Reportable

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no. 6165/2012

Before: The Hon. Mr Justice Binns-Ward

In the interlocutory applications between:

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED Applicant

And

THE CITY OF CAPE TOWN

AND OTHERS Respondents

And

PROTEA PARKWAY CONSORTIUM Applicant

And

THE CITY OF CAPE TOWN

AND OTHERS Respondents

JUDGMENT: DELIVERED: 28 AUGUST 2014

BINNS-WARD J:

[1] This judgment decides two interlocutory applications. Both of them are related to a pending judicial review application. They were argued together because they concerned similar issues.

SANRAL's application

[2] The first matter is an application by the South African National Roads Agency Limited (SANRAL) for an order that would require the supplementary founding papers of the City of Cape Town in the pending review proceedings to be redacted so as to keep secret certain information which SANRAL contends should not be released in the public domain. SANRAL is a public company established in terms of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ('the SANRAL Act'). It is an organ of state as defined in para (b)(ii) of the definition of the term in s 239 of the Constitution.[1] The City was placed in possession of the information concerned by SANRAL in terms of rule 53 of the Uniform Rules of Court and certain related interlocutory directions given by the court. The information is derived from or is part of the relevant administrative record of decision in the review proceedings.

[3] SANRAL had provided the information subject to the recipients being restricted to the respondent parties' legal representatives and the client representatives and witnesses with whom the legal representatives required to consult. Furthermore, all such recipients were required to sign undertakings to maintain the secrecy of the information. Precedent for the procedure insisted upon by SANRAL is afforded by a number of judgments in which similar restrictions have been imposed in special circumstances by order of court; cf. e.g. *Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others* 1980 (3) SA 1093 (W), *ABBM Printing & Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W) and *Tetra Mobile Radio (Pty) Ltd. v Member of the Executive Council of the Department of Works and Others* 2008 (1) SA 438 (SCA) at para 14.

[4] When agreeing to submit to the restrictions demanded by SANRAL, the City's attorneys reserved their client's position, stating as follows in a letter to SANRAL's attorneys, dated 5 September 2013:

> 3.3 The City may place the allegedly confidential information before the court hearing the review application either publicly or in closed affidavits, arguments and hearings.
>
> 3.4 If the parties cannot agree whether particular documents should be dealt with publicly or on a closed basis, the parties will ask a judge or the court to decide that question at a preliminary hearing. Any such preliminary hearing will be closed, and the parties and the judge or court will be able to have sight of and refer to copies of the contested documents.
>
> 3.5 It is recorded that the City does not at this stage concede the validity of any claim to irrelevance or confidentiality.

[1] Constitution of the Republic of South Africa 1996.

[5] The subsequent employment by the City of some of the affected information in the supplementary founding affidavits that it was entitled to deliver in terms of rule 53(4) gave rise to a claim by SANRAL that certain portions of the supplementary papers should be redacted, and that only the redacted papers should form part of the ordinary court record. The City declined to submit to the restrictions proposed by SANRAL and a directions hearing was convened in chambers before the Deputy Judge President to determine the resultant dispute. The Deputy Judge President ruled that the issue was not one that was properly amenable to determination in a case management context. She directed that SANRAL, if it wished to persist in its claim that part of the record should be kept under seal, should formally institute an interlocutory application for whatever relief it considered necessary. The ruling was consistent with the proper approach stated in analogous, but not exactly similar, circumstances in *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC), 2008 (8) BCLR 771 at para 43.

[6] By agreement between SANRAL and the City, together with certain of the other respondents,[2] an order was made in chambers by the Deputy Judge President on 18 June 2014 establishing a timetable in terms of which any such interlocutory application brought by SANRAL was to be prosecuted and set down. The order directed that the record in the interlocutory application would be temporarily under seal until 'the status of those papers is decided in the interlocutory application'. It was implicit in the order, and accepted by the parties, that the supplementary founding papers, or at least the unexpurgated version thereof, would also be kept under seal pending the determination of the application.

