



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

DATE: 14 November 2023

SIGNATURE

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

ALLI, NAZIR

THIRD RESPONDENT

MOTAUNG, DANIEL

FOURTH RESPONDENT

MACOZOMA, SKHUMBUZO N.O

FIFTH RESPONDENT

N3 TOLL CONCESSION (RF) (PTY) LTD

SIXTH RESPONDENT

Coram:

Millar J

Heard on: 10 October 2023

Delivered: 14 November 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09H00 on 14 November 2023.

JUDGMENT

MILLAR J

- [1] This is an application in which the applicant (OUTA) seeks an order against the first respondent (SANRAL) to furnish certain information (in documentary form) said to be in its possession or under its control, to it. The sixth respondent (N3TC) intervened in the application and opposed the furnishing of certain of the documents.
- [2] OUTA describes itself as a *"proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. OUTA was established to challenge the abuse of authority, in particular the abuse of taxpayers' money."*¹
- [3] SANRAL is the state-owned entity established in terms of the South African National Roads Agency Limited and National Roads Act.² It is *inter alia* *"responsible for, and is hereby given power to perform, all strategic planning with regard to the South African national roads system, as well as the planning, design, construction, operation, management, control, maintenance and rehabilitation of national roads for the Republic, . . ."*³

¹ A self-description set out in paragraph 2 of a letter sent by OUTA to the Information Officer of SANRAL on 30 July 2019.

² 7 of 1998.

³ *Ibid* s 25(1).

- [4] N3TC is a private company with whom SANRAL contracted, and which has over the last 24 years to attend to *inter alia* the construction, operation, management and control of a section of the N3 highway. The information which OUTA has requested from SANRAL, all relates to the contract between SANRAL and N3TC.

THIS APPLICATION

- [5] The present proceedings are brought by OUTA in terms of the Promotion of Access to Information Act⁴ (PAIA) for access⁵ to copies of documents relating to a tender awarded to N3TC for the construction and management of a portion of the N3 highway between Heidelberg South in Gauteng and Cedara in KwaZulu Natal. Included in this construction and management is also the collection of tolls at various points from users of the road concerned.
- [6] The application is brought by OUTA against SANRAL. While SANRAL is a public body in terms of PAIA, N3TC is not. It is a private company.
- [7] PAIA is the means whereby effect is given to "*the constitutional right to access information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights.*"⁶ The present application is not a review of the refusal by SANRAL to furnish OUTA with the documents that it requested but rather a reconsideration *de novo* of the request.⁷ The reconsideration of the request is not limited to what was before SANRAL at the time that the request was made but must now be undertaken on what is presently before the Court.⁸

⁴ 2 of 2000 and in particular s 78(2) read together with s 82 which permit a party who has been unsuccessful in procuring the information sought to apply to Court.

⁵ *Brummer v Minister of Social Development and Others* 2009 (6) SA 323 (CC) at paras [62] to [63] in which the Court said "access to information is crucial to the right of freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas."

⁶ The part of the preamble to PAIA relevant in this matter.

⁷ *President of the Republic of South Africa and Others v M & G Media Ltd* 2012 (2) SA 50 (CC) paras [13] – [14].

⁸ *Transnet Ltd and Another v SA Metal Company Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para [24].

- [8] It is not in issue between the parties that at least insofar as OUTA and SANRAL are concerned, OUTA is entitled to request access to information in terms of PAIA. In issue between the parties is whether all the information which has been requested should be furnished. There is no dispute in respect of certain of the information which SANRAL has agreed to provide and had already provided by the time this application was heard.
- [9] Initially, OUTA sought an order in two parts – Part A and Part B, in the following terms:

