC's business cause and to take advantage of the intellectual property which has been developed over two decades. (Paragraph 52).
- 15.7. In terms of section 37 of PAIA, SANRAL is well within its rights to refuse to grant OUTA's request for access to the requested records where such disclosure would constitute a breach of a duty of confidence owed to a third party in terms of an agreement. (Paragraph 59).
- 15.8. Furthermore, clause 22.2 of the concession agreement requires each party to keep in confidence all information, data and other records provided in terms of the concession agreement. The commercial and financial records were thus

provided by N3TC to SANRAL on the understanding that confidentiality of such information is protected in terms of clause 22.2 of the concession agreement in order to preserve, maintain and facilitate an open and transparent relationship between SANRAL and N3TC. (Paragraph 62).

**THE APPLICANTS REPLYING AFFIDAVIT TO THE SIXTH RESPONDENT:**

The applicant, in its replying affidavit, deposed to *inter alia* the following:

16.

- 16.1. N3TC have sought to shift the proverbial goalposts away from the factual issues by utilising portions of OUTA's founding affidavit out of context to create a false narrative and arguments orbiting meritless defences in an attempt to discredit the applicant's application.
- 16.2. N3TC's argument rests on the following, in respect of the disclosure of the requested records will;
  - 16.2.1. amount to pre-litigation discovery;
  - 16.2.2. likely cause harm to the commercial and or financial interest of N3TC;
  - 16.2.3. constitute an action for breach of a duty of confidence owed to third parties under agreements concluded by N3TC with such third parties.
- 16.3. The aforementioned, collectively, and once broken down and scrutinised by the

Honourable Court can be construed as red herring defences. It is extremely unfortunate and unbecoming of a major concessionaire knowingly conducting business with an independent statutory public company such as SANRAL to mistake the proverbial wood for the trees. N3TC, have attempted to discover harm objectively, nothing exists. The allegation of harm in respect of financial and confidence are, with respect, without merit, and vehemently denied. (Paragraphs 6 to 8)

16.4. Within the confines of section 11 of PAIA the applicant has a right as requested to be given access to public records without giving a reason for seeking access to information. OUTA's right of access is not affected by any reasons OUTA gives for requesting access or by SANRAL and/or N3TC's believe as to what OUTA's reasons are for requesting access. (Paragraph 12)

16.5. To this end, the nefarious reasons advanced by N3TC that OUTA's application amounts to pre-trial litigation is misplaced and wrong to say the least. The request for information underpins the requirement for government entities to operate in a transparent manner as envisioned by section 217 of the Constitution.

## 17.

17.1. The ultimate goal of PAIA is to promote transparency, accountability and effective governance of all public and private bodies to assist members of the public to effectively scrutinise and participate in decisions made by public bodies, to ensure that the state promotes a human rights culture and social justice, to

encourage openness, to establish voluntary and mandatory mechanisms or procedures which gives effect to the right of access to information in a speedy, inexpensive and effortless manner. (Paragraph 15).

- 17.2. Although the PFMA may does not find application to the concessionary contract there can be no debate that SANRAL is an organ of state and that the provisions of section 195, 1216 and 217 of the Constitution find application to SANRAL and to the concessionary contract which wholly impacts N3TC. Such submissions cannot be disputed by N3TC as the contracting party to the concessionary agreement. (Paragraph 19.1).

18.

- 18.1. OUTA accepts the records no longer opposed by N3TC, and in consideration of such tenders in both answering affidavits on behalf of SANRAL and N3TC, the following breakdown is provided in respect of the current standing on each requested record since OUTA sought access to copies of the following records:

18.1.1. terms of Part A of the request for information —

1. the concession agreement; (no longer opposed)
2. all annexures, amendments, and addenda to the concession agreement (no longer opposed);

3. all operation and maintenance contracts entered into between N3TC and the O&M contractors, relating to the concession agreement (N3TC submits that SANRAL does not have these records in its possession and thus opposes its disclosure);
4. the operational and maintenance manual pertaining to the concession agreement (N3TC is unsure if SANRAL still has this record in its possession and thus opposes its disclosure);
5. the contracts entered into with the independent engineer/s related to the concession agreement (no longer opposed);
6. all the independent engineer/s reports submitted to SANRAL related to the concession agreement (no longer opposed);
7. all construction work contracts entered into by N3TC relating to the concession agreement; (N3TC submits that SANRAL does not have these records in its possession and thus opposes its disclosure)
8. all Performance Certificates issued, relating to the construction works contracts entered into by N3TC (opposed);
9. all Taking Over Certificates that have been issued in terms of the concession agreement (N3TC submits that SANRAL does not have these records in its possession and thus opposes its disclosure).