[7] The City's attorneys contended that the interlocutory application that was instituted by SANRAL shortly thereafter raised constitutional issues, and that SANRAL was therefore in the circumstances required to give notice of the proceedings in terms of rule 16A(1). SANRAL contested the City's contention, whereupon the City gave such notice. The notice elicited the interest of two public interest groups, Right2Know and Section16, whose object is the promotion of freedom of expression in the wide sense defined in s 16 of the Constitution.[3] These organisations sought, and eventually obtained, the 'consent' of the

[2] The national Ministers of Transport and of Water and Environmental Affairs and the Protea Parkways Consortium.

[3] Section 16 of the Constitution provides:

other parties to intervene in the interlocutory applications as *amici curiae*. Counsel appointed by the two organisations appeared when the matter was called and sought to claim audience on the basis of the 'written consent' of the other parties. Rule 16A(2) provides that a person may obtain admission as an *amicus* with the written consent of the parties in the case.[4] On enquiry, however, it immediately became apparent that adequate consent was lacking because SANRAL was not willing for the aspirant *amici* to be provided with a copy of the papers, save on terms to which they were not willing to submit.

[8] In my judgment, an agreement constituting 'written consent' within the meaning of rule 16A(2) must evince a practical basis for the intended participation of the *amicus* in the proceedings. It should indicate agreement on the character of the contribution that the *amicus* wishes to make and as to the form in which it proposes to do so. The provisions of subrule 16A(4),[5] which provide an important tool to assist the court to manage the proceedings efficiently, cannot find a proper foundation for operation if the 'written consent' given in terms of subrule 16A(2) does not meet these requirements. In the circumstances I was of the view that no basis had been laid for effective assistance to be provided by the admission of the organisations as *amici* and ruled that their possible admission to the proceedings would have to be preceded by an application of the nature contemplated in sub-rules 16A(5)-(8). No such application was brought before the conclusion of the hearing, but negotiations between the legal representatives of the organisations and the parties in the interlocutory applications resulted in agreement that an order could be taken granting the organisations access to a redacted copy of the papers in the interlocutory application. The

---

Freedom of expression

(1) Everyone has the right to freedom of expression, which includes-

- *(a) freedom of the press and other media;*
- *(b) freedom to receive or impart information or ideas;*
- *(c) freedom of artistic creativity; and*
- *(d) academic freedom and freedom of scientific research.*

(2) The right in subsection (1) does not extend to-

- *(a) propaganda for war;*
- *(b) incitement of imminent violence; or*
- *(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

[4] Rule 16A(2) of the Uniform Rules of Court provides:

Subject to the provisions of national legislation enacted in accordance with section 171 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), and these Rules, any interested party in a constitutional issue raised in proceedings before a court may, with the written consent of all the parties to the proceedings, given not later than 20 days after the filing of the affidavit or pleading in which the constitutional issue was first raised, be admitted therein as amicus curiae upon such terms and conditions as may be agreed upon in writing by the parties.

[5] Rule 16A(4) provides:

The terms and conditions agreed upon in terms of subrule (2) may be amended by the court.

organisations were content to take such an order, which was duly granted. Its effect was to partially lift the seal placed on the papers in the interlocutory applications in terms of the order made by the Deputy Judge President.

[9] To get back to the interlocutory applications themselves: It is appropriate to sketch the context in which they were brought. As is well-known, by virtue of the extensive media coverage that has been given to the case since its inception, the City has applied for the judicial review and setting aside of the declaration of parts of the N1 and N2 national roads as toll roads in terms of s 27 of the SANRAL Act. One of the main struts of the City's challenge to the declaration is the allegation that the decision to declare the roads as toll roads was irrational because the Minister of Transport approved the declaration of the affected portions of the N1 and N2 as toll roads without knowing what the cost of the project or the toll fees would be, and without considering whether the toll fees would be affordable, or whether tolling would afford a financially sustainable or socio-economically appropriate means of undertaking the work needed on the road routes in issue. The City was granted an interim interdict in May 2013 prohibiting the conclusion by SANRAL of a contract with a concessionary for the construction and operation of the toll roads pending the determination of the review; see *City of Cape Town v South African National Roads Agency Ltd and Others* [2013] ZAWCHC 74, 2013 JDR 1022 (WCC). As appears from the judgment in the interdict application, a public procurement process had been undertaken for the purpose of identifying such a concessionary. At the time the interdict was granted, Protea Parkways Consortium (PPC)[6] had been identified, consequent upon the procurement process, as the preferred bidder. Another participant in the bidding process, the N1/N2 Overberg Consortium (Overberg Consortium), had been identified as the reserve preferred bidder. SANRAL's BAFO[7] Evaluation Report, which was signed by SANRAL's project manager and issued in September 2011, provided a summary of the tender process. It recorded the announcement of the preferred bidder, on 7 September 2011, and described the event as the '*Official end of the Tender Stage of the Project and start of the Negotiations to sign a Concession Contract*'.