"PART A

1. *A copy of The Concession Contract No. SAPR N0304102/1, for a portion of National Route 3 from Cedara in Kwazulu-Natal to Heidelberg South interchange in Gauteng as a toll Highway (hereinafter referred to as the N3TC Concession Contract) duly signed on the 27th of May 1999;*
2. *A copy of all Annexures and Addenda to the N3TC Concession Contract;*
3. *A copy of all Amendments and Addenda (if any) to the N3TC Concession Contract;*
4. *A copy of all Operation and Maintenance contracts entered into between the Concessionaire and the O&M Contractors, relating to the N3TC Concession Contract;*
5. *A copy of the Operational and Maintenance Manual pertaining to the N3TC Concession Contract;*
6. *A copy of the contracts entered into with the Independent Engineer(s), pertaining to the N3TC Concession Contract, as specifically stipulated in clause 6.1;*
7. *A copy of all the Independent Engineer(s) Reports submitted to SANRAL, pertaining to the N3TC Concession Contract;*

8. *A copy of all Construction Work contracts entered into by the Concessionaire relating to the N3TC Concession Contract, as set out in Clause 8.5.2;*
9. *A copy of all "Performance Certificates" issued, relating to the Construction Works contracts entered into by the Concessionaire (as referred to in item 8, above);*
10. *A copy of all "Taking Over certificates" that have been issued in terms of the N3TC Concession Contract, as set out in Clause 9.2;*

PART B

1. *Copies of N3TC's complete financial statements for each fiscal year, submitted to SANRAL in terms of the N3TC Concession Contract (as from 1999/2000 financial year to present) as specified in Clause 16.3.1(a);*
2. *Copies of all reconciliations of N3TC'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 N3TC Concession Contract, with specific reference to Clause 16.3.1(d);*
3. *Copies of all Annual Reports submitted to SANRAL, pertaining to the N3TC Concession Contract (as from the 1999/2000 financial year to present), issued by the N3TC's appointed auditors, certifying that the computation of the Highway Usage Fee for the previous year was correctly calculated, as specified in Clause 16.3.1(e);*
4. *Copies of the lists, submitted to SANRAL in terms of the N3TC Concession Contract (as from 1999 to present), of N3TC's lenders and creditors to which N3TC owns a sum in excess of the equivalent of R10 000 000 (ten million Rand), including the amounts due to each of them, as stipulated in Clause 16.3.2(c);"*

[10] Initially, the information sought by OUTA in its request was not furnished, in part because N3TC had not agreed to this. By the time this application was heard, however:

[10.1] In respect of PART A:

[10.1.1] The furnishing of items 1, 2, 5 and 6 was no longer opposed and was tendered.⁹

[10.1.2] In respect of items 3, 4, 7 and 9, SANRAL asserted that it did not have this information in its possession and for this reason it could not be furnished; and

[10.1.3] In respect of item 8, the furnishing of this was opposed.

[10.2] In respect of PART B:

[10.2.1] The furnishing of items 1, 2, 3 and 4 was opposed.

BACKGROUND

[11] OUTA asserts that it conducted an investigation into a series of irregularities *“following a concessionaire agreement entered into between SANRAL and N3TC.”* OUTA sought to give some indication of what this investigation had revealed. It contended, somewhat illogically, that:

“Without elaborating on the merits of the above-mentioned agreement, OUTA has established that the agreement will lapse during the course of May 2029.

⁹ A complaint was made by OUTA that the tendered documents had not been received from SANRAL sufficiently far in advance of the hearing by OUTA to enable it to consider them and to make further submissions in respect of the disputed documents. I invited the parties to make further submissions in writing which invitation was accepted by OUTA, SANRAL and N3TC. Those submissions were considered together with all the other papers filed of record and the arguments advanced at the hearing in the preparation of this judgment.

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").