18.1.2. in terms of Part B of the request for information –

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

19.

- 19.1. In respect of the records, which N3TC states that SANRAL does not have such records in its possession and thus opposes its disclosure, OUTA is alarmed by such submissions, because on N3TC's version such conduct is a clear



irregularity. N3TC expects the court to believe that contracts and manuals which regulate the concessionary agreement between SANRAL and N3TC, an agreement which has been extended and is still in force between the parties, but certain contents and manuals are no longer in the possession of SANRAL. (Paragraph 22)

- 19.2. SANRAL is not only mandated to keep in its possession such contracts since it regulates an existing agreement with N3TC, in line with the legislation SANRAL must retain its agreements. Once OUTA is in position of the tendered records it will then be in a position to determine, if necessary, the weight attached to the records, which N3TC contends is not in SANRAL's possession, such conduct further illustrates the need for the disclosure of the records requested by OUTA to flush out the extent to and further irregularities which SANRAL is wrongly at ease with not being in possession. (Paragraph 23)
- 19.3. Nowhere in SANRAL's affidavit does it allege that it is not in possession of the records as requested by OUTA. The only objections raised related to the financial and technical information sought which would impact on N3TC and renders such records confidential. SANRAL does not alleged that it is not in possession of the records and N3TC's version is that it is unsure. SANRAL has not stated that it is not in the possession of the requested records.
- 19.4. OUTA continues on the premise that SANRAL is then in the possession of the

records and should be, since such contracts and manuals are relevant to the continued agreement between SANRAL and N3TC. If no such records are within the scope of the agreement, then N3TC is incorrect in its stance that there is no reason, be it under the concession agreement, then N3TC would not be required to give these documents to SANRAL. OUTA submits that under the concession agreement N3TC is required to give those documents to SANRAL and SANRAL should accordingly be in possession of such documents. It is concerning if it is not. (Paragraph 25 to 26).

- 19.5. N3TC have failed to show that it is probable that the disclosure, even of the confidential information cause harm to N3TC's commercial interest, a party relying on such a provision must show that harm is not simply possible but probable. (Paragraph 29).
- 19.6. OUTA does not seek the disclosure of N3TC financial model, OUTA seeks the data which that model produces, further which is required as it relates to the concession agreement. The concession agreement must bear certain obligations to N3TC in respect of the information sought in line with the agreement. Thus, it is not the model OUTA requires, but the data it provides, which ought to be provided to SANRAL in their continued engagement. N3TC cannot expect OUTA or the court to believe that due to intellectual property N3TC has provided SANRAL with no data, despite its obligation to do so.

19.7. Further, only three concessionaires conduct business in the Republic, this limits N3TC stance in respect of competitiveness in the disclosure exposing it to harm there since there are only three competitors in the market. N3TC's argument in this regard has no foundation. (Paragraphs 30 to 32).

**RESPONDENTS FAILURE TO PROVIDE THE TENDERED RECORDS:**

20.

20.1. Despite the records tendered by SANRAL and disclosure of such documents approved by N3TC, no such records have been forthcoming. OUTAs attorney has engaged SANRAL's attorney on numerous occasions, on the basis that the respondents tendered such records.

20.2. SANRAL confirmed in its replying affidavit that OUTA will have to arrange with SANRAL for this information to be made available to it. The perpetual silence and desire to frustrate this application led to OUTAs attorney deposing to an affidavit in respect of the attempts to retrieve the tendered records. The salient aspects are reflected as:

20.2.1. Upon consideration of the content of the answering affidavit, the applicant noted that-when the sixth respondents answering affidavit is read with the answering affidavit of the first, fourth and fifth

respondents answering affidavit- that various documents were no longer objected to being disclosed;

20.2.2. On 13 April 2022, both attorneys representing the respondents Respectively, copies of the documents tendered were requested. No response was received and a follow up to both attorneys was sent on 25 April 2022;

20.2.3. On 26 April 2022, the sixth respondent's attorney responded and confirm that N3TC does not object the disclosure and further that any request by OUTA's attorney should be directed directly to SANRAL; and

20.2.4. On 12 May 2022, after still not receiving any reply from the first, fourth and fifth respondents, they were advised that due to their failure to provide the tendered documents, heads of argument will be finalised without the tendered documents and reserve the right to supplement should the need arise.