[10] The procurement process required SANRAL to negotiate with the preferred bidder to conclude a concession contract. As also apparent from the interdict application judgment,[8] SANRAL had indicated in that application that it anticipated being in a position to conclude

[6] PPC is the sixth respondent in the review application.
[7] 'Best and Final Offer'.
[8] At para 93.

a concession agreement with the preferred bidder, or failing that with the reserve bidder, within a matter of weeks. The basis for the contemplated agreement was a draft concession agreement prepared by SANRAL, which had formed part of the bid documentation. The bidders had been required, as part of their respective bids, to mark-up those portions of the draft agreement that they would wish to vary and to provide a fully motivated indication of how they would prefer the affected provisions to be formulated.[9] The negotiation process would be limited to achieving agreement on the portions thus marked-up. The portions not marked-up would be taken as uncontentious and effectively agreed. It follows that the portions marked-up by the preferred bidder would not necessarily correspond with those marked-up by the reserve preferred bidder, and, even if the portions did correspond, the proposed changes would no doubt differ from bidder to bidder. The terms of the bid process provided that only if the negotiations with the preferred bidder were unsuccessful, or if the preferred bidder were disqualified for any reason, would SANRAL be permitted to turn to the reserve preferred bidder, which was bound to hold itself available for such a contingency. The negotiations would be premised on the respective bid submissions.[10]

[11] Judgment in the interdict application appears to have frozen the position as at 21 May 2013. Although nothing in the terms of the interdict prevented SANRAL and PPC from completing their negotiations, it is not apparent that they did so. For present purposes it may

---

[9] Para. 5.16.2 and 5.16.3 of the Invitation to Tender provided as follows:

> *5.16.2 Changes to the draft Concession Contract… are discouraged, however, if a Tenderer is able to materially improve the terms of their Compliant Tender by changes to draft Concession Contract, … above or submits a Variant Tender which necessitates amendments (if any) to any project document, as contemplated in paragraph 5.9.2 above, Tenderers are entitled to put forward such changes by way of comprehensive mark-up to the draft Concession Contract, … to reflect all the deletions and insertions required to support its Tender. SANRAL will not consider any further matters pertaining to the draft Concession Contract… which are not clearly marked-up in accordance with this paragraph 5.16. Documents that have not been marked-up with tracked changes will be considered by SANRAL to have been accepted by the Tenderer and no further negotiation in respect of these documents will be entertained by SANRAL.*
>
> *5.16.3 In addition to the marked changes in the draft Concession Contract, … each mark-up is to be motivated by way of a consecutively numbered footnote to the change.*

[10] It is apparent from the BAFO Evaluation Report, annexure AE 77 to the City's supplementary founding affidavit, that the preferred and reserve preferred bidders were permitted to amend the mark-up of the draft concession contract submitted in the initial phase of the tender process before their respective selection as preferred bidders. The amendments could be effected subsequent to requests made by SANRAL in a so-called 'Roadmap' process at the conclusion of the initial tender phase in which, it would appear, that the preferred tenderers were informed of SANRAL's views on their initial mark-ups. The BAFO evaluation report indicates that PPC removed the majority of the initially indicated mark-ups '*and the wording of the documents as drafted by SANRAL was to a large degree accepted*' If regard is had to salient aspects of the preferred bidders' mark-ups in their respective best and final offers, which were summarised in part 4 of the executive summary to the BAFO evaluation report, it would appear that the character of the final mark-ups made by the two preferred bidders differed markedly one from the other. This tends to confirm my impression that there is nothing of a materially competitive nature involved in the negotiation of the concession contract.

be assumed that they did not. Certainly, that was the assumption upon which SANRAL's counsel approached the argument of the current application by SANRAL that certain parts of the City's supplementary founding papers in the review application should be kept under seal and made available to the other parties and their respective legal representatives and witnesses only after such parties had formally undertaken to keep the information confidential. Indeed, the suggestion in the papers in the second application before me (inconsistently with the intimation by SANRAL when opposing the interim interdict application) is that the negotiation of the concession contract will be a process that is expected to take several months.