- [12] The agreement has not yet run its course and so self-evidently, there is no need for any extension for the continued performance of obligations in terms of the agreement. OUTA went on to assert that the legality of the agreement entered into between SANRAL and N3TC could only be established upon consulting all relevant annexures and addenda to the agreement.
- [13] It is not necessary for purposes of the request in terms of PAIA,¹⁰ to furnish any reason for which the information is required. However, the reference by OUTA to both the investigation as well as to specific clauses in the agreement (in the relief sought in PARTS A and B) make it apparent that OUTA at the time it brought the present application already had the agreement, or at least substantial parts of it, in its possession. N3TC asserted that this was already publicly available and hence the withdrawal of its opposition to the furnishing of certain of the information.
- [14] It bears mentioning at this stage, that despite the entire application being predicated on item 1 of Part A – the main contract – being made available, OUTA, although it was apparently already publicly available, did not disclose this in its application. What it did disclose through the request, was its knowledge of specific parts of the main contract. Of the 14 items requested in Parts A and B, 8 of the items are specifically referenced in the main contract.¹¹
- [15] It is access to the information that was not publicly available before OUTA's request to SANRAL on 30 July 2019, that is the crux of this application – items 3, 4, 7, 8 and 9 in Part A and items 1 to 4 in Part B.

¹⁰ Section 11(3)(a) of the Act provides that: "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."

¹¹ In Part A, item 6 refers to clause 6.1, item 8 refers to clause 8.5.2, item 9 refers to clause 8, item 10 refers to clause 9.2 and in Part B, item 1 refers to clause 16.3.1 (a), item 2 refers to clause 16.3.1(d), item 3 refers to clause 16.3.1(e) and item 4 refers to clause 16.3.2(c).

- [16] It is OUTA's case that notwithstanding the refusal of access to the information which has not been tendered, that this Court should nevertheless, and having regard to the public interest override set out in s 46 of PAIA, order SANRAL to make all the information it has requested, available to it.

CONDONATION

- [17] There was initially some concern about whether or not the present application had been brought timeously. The genesis of this arose out of the apparent failure on the part of SANRAL to update its PAIA manual¹² on its website to reflect the correct details of its Information Officer.
- [18] The date on which the request was made and the failure on the part of SANRAL to communicate a decision within 30 days of the request,¹³ obfuscated when it had actually been received. This had a consequential effect. One consequence was that OUTA embarked upon an internal appeal process in respect of the deemed refusal on the part of SANRAL and another was the joinder of the third and fifth respondents, Mr. Alli and Mr. Macozoma respectively.
- [19] It bears mentioning that the initial request, which was made on 30 July 2019, was forwarded by SANRAL to N3TC which in turn had communicated its agreement to the furnishing of certain documents and objection to the furnishing of others. SANRAL for its part failed to respond to the request of OUTA timeously. SANRAL did not refuse the request in express terms or provide reasons and hence the failure to communicate its decision resulted in it being a deemed refusal.¹⁴
- [20] In consequence of this, OUTA sought condonation in respect of its non-compliance with the 180-day period referred to in s 78(2)(c)(i) of PAIA, insofar as there may have been any non-compliance, for the bringing of this application.

¹² In terms of sections 14 and 51 of PAIA, it is required to update its manual annually.

¹³ Section 25 of the Act.

¹⁴ Section 27 of the Act.

- [21] The reasons for the bringing of the present application when it was, make plain that there was no tardiness on the part of OUTA in its pursuit of this matter. However, neither Mr. Alli nor Mr. Macozoma ought to have been joined in these proceedings even though no relief was sought against them. I am of the view that condonation, insofar as it may be required, should be granted,¹⁵ and also that the references to both Mr. Alli and Mr. Macozoma in these proceedings be struck out.
- [22] The grounds of refusal, although not furnished before the institution of this application, have now been furnished by SANRAL.¹⁶ There are two main grounds – firstly, that information has been requested from SANRAL that is not in its possession and secondly, that information that is in its possession is confidential and that it is entitled to refuse access to that information. OUTA for its part argues that notwithstanding the confidentiality, disclosure should be ordered in the public interest. I propose dealing with each of these in turn.
- [23] It is at this juncture and before dealing with the reasons for the refusal, to deal briefly with what are considered to be “adequate reasons” for the refusal of access to information. In the present matter, the reasons proffered fall squarely within the provisions of s 36 alternatively s 38 of the Act. In the present matter, the reasons for the refusal of the request have been cogently set out.¹⁷

THE DOCUMENTS THAT SANRAL DOES NOT HAVE

- [24] It was the case for both SANRAL and N3TC that items 3, 4, 7 and 9 of the information requested in Part A was not in its possession and for that reason, could not be furnished to OUTA.
- [25] The specific documents are:

¹⁵ Section 82(e) of the Act.