20.3. Based on such tender N3TC contented in its replying affidavit that OUTA's application thus falls to be determined on the basis that it has access to, amongst others the concession agreement records and will enable OUTA to determine the validity of the concession agreement as well as the validity of any amendments to the concession agreement or renewals or extensions to the concession agreement. Such determination cannot be made if SANRAL refuses to provide the records.

20.4. The only conclusion the Court should draw from this refusal to provide the records tendered by the first, fourth and fifth respondents is that there is indeed merit in OUTA evaluation that production of such records and the respondents conduct further illustrates the need for the disclosure of the records requested by OUTA to flush out the extent to and further irregularities which SANRAL is wrongly at ease with concealing from the public.

20.5. I submit that in addition to the relief sought by OUTA, the Court order the disclosure of the tendered records. The application should only proceed on the records that remain opposed as set out in the respondents' affidavits, this being motion proceedings, in such proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of a party's case should appear clearly therefrom.

See: *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 182 SCA at 200D.

### **LEGAL PRINCIPLES:**

21.

21.1. In ***Transnet LTD and Another v SA Metal Company Co (Pty) LTD* 2006 (6) SA 285 (SCA)** Howard P expressed the following sentiment, which in my view, remains the correct and relevant legal exposition on proceedings in terms of section 78:

*“(24) As to the contested issues, it is convenient to begin with a point raised by the appellant, which is really traditional in nature. It contended that in an application under s. 78 the relevant material on which a court had to make its decision was limited to such material as was before the information officer when access was refused.*

*That cannot be correct. A court application under the act is not the kind of limited review provided for example, under the Promotion of Administration of Justice Act, 3 of 2000 it is much more extensive. It is a civil proceeding like any motion matter (during which both sides (and the third party, if appropriate) are at liberty to present evidence to support the respective cases for access and refusal as the present matter serves to illustrate, the parties respective cases in such an application will no doubt in most instances travel beyond the limited material before the information officer. That conclusion is reinforced by the legislation having catered for the presentation of evidence and the resolution of disputes of fact by reference to an onus of proof. Those provisions would have been unnecessarily if the suggested limitation applied. Moreover, it is unlikely that a court, acting under section 82, would be sufficiently informed to be in a position to make a just and equitable order with the limitation to apply.”*

21.2. This application only deals with PAIA applications in respect of access to records of public bodies. Section 32 of the Constitution provides thus:

- “(1) *Everyone has the right of access to –*
- (a) *any information held by the state; and*
  - (b) *any information that is held by another person and that is required for the exercise or protection of any right.*
- (2) *National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state”*

21.3. In light of the above, however, the life experience of ordinary South Africans, at least within the area of jurisdiction of this division, has shown that requests for access to information, as the current case presents, constitutional as they are, are regarded with disdain and are consequently ignored. This attitude by state functionaries has resulted in ordinary South Africans having to resort to the courts, burdening court rolls with court applications, construed as red herring and nefarious defences.

21.4. This burdens the fiscus of unnecessary costs orders in circumstances ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 492 (CC)*** Promotion of Administration of Justice, Act 3 of 2000 where scarce resources are severely challenged by competing needs. The time may have arrive for costs order in deserving cases to be made against the respective officials who unnecessarily force ordinary citizens, many of whom may be poor, to go to court to enforce a right enshrined in the constitution.

21.5. I am fortified in this view the sentiments expressed many years ago in the unanimous decision of the Constitutional Court in ***Batho Star Fishing*** *supra*. In the context of the Promotion of Justice Act the court stated that,

*“the provisions of section 6 divulge a clear purpose to codify the grounds of judicial review on administrative action as provided by PAIA. The cause of action for the judicial review of administration action now ordinary arises from PAIA, not from the common law, as in the past. On the authority of PAIA to grant such causes of action rests squarely on the Constitution. It is not necessary to consider here causes of action for judicial review of administration action that do not fall within the scope of PAIA. As PAIA gives effect to section 33 of the Constitution matters relating to the interpretation and application of PAIA will of course be constitutional matters.” I contend that my application is not moot, the legislative provisions of PAIA must be respected and complied with, regardless of whether there is a review or an appeal. It is demonstrated clear from the provisions of PAIA that the legislation has gone to great lengths and codifying a user-friendly legislative roadmap for applications under PAIA. This roadmap starts with an initial application for access to information is made to any information officer long before a court application in terms of section 78 of PAIA is made or even conceptualised. It is evident from PAIA that the legislative had in mind an uncomplicated and inexpensive procedure in which a request for information is made and access thereto is given administratively, a court application being the exception rather than the rule.”*

21.6. To this end, the nefarious reasons advanced by the respondents that an order is been sought by OUTA for SANRAL to provide the requested information, for the



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purpose of pre-litigation discovery is misplaced and wrong to say the least. The request for information underpins the requirement for government entities to operate in a transparent manner as envisioned by section 27 of the Constitution.