[12] SANRAL has now applied for orders in the following terms (I quote from the notice of motion):

1. The Confidentiality Undertakings signed by the parties to the Review Application, and their legal representatives remain in force and binding, subject to any variations necessitated by the order granted below;
2. The Supplementary Founding Affidavit, including the annexures and annexed affidavits ("the Supplementary Affidavit") is to be redacted in accordance with the first and second schedules, copies of which are attached hereto marked "NOM1" and "NOM2" respectively.
3. The redacted Supplementary Affidavit may then be served and filed;
4. After the service and filing of the Applicant's (First Respondent in the main application) Answering Affidavit, the Supplementary Affidavit may be further amended, so as to exclude the redaction set out in the first schedule (NOM1);
5. The amended Supplementary Affidavit, subject to the retention of the redactions as set out in "NOM2", which will remain effective, may then be served and filed;
6. The full Supplementary Affidavit, without any redactions, may only be provided to the Judge hearing the review application;
7. Insofar as the Heads of Argument may refer to the contents of the unredacted portions of the Supplementary Affidavit, such Heads of Argument may only be provided to the Judge hearing the review application;
8. The review application is to be heard in camera, as and when any of the aspects and/or information as set out in "NOM2" are raised and dealt with;
9. The First Respondent is to pay the costs of the application;
10. Such further or other relief as the Court may deem appropriate.

It is thus apparent that in terms of its notice of motion SANRAL sought a temporary seal in respect of the material specified in schedule NOM 1 and an effectively permanent seal in respect of that described in schedule NOM 2. The material identified in schedules NOM 1 and NOM 2 to the notice of motion was amended by SANRAL at the hearing. Its extent was

pruned down to a minor extent, while some content of the supplementary founding papers that had been originally left out was inserted. The amendment also addressed a measure of overlap between NOM 1 and NOM 2, by which some parts of the supplementary founding affidavits had been identified in both schedules, at odds with the scheme of differentiation contemplated in the formulation of paragraphs 4 and 5 of the notice of motion.

[13] The application of the confidentiality undertakings given by the other parties to the review has not been placed in issue. There is no indication that any party to such an undertaking threatens to break it. The issue in this application concerns something else: the sealing of part of the record and the ambit of 'open justice'. It seems to me therefore that no basis has been made out for the order sought in terms of para 1 of SANRAL's notice of motion. (It bears mention that it would necessarily follow, however, that any content of the City's supplementary founding affidavit to which the public or the representatives of any party to the review application are not denied access consequent upon the determination of the interlocutory applications would, *pro tanto*, no longer be subject to the regime of secrecy imposed by the confidentiality undertakings.)

[14] It was furthermore conceded at the hearing that it would be inappropriate for me to purport to determine the degree of openness that should attend the hearing of the review application. That is a matter in the province of the court that will in due course be seized of that hearing. SANRAL therefore did not press for the relief sought in terms of paragraph 8 of its notice of motion. Its counsel (Mr *Wasserman* SC, assisted by Mr *GJ Nel*) made it clear that the secrecy relief in respect of the material in schedule NOM1 was sought only until the delivery of SANRAL's answering affidavit (paragraph 4 of the notice of motion would thus fall to be read accordingly, to more limited effect than its literal tenor) and, in respect of the evidence identified in schedule NOM 2, until otherwise directed by the bench seized of the review (and not permanently, as the terms of paragraph 5 of the notice of motion might suggest).