¹⁶ In terms of s 25(3)(a) of the Act, when access is refused, the party refusing access is required to “state adequate reasons for the refusal, including the provisions of the Act relied upon.”

¹⁷ For this reason, the present matter is distinguishable from *CCII Systems (Pty) Ltd v Fakie and Others* NNO 2003 (2) 325 (T) para [16]; *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) para [19]; *South African History Archive Trust v South African Reserve Bank and Another* 2020 (6) SA 127 (SCA) para [36].

[25.1] Item 3 - "*amendments and addenda (if any) to the main contract*". The possibility that the document/s requested does not exist was recognised by OUTA in its request.

[25.2] Item 4 - contracts entered into between N3TC and third parties.

[25.3] Item 7 - independent engineers reports submitted to SANRAL in respect of the N3TC concession contract.

[25.4] Item 9 - a copy of all "performance certificates" which were issued relating to the construction works undertaken by N3TC.

[26] On consideration of the items reflected in paragraphs [25.1], [25.3] and [25.4] above, it is readily apparent that if, insofar as any of those documents were to exist and have been submitted to SANRAL, this would have fallen squarely within the knowledge of both SANRAL and N3TC.

[27] Since both SANRAL and N3TC deny that SANRAL is in possession of these specific items of information, there is no obligation upon SANRAL to furnish to OUTA that which it does not have. It was argued for OUTA that the contention that the specific documents were not in the possession of SANRAL should not be accepted.

[28] While it may not suit the case for OUTA that SANRAL either no longer has documents it once had in its possession or has never been furnished with documents by N3TC, these are operational issues falling within the exclusive purview of both SANRAL and N3TC. This Court is in no position, absent a case being made out for it, to not accept this.¹⁸

[29] Insofar as the documents referred to in paragraph [25.2] above are concerned, it is the case for SANRAL and N3TC that SANRAL does not have these documents in its possession. In any event, those contracts are private contracts entered into

¹⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634–635.

between N3TC and other parties. SANRAL is not a party to those private contracts.

- [30] PAIA does not require that the party from whom information is requested must embark upon a process to obtain information or documents that are not already in their possession.¹⁹

REFUSAL BY SANRAL IN TERMS OF THE ACT

- [31] SANRAL refused to furnish item 8 of Part A – *“a copy of all Construction Work contracts entered into by the concessionaire relating to the N3TC Concession Contract, as set out in clause 8.5.2”*.
- [32] It similarly also refused to furnish any of the items referred to in Part B. All the items in Part B relate to the financial records of N3TC and OUTA relies upon specific clauses in the concession agreement for its contention that SANRAL is in fact in possession of this information.
- [33] The refusal by SANRAL to furnish OUTA with the disputed documents is predicated on the fact that it either does not have the documents in question in its possession alternatively that it is obligated to refuse access in consequence of the objection in doing so by N3TC.

SECTIONS 36(1)(b) and (c) of PAIA

- [34] Section 36(1) provides that access to a record must be refused if it contains:

“(b) 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; or

¹⁹ Section 23 provides that if a record cannot be found or does not exist then an affidavit must be furnished setting out that it is not possible to give access to the record. In the present matter, SANRAL has confirmed on oath that it does not have certain of the documents in its possession. Insofar as those documents do exist, N3TC has confirmed that it has the documents but objects on the grounds that it has stated to the furnishing of those documents.

- (c) *information supplied in confidence by a third party, the disclosure of which could reasonably be expected –*
 - (i) *To put that third party at a disadvantage in contractual or other negotiations; or*
 - (ii) *To prejudice that third party in commercial competition.”*

[35] In *SA Metal and Machinery Company v Transnet Ltd*,²⁰ the Court held that:

“to cause harm to the commercial and financial interests of the third party by disclosure of the information, the information must obviously have an objective market value. This will be the case where the information sought is ‘important or essential to the profitability, viability or competitiveness of a commercial operation.’”

[36] In addition to the argument that the disclosure of the records would cause harm to N3TC. Although it was not necessary for it to do so, it demonstrated clearly and unequivocally to my mind, that the disclosure of its commercial or financial information fell squarely within the ambit of the section.

[37] It argued *inter alia* that it would within the next few years be required to undertake and perform a competitive arm’s length tender process when the main contract came up for renewal besides concluding other contracts before then. Given the particularly small and competitive market within which it operates, its private financial information which, if disclosed to a competitor, would likely cause harm to it had not even been disclosed to SANRAL.

[38] Furthermore, the disclosure of commercial records in their raw form would prejudice N3TC in its ability to tender fairly and competitively. Insofar as its

²⁰ [2003] 1 ALL SA 335 (W) para [12]. See also *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) para [42]; *Van der Merwe v National Lotteries Board* 2014 JDR 0844 (GP) para [32]-[36].

financial records are concerned, besides the records relating to the day-to-day operations, N3TC had had to develop a bespoke and discreet financial model that could accommodate the specific financing requirements of the main contract to enable it to perform its obligations in terms thereof. This information, if disclosed, would especially cause commercial and financial harm to N3TC.²¹

[39] It was also argued that the request for the disclosure of these confidential documents, given the reasons proffered by OUTA for bringing the application, after having already conducted an investigation, was nothing more than an attempt to compel pre-litigation discovery – a situation which PAIA specifically provides in s 7(1)(a).²²

[40] It was argued by OUTA that insofar as SANRAL had refused access on the basis of the confidentiality of the disputed information, that if there were a confidentiality clause and it were relied upon, this would negate the spirit and purpose of PAIA. I agree with this proposition.²³

[41] However, s 36 expressly enjoins SANRAL to refuse access if N3TC does not consent to its furnishing and that is precisely the situation that prevails in the present matter.

[42] N3TC asserted that insofar as information and documentation relating to its operations but also contract/s with third parties had been furnished by it to SANRAL, this had been done on the basis that its confidentiality would be kept.

[43] In *South African History Archive Trust v South African Reserve Bank*,²⁴ it was held:

²¹ *BHP Billiton PLC Incorporated v De Langa* [2013] ZASCA 11 (SCA).

²² This section provides that PAIA does not apply to records for criminal or civil proceedings if "(a) that record is requested for the purpose of criminal or civil proceedings." See also *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) para [21]-[22]; *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 (3) SA 119 (C) at 135E-136A.

²³ *SA Airlink (Pty) Ltd v Mpumalanga Tourism and Parks Agency and Others* 2013 (3) SA 112 (GSJ).

²⁴ 2020 (6) SA 127 (SCA) para [40].

[40] Section 37(1)(b) gives rise to a discretionary refusal as opposed to a mandatory one. The discretion must be based on facts before it can be said to have been properly exercised. First, the record must consist of information which was supplied in confidence by a third party. Secondly, it must be proved that the disclosure could reasonably be expected to prejudice the future supply of similar information or information from the same source. Thirdly, it must be in the public interest that such information, or information from the same source should continue to be supplied."

THE PUBLIC INTEREST OVERRIDE – SECTION 46 OF PAIA

[44] It was argued for OUTA that it "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."

[45] Section 46 of PAIA provides for the:

"Mandatory disclosure in the public interest – 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), 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, 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 the public interest in the disclosure of the record clearly outweighs the harm in the provision in question."

- [46] OUTA argued that having regard to s 195²⁵ and s 217²⁶ of the Constitution of the Republic of South Africa, 1996, which deal with basic values in principles governing public administration and procurement, respectively. It was argued that the reliance by SANRAL on s 36(1)(b) and (c) of PAIA as the basis for refusing to make the information in its possession available is at odds with its constitutional obligations.
- [47] It was argued for SANRAL that neither s 195 nor s 217 are actionable (in the sense that they cannot ground a cause of action) and the principle of subsidiarity in any event prevented OUTA from relying directly on the provisions of these sections in the present application.²⁷
- [48] SANRAL AND N3TC argued that there is no basis for the application of the public interest override provided for in s 46 of PAIA.
- [49] In *Centre for Social Accountability v Secretary of Parliament*,²⁸ it was held that:

[92] *In order to give effect to the constitutional right of access to information held by the State, qualified only by the limitation clause 36 of the Constitution and other rights, the restrictive wording used by s 46 of PAIA must be read subject to s 81 of PAIA. Section 81 stipulates that the rules of evidence applicable in civil proceedings apply to the proceedings on application in terms of s 78. This is an application under s 78 and the civil onus for the discharging of the burden of proof referred to in s 81(2) is proof on a balance of probabilities. It follows that the applicant in this case must prove on a balance of probabilities that the disclosure of the schedules would reveal evidence of a substantial contravention of, or failure to comply with, the law.*

[93] . . .

²⁵ These are set out in s 195(1) and are in terms of s 195(2)(b) applicable to organs of state.

²⁶ S 217(1) provides that when contracting for goods or services, an organ of state "must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective."

²⁷ *My Vote Counts v The Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) para [44]-[66].

²⁸ 2011 (5) SA 279 (ECG) paras [92] and [94].

[94] *In these circumstances a requestor is called upon to show on a balance of probability that the disclosure would reveal evidence of the required contravention or failure – not that the disclosure would, as a fact, show such contravention or failure.”*

[50] There is an onus on OUTA to show on a balance of probabilities that the disclosure would reveal evidence of either a substantial contravention of or failure to comply with the law, imminent or serious public safety or environmental risk or that the public interest in the disclosure would clearly outweigh the harm.

[51] The entirety of the argument made by OUTA on this score was predicated on its “*evaluation of the legality of the agreement*” and a determination in consequence of such evaluation as to whether or not SANRAL had “*acted unlawfully in the implementation*” of the agreement.

[52] In argument I was directed by OUTA to the provisions of s 80(1) of PAIA which provides that:

“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 public or private body to which this Act applies, and no such record may be withheld from the court on any grounds.”

[53] Notwithstanding the invitation to call for any of the disputed documents, OUTA inexplicably failed to place before the Court, when it was clearly able to do so, the main agreement or portions thereof that it had in its possession. The highwater mark of OUTA’s argument that the disputed contract/s and financial records ought to be furnished in the public interest was the argument and conclusion, made and reached *in vacuo* without any basis²⁹ having been laid for it³⁰ that:

²⁹ Somewhat belatedly and in reply, OUTA sought to rely, 7 years after the fact, on an article published in the Sunday Times Newspaper on 25 November 2012 in which issue had been taken with the main contract concluded 13 years earlier.

³⁰ *Mostert v FirstRand Bank t/a RMB Private Bank* 2018 (4) SA 443 (SCA) para [13].

"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."

And

"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".

[54] Both SANRAL and N3TC argued that OUTA failed to demonstrate that the non-disclosure of N3TC's confidential financial information would reveal either "a substantial contravention of, or failure to comply with, the law; or an imminent and serious public safety or environmental risk";³¹ and that "the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question."³²

[55] OUTA's claim that the disclosure of the disputed documents is in the public interest is, properly construed on the case before me, predicated entirely, not upon any irregularity with the contract that was concluded in 1999 between SANRAL and N3TC but rather upon on the perception, after an investigation conducted some 20 years after the fact, that N3TC in the performance of its obligations in terms of the contract may well have made profit.

[56] There is no provision in our law that any private third party which contracts with the State is prohibited, within the confines of a lawfully made and awarded tender, to make a profit. In its terms, s 46 of PAIA applies only to contraventions

³¹ *De Lange and Another v Eskom Holdings Ltd and Others* 2012 (1) SA 280 (GSJ) para [40].

³² *ibid* para [40].

or failure to comply with the law or public safety or environmental risk. None of these apply in the present case.

- [57] However, does the public interest in the disclosure of the contract/s and confidential information of N3TC which is ancillary to the main contract, outweigh the harm to N3TC's present and future financial interests and would it prejudice them in their future commercial endeavours?
- [58] In the *Health Justice Initiative v Minister of Health*,³³ the public interest override was found to be of application in respect of contracts that had been negotiated by the Ministry of Health for the provision of Covid-19 vaccines. In that case, the Minister of Health had been compelled to agree to onerous confidentiality clauses which shrouded the entire procurement and contracting process in secrecy. In that case, even the identities of the parties with whom the Ministry and contracted, were withheld in terms of the confidentiality clauses.
- [59] The circumstances of the present case are entirely distinguishable. The main contract for which SANRAL issued and awarded a tender was already a public document by the time the present proceedings were brought. Having found that OUTA already had the main contract or at least substantial portions of it, it is apparent that the present application has nothing to do with the award of that contract.
- [60] The present case concerns the implementation of the contract. It was neither argued nor was any case made out that N3TC had failed to comply with its obligations in terms of the main agreement and to deliver that for which it had been contracted. The making of profit, in a private company, is an everyday commercial consequence and is not in and of itself a matter which requires disclosure in the public interest.

³³ 2023 JDR 3132 (GP).

- [61] For the reasons set out above, I find that the public interest override finds no application in respect of the disputed documents and accordingly the application fails.

COSTS

- [62] All the parties who appeared in this matter were *ad idem* that in the event that they were successful, that a punitive order for costs should be awarded against the losing party.
- [63] OUTA argued that the refusal to furnish the information that it had sought from SANRAL together with N3TC's refusal to consent was to be construed as "*nefarious*" and nothing other than an attempt to subvert the operation of PAIA and to hide wrongdoing from public scrutiny. It was argued by OUTA that the fact that it even had to bring an application evidenced this.³⁴
- [64] It was argued by SANRAL and N3TC that should the Court find that the application brought by OUTA was without merit, that a punitive order for costs should be made against them. OUTA for its part argued that in the event that it did not succeed, since it was acting in the public interest, there ought to be no costs order against it.

In my view, the costs should follow the result. However, notwithstanding that OUTA was in possession of the main contract or parts thereof before these proceedings were instituted, it only became aware when the respective answering affidavits were delivered by SANRAL and N3TC of the reasons for the refusal of the disputed documents. For this reason, the institution of the proceedings was not unreasonable. I am of the view that a punitive order for costs is, in the circumstances, not warranted. However, given the nature and

³⁴ On this specific point the Court was referred to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 492 (CC).

importance of the disputed information, the engagement of more than one counsel by N3TC was appropriate and hence the order for costs that will follow.

ORDER

[65] It is ordered: -

[65.1] The applicant is granted condonation for non-compliance with the 180-day period referred to in s 78(2)(c)(i) of PAIA.

[65.2] All references in the present application to the third and fifth respondents are struck out.

[65.3] The application is dismissed.

[65.4] The applicant is ordered to pay the costs of the respondents who opposed this application on the scale as between party and party, such costs to include the costs consequent upon the employment of two counsel, where so employed.



A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:

10 OCTOBER 2023

JUDGMENT DELIVERED ON:

14 NOVEMBER 2023

COUNSEL FOR THE APPLICANT:

ADV. E PROPHY

INSTRUCTED BY:

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