21.7. The ultimate goal to PAIA is to promote transparency and accountability in effective governance on all public and private bodies to assist members of the public to effectively scrutinise and participate in decision-making by public bodies to ensure that the state promotes human rights culture and social justice, to encourage openness, to establish voluntary and mandatory mechanisms or procedures which give effect to the right of access to information in a speedy and effective and effortless manner.

21.8. Section 18 of PAIA provides request to information is to be made as follows.

*“(1) A request for access must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address.*

*(2) The form of the request of access prescribed for the purpose of subsection 1 must at least require the request are concerned –*

*(1) To provide sufficient particulars to enable an official of the public body concerned to identify –*

*(a) The record or records requested; and*

*(b) The requester being to indicate which applicable form of access referred to in section 29(2) is required;*

*(c) To state whether the record concerned is preferred in a particular language;*

- (d) *To specify a postal address or fax number of the requester in the Republic,;*
- (e) *In addition to a written reply, the requester wishes to be informed of the decision of the requester in any other manner to state that manner and the necessary particulars to be so informed; and*
- (f) *If the request is made on behalf of a person, to submit proof of the capacity in which the requester is making the request to the reasonable satisfaction of the information officer.”*

21.9. The provisions of section 25 and 27 are very important because often request for access are ignored by information offices. On a proper understanding of the relationship between section 25 and 27 it is not necessary for numerous letters to be sent to an information officer reminding him or her to respond to the request for access as was done in this case.

## 22.

22.1. Only a requester who falls into one of the categories mentioned in section 28(2) may approach the court for appropriate relief. PAIA applications have authoritatively described in our courts. In **President of the Republic of South Africa and Another v M & G Media Ltd**, the Constitutional Court said.

*“Court proceedings under PAIA governed by sections 78 to 82, section 81 provides the proceedings under PAIA civil proceedings and the rules of evidence applicable in civil proceedings apply. The burden of establishing that the refusal of access to information is justified on the provisions of PAIA rests on the state or any other*

*party refusing access. Section 81 provides:*

- (1) *For the purposes of this chapter proceedings on application in terms of section 78 of civil proceedings.*
- (2) *The rules of evidence applicable in civil proceedings apply to proceedings on application in terms of section 78.*
- (3) *The burden of establishing that:*
  - (a) *The refusal of a request for access or;*
  - (b) *Any decision taken in terms of section 22, 26(1), 29(32), 54, 57(1) or 60, complies with the provisions of this acts rests on the party claiming that it so complies. The proceedings under PAIA, the court is not limited to reviewing the decisions of the information officer or the officer who undertook the internal appeal. It assigns the claim of exception from disclosure afresh, engaging a de novo reconsideration of the merits. The evidentiary burden borne by the state pursuant to section 81(3) must be discharged, as in any civil proceedings on a balance of probabilities. It has never been a requirement in our law to annex pages of departmental documents where proper reference is made to them in an affidavit.”*

## 23.

23.1. Section 32 of the Constitution makes a decisive break with the past, entitling everyone to information held by the State. Various authorities and our higher courts have consistently held that the purpose of the right of access to information is to subordinate the organs of the state to a new regimen of openness and fair dealing with the public.

See: -*Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) at 850C.

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*-MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd 2006 (5) SA 1 (SCA) at para [21].*

*-The President of RSA v M&G Media 2011 (2) SA 1 (SCA).*

23.2. PAIA deals with information held by public bodies differently from information held by private bodies. For public bodies, which includes SANRAL, the requester does not need to explain why it seeks the information, let alone why it requires it for the exercise of its rights. In terms of section 11(1) of PAIA a requester of information is entitled to the information requested from a public body as long as it has complied with the procedural requirements set in that Act and as long as none of the grounds of refusal are applicable.