[15] Clearly, SANRAL's object is to prevent the content of certain parts of the City's supplementary founding papers being made publicly available. The Chief Executive Officer of SANRAL stated the position thus in para 20-21 of SANRAL's supporting affidavit:

> 20. SANRAL wishes to limit the disclosure of portions of the information and documentation contained in the Supplementary Founding Affidavit prior to the dissemination of such Supplementary Founding Affidavit. The City is however of the view that all information and documentation contained, and referred to, in the Supplementary Founding Affidavit ought to

be served and filed as a public record, and ought to be made available to the general public at large.

21. SANRAL has accordingly launched this application in order to seek specific declaratory relief, in respect of portions of the confidential (and potentially inflammatory) documentation and information contained in, and attached to, the City's Supplementary Founding Affidavit.

[16] The Chief Executive Officer of SANRAL explained the dichotomous categorisation of the material in the City's supplementary founding papers in terms of schedules NOM 1 and NOM 2 to the notice of motion as follows at para 72 -73 of the supporting affidavit:

72. The first category relates to information and documentation that needs to be kept confidential until after the filing of SANRAL's answering affidavit in the Review Application. Such information and documentation has been identified and described in the schedule attached to the Notice of Motion as annexure "NOM1" ("the First Schedule"). The first category of documentation and information must be kept confidential, as the failure to do so will simply cause unjustified and unnecessary concern among the general public, and will result in unjustified antagonism and bias towards SANRAL by the general public.

73. The second category relates to information and documentation that must be kept confidential at all times during the legal proceedings, and thereafter. Such information and documentation has been identified and described in the schedule attached to the Notice of Motion as annexure "NOM2" ("the Second Schedule"). The second category of documentation and information ought to be kept confidential, as the failure to do so will not only cause harm and damage to SANRAL, but also to the bidders in the tender process, the South African fiscus and economy and the general public. In addition, the disclosure of such information and documentation will fall foul of SANRAL's statutory obligations.

It is appropriate to consider the two categories separately because in some respects they entail quite discrete considerations.

The schedule NOM 1 – related relief

[17] SANRAL's concern about the material in schedule NOM 1 is that it has been employed by the City in its supplementary founding papers in order to cast the decision to address the upgrading of the N1 and N2 freeways by means of a tolling undertaking as financially untenable; more particularly, by purporting to show that the contemplated project has a demonstrably negative costs-benefits ratio. The City's supplementary founding papers include a number of affidavits by experts commissioned by the City to investigate and report on various aspects of the proposed tolling project. These reports have been premised on information derived from the administrative record made available by SANRAL in terms of rule 53 for the purposes of the review application. The experts had access to the information

on the basis of confidentiality undertakings of the nature described earlier. SANRAL contends that the City has, in part at least, employed the information in its supplementary founding papers to put the material into the public domain for ulterior purposes. It has not been suggested, however, that the allegations are evidentially irrelevant for the purposes of the review application.

[18] SANRAL's Chief Executive Officer states that the adverse impression as to the feasibility and socio-economic impact of the tolling project created by these parts of the City's supplementary founding papers is unfounded and based on misconceptions. He promises that they will be rebutted in SANRAL's answering papers in the review (which in terms of the currently fixed timetable are due to be delivered a few weeks hence). SANRAL alleges that the City's ulterior purpose in using the information is political – namely, to work up widespread public antipathy to the idea of tolling the roads. In support of its allegation, SANRAL attached to its supporting affidavit copies of a number of media articles published during June 2014 in the lead-up to the meeting in chambers before the Deputy Judge President mentioned earlier. The content of those articles indicated that City politicians had made some play out of SANRAL's insistence on confidentiality on matters such as the costs of the tolling project and the level of tolls that would be required to fund it.

[19] It was clear from the written submissions on behalf of the City filed in advance of the in chambers meeting with the Deputy Judge President that the City's position was indeed that, save in limited circumstances, which it contended were not currently applicable, documents filed of record in court proceedings become publicly available upon being filed. The relief sought in respect of the material identified in schedule NOM 1 to SANRAL's notice of motion will require a consideration of the validity of that position.

[20] The Chief Executive Officer of SANRAL explained the applicant's case in respect of the material identified in NOM 1 as follows, at paragraphs 79-81 of the supporting affidavit:

> 79. In the circumstances, and in order to avoid unjustified alarm the portions of the Supplementary Affidavit and the supporting documentation, as described in the First Schedule should not be released until after SANRAL has had an opportunity of filing its Answering Affidavit and its own expert reports, which will deal with and refute the allegations made.
>
> 80. The Answering Affidavit will provide a proper response to the costing predictions set out in the Supplementary Affidavit, and will provide appropriate answers to the fears expressed by the City's "Experts". It would certainly be to the benefit of the general public to have "both sides of the story", before drawing any conclusions.

> 81. SANRAL will accordingly contend for a procedural directive, compelling the City and other Respondents to comply with the confidentiality undertaking in regard to this category pending the filing of SANRAL's Answering Affidavit in the Review Application.

[21] It is appropriate to commence the consideration of the NOM 1- related relief by clarifying the status of documents filed of record in court proceedings, more particularly their availability to the public and the extent to which the press is free to report on their content.

[22] The City relied on the judgment in *Independent Newspapers* supra to contend that the default position is that documents filed at court thereupon become publicly accessible and freely amenable to publication. *Independent Newspapers* was a matter that arose from an application by the press to have access to a court record in the Constitutional Court that had been sealed at the instance of the Court *suo motu* because it contained material that had been classified as secret in terms of legislation regulating national security. The Court treated of the issue under the rubric of 'open justice', a term commonly encountered in the jurisprudence and academic literature of many jurisdictions apart from our own.[11] It held that the 'default' position was that the content of the court file should be available for public scrutiny. However, the approach adopted in the majority judgment in *Independent Newspapers* is not dispositive of the question that the current matter poses. This is because *Independent Newspapers* was concerned with access to an appellate record, and, moreover, to papers that had been in the record and referred to in open court when the matter had been heard at first instance.

[23] The question that presented in *Independent Newspapers* was whether, in the context just described, the classification of certain documents in the record as secret in terms of the relevant legislation justified keeping the affected part of the record sealed. The Court held that once classified information was referred to in court proceedings the question whether it should consequently come into the public domain or not was one to be determined by the court. Moseneke DCJ articulated the premise thus: 'Once the [classified] documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access.'[12] The point of departure ('default position') in

---

[11] See e.g. *Guardian News and Media Ltd, R (on the application of) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2012] 3 All ER 551 (which includes a passing reference to the Constitutional Court's judgment in *Independent Newspapers*); *Hogan v Hinch* [2011] HCA 4 and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522, [2002] 2 SCR 522.

[12] *Independent Newspapers* supra, at para 55.

any such determination is one of openness.[13] This begs the question as to at what stage of the litigious process it is properly said that documents are 'placed before the court'. Does it happen when they are filed at the registrar's office, or when they are placed before a judge seized of hearing the matter in respect of which they were filed, or only when the parties employ them by relying on them at, or for the purpose of, the hearing, say in heads of argument or in open court? How do the mechanics of 'open justice' work in the applicable legal framework?

[24] A comparative survey illustrates that 'open justice' is a concept that is defined with variable emphases in different jurisdictions. In many countries the essence of the concept is defined with the emphasis on the importance of the promotion of public confidence in the administration of justice by the conduct of judicial proceedings in public, save in exceptional cases – a principle enshrined locally in s 34 of the Constitution and s 32 of the Superior Courts Act 10 of 2013.[14] In South Africa's Constitutional Court jurisprudence the concept has been given a wider implication and has been held to manifest 'a cluster or… umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial…. The constitutional imperative of dispensing justice in the open is captured in several provisions of the Bill of Rights' including 16(1)(a) and (b) - the right to freedom of expression, which includes freedom of the press and other media as well as freedom to receive and impart information or ideas - and s 34 which 'commands that courts deliberate in a public hearing'. The articulation of the concept is similar in Canada.[15] The narrower

---

[13] Ibid para 43.

[14] Section 32 of the Superior Courts Act 10 of 2013 provides:

Proceedings to be carried on in open court

Save as is otherwise provided for in this Act or any other law, all proceedings in any Superior Court must, except in so far as any such court may in special cases otherwise direct, be carried on in open court.

Section 16 of the Supreme Court Act 59 of 1959 (which by virtue of the transitional provisions in s 52 of Act 10 of 2013 is applicable in the current matter) was essentially to the same effect.

[15] See *Independent Newspapers* supra, at para 39-42; see also *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) (2007 (1) SACR 408; 2007 (2) BCLR 167 and *S v Mamabolo* 2001 (3) SA 409 (CC) at para 29-31. Cf. *Sierra Club of Canada* supra. The effect of the broader versus the narrower view of 'open justice' is succinctly stated by Sharon Rodrick (senior lecturer in law at Monash University and the co-author of D Butler & S Rodrick *Australian Media Law* (4th ed, 2012)) in her article *Open Justice, the Media and Avenues of Access to Documents on the Court Record* published in the University of New South Wales Law Journal ([2006] UNSWLawJl 40; (2006) 29(3) University of New South Wales Law Journal 90)., as follows:

> 'More recently, there has been a tendency to regard open justice – in the form of the media's right to report on the courts and the corresponding right of the public to receive those reports – as a stand-alone exercise of freedom of expression. Treating open justice as an adjunct of free speech has a number of consequences. First, unlike the traditional approach to open justice, it does not demand a link between open justice and the administration of justice. Rather, it posits that the right to distribute information about the courts is an emanation of the right to speak, irrespective of whether it yields positive benefits for the administration of justice. Second, viewing open justice in this manner effects an alteration in

formulation of the concept in countries like England and Australia no doubt explains why documents filed of record in court proceedings in those countries are not generally accessible other than to the parties to a suit and persons with an objectively determinable legal interest in it. In those countries it is only when documents are employed in open court that their content becomes 'public'. The effect of rule 62(7) of the Uniform Rules and the incidents of the rules concerning discovery in the context of our law of civil procedure must be considered to determine whether, notwithstanding the apparent difference of emphasis in the conceptualisation of 'open justice'; our law is effectively any different in the respect relevant for current purposes from that in places like England and Australia.

[25] In this court access to the documents filed with the registrar in any case is formally regulated by rule 62(7), which provides: '*Any party to a cause, and any person having a personal interest therein, with leave of the registrar on good cause shown, may at his office, examine and make copies of all documents in such cause*'. I shall discuss the effect of that provision presently in the context of SANRAL's contention that it stands in aid of its argument limiting publication of certain content of the City's supplementary founding affidavits pending the delivery of SANRAL's answering papers.

[26] But even in the context of a concept of 'open justice' that includes freedom of expression as one of its elements, it is universally accepted that it is susceptible to reasonable limitations. Section 36 of the Constitution states the test by which the permissible limitation of any basic right is to be measured in this country. It applies equally when a cluster or umbrella of rights is entailed. Section 36 provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. What then is the law of general application that limits access to court records, or which prohibits a party to legal proceedings making its papers, or those served on

---

the perceived role of the media. The media are not a mere conduit through which the workings of the courts are relayed to the general public , but are perceived as exercising their own independent right of free speech. Whilst Australian judges have readily embraced the traditional purposes of open justice, most have tended to shy away from regarding open justice as an aspect of free speech *simpliciter*. For example, the New South Wales Court of Appeal has declared that the purposes of the principle are tied to the operation of the legal system, and "do not extend to encompass issues of freedom of speech and freedom of the press" [. A wider perspective on open justice might attract more support as the pressure continues for Australia to adopt a Bill of Rights in line with other liberal democracies.' (footnotes excluded)

The article is accessible online at http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/UNSWLawJl/2006/40.html .

it by another party, available to strangers to the proceedings, or which affords a basis to prohibit or restrict the publication of their content?

[27] The only laws of general application that, to my knowledge, might have a bearing are the law of defamation, rule 62(7) of the Uniform Rules, the *sub judice* rule, which our common law adopted from that of England, the legal incidents of the compulsory disclosure processes in civil litigation, and the law that gives superior courts the inherent power to regulate their own processes and procedures. The latter is an incident of the common law that is expressly affirmed in s 173 of the Constitution. No-one argued that the law of defamation had any role to play in the current matter.

[28] As mentioned, SANRAL relies, in part, on the provisions of rule 62(7) in support of the NOM 1 - related relief. The commentary on the sub-rule in Van Loggerenberg ed. *Erasmus, Superior Court Practice* suggests that it is related to a common law rule that public access to the content of the court file in litigious proceedings is permissible only after the matter has been called in open court. The nature of the common law rule and its origin are not discussed in the commentary. It appears to me that it is the English common law that is referred to.

[29] In *Ex Parte Bothma: In Re R v Bothma* 1957 (2) SA 104 (O), Van Blerk JP took exception to the publication in the morning press of details of a matter that came before him later in the day. It would appear from the tenor of the learned judge's remarks that, having been assured by the registrar that the papers had not been made available by the court's officials, he inferred that their content had probably been disclosed by one of the parties' legal representatives. The judge remarked that where the registrar was prohibited from making documents of record publicly available, it was equally desirable ('*ewe wenslik*') that legal practitioners also abide by the rule, especially where publicity was given to only one party's case. The only authority offered in support of that observation was *Abt v. Registrar of Supreme Court and Others* (1899) 16 S.C. 476.

[30] *Abt*'s case concerned an application to court for access to a court record in a pending case not yet called for hearing in open court. The only issue for determination was whether the record was a public record. It appears from the judgment that the applicable rule of court at the time, like rule 62(7), permitted any party to a cause to search for and make copies of the pleadings, but afforded no such permission to strangers to the cause. De Villiers CJ was prepared to countenance that a court record became a public record once judgment had been pronounced in the matter on the principle that 'public interest requires that the proceedings of

Courts of Justice should be public', but, as many a case in which summons had been filed never came to trial, he considered that 'there exists no ground of public policy why the public should have access to records showing against whom summonses for debt have been issued or defamatory charges made'. In a separate judgment, Buchanan J, with whom Maasdorp J concurred, held that access to a court record could be permitted as of right only if the court record were a public record. In the face of evidence that the practice of the registrar was 'to file of record only the documents of a completed case, all others [being] destroyed', he concluded '[t]hat being the case, inchoate matters not yet adjudicated upon and which are liable to be utterly destroyed and not yet kept in perpetuity do not come within the rule as to inspection'. *Abt*'s case thus did not afford any authority for the view expressed in *Bothma* supra.

[31] In *Bell v Van Rensburg, NO* 1971 (3) SA 693 (C) at 722B-D, Baker AJ stated '*In 'n hof se sakelêer word die dokumente wat geliasseer is vir die publiek regtens toeganklik sodra die dokumente deel van die oorkonde word. Die vraag is nou, wanneer word dokumente en rekords van getuienis deel van die oorkonde? Die antwoord hierop is dat dit geskied wanneer die saak afgehandel is. Terwyl die saak nog hangende is, is die dokumente en enige getuienis wat afgeneem is nog nie deel van die oorkonde nie en het die publiek geen reg tot insae nie (Abt v. Registrar of Supreme Court and Others, 16 S.C. 476, waarna verwys word in Visser v Minister of Justice and Another, 1953 (3) SA 525 (W) op bl. 527). Die reg van die publiek om insae te hê nadat die saak afgehandel is, is afkomstig van die feit dat 'n hof regtens 'n oordkondehof is*.'[16]

[32] The judgments discussed thus far were limited in their ambit to the right of access to the content of the court file in the registrar's office. They did not, save for *Bothma*, deal with the question of the right of anyone to other means of access to the information in the court file, or the right to disseminate and publish such information.

[33] In *Romero v Gauteng Newspapers Ltd & Others* 2002 (2) SA 431 (W) (a judgment delivered in 1997), Wunsh J held that there was no general rule that makes it unlawful to publish the content of papers filed at court in respect of pending proceedings before the

[16] 'Documents filed in a court file opened for a case are legally accessible by the public as soon as the documents become part of the record. The question then is when do documents and records of evidence become part of the record? The answer is when the case has been disposed of. While the case remains pending, the documents and any evidence that is recorded is not yet part of the record and the public has no right of inspection (Abt…, to which