23.3. Consequently, the importance of access to information held by the state or public or state entity as a means to secure accountability and transparency justifies the approach adopted in section 32(1)(a) of the Bill of Rights and in PAIA, namely, that unless one of the specially enumerated grounds of refusal obtains, citizens are entitled to information held by the state or state or public entity as a matter of right. This is so regardless of the reasons for which access is sought and regardless of what the organ of state believes those reasons to be.

23.4. The overriding principle in relation to this “disclosure” clause is that a public body is obliged to conduct its operations transparently and accountably. **In *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd 2006 (6) SA 285 (SCA) at [55]***, it was held that “Once it enters into a commercial agreement of a public character

like the one in issue (disclosure of the details of which does not involve any risk, for example, to State security or the safety of the public) the imperative of transparency and accountability entitles members of the public, in whose interest an organ of State operates, to know what expenditure such an agreement entails ... Parties cannot circumvent the terms of the Act by resorting to a confidentiality clause”.

23.5. SANRAL has not shown that it is probable that the disclosure even of confidential information would cause harm to N3TC’s commercial interests. A party relying on this provision must show that harm is not simply possible, but probable. In the circumstances, the respondents have not put up any reasons that justify the refusal of access to the records. Furthermore, N3TC will not, therefore, suffer any damages should there be such disclosure.

23.6. Merely because the agreement contains a confidentiality clause cannot shield the agreement from disclosure. If all public bodies were allowed to hide behind confidentiality agreements or clauses in their agreements to avoid disclosure, that would be a negation of the spirit and purpose of PAIA.

*See: SA Airlink (Pty) Ltd v Mpumalanga Tourism and Parks Agency and Others 2013 (3) SA 112 (GSJ) (22 August 2012).*

## 24.

24.1. Section 46 of PAIA has been promulgated specifically to serve or act as a mandatory public interest override provision where one or more grounds of refusal have been established. The section’s requirements are mandatory:

where access to a record is denied under section 36(1)(b) or (c) or section 37(1)(a), an information officer must nonetheless grant access to the record if it is in the public interest to do so.

24.2. For elucidatory purposes I repeat the wording of the section:

*“Despite any other provision of this Chapter, the information officer of a public body must grant a request for access to a record of the body contemplated in section 34(1), 36(1) or 37(1) [...] if –*

*(a) the disclosure of the record would reveal evidence of –*

*(i) a substantial contravention of, or failure to comply with, the law; or*

*(ii) an imminent and serious public safety or environmental risk; and*

*(b) the public interest in the disclosure of the record clearly outweighs the harm contemplated in question.”*

24.3. The requirements for the granting of access under section 46 are the following:

1. If the disclosure of the record would reveal evidence of a substantial breach of the law or an imminent and serious public safety or environmental risk; and

2. Where the public interest in the disclosure clearly outweighs the harm contemplated in the section.

*See: De Lange and Another v Eskom Holdings Ltd and Others 2012 (1) SA 280 (GSJ)*

24.4. It is trite that if one or more of the requirements set out in section 46 are present, then despite the fact that disclosure could be validly refused in terms of sections 34(1), 36(1), 37(1)(a) or (b), 38(a) or (b), 39(1)(a) or (b), 40, 41(1)(a) or (b), 42(1) or (3), 43(1) or (2), 44(1) or (2) or 45 of PAIA, the information officer of a public body must still grant a request for access to a record of the body contemplated.

## **CONCLUSION**

### 25.

25.1. To that end, SANRAL has no basis in law to prevent disclosure of the documents in question. The respondents is contravening the PAIA legislation for nefarious reasons. SANRAL has not anywhere indicated if all reasonable steps have been taken to find the requested information and is not indicated that such record cannot be find or if the records do not exist or is not in its possession.

25.2. SANRAL has rejected the request for the information sought by OUTA because it is aware of the consequence thereto within the public's knowledge will reveal certain contraventions it is party to. As such, this would be regarded as a decision to refuse a request to the record concerned for the purposes of this act. OUTA has demonstrated that the defences raised have no sustainability or prospects of success once the Court scrutinises the intention of the respondents.

25.3. OUTA is well within its rights and further taking public interest into consideration, in succeeding in the relief sought as protect and envisioned by PAIA.

25.4. Accordingly, OUTA has made out a case for access to the information sought in terms of the above principles. The application must be granted with costs on attorney and client scale.

**ADV EBENEZER PROPHY**

**GROENKLOOF CHAMBERS**

**26 MAY 2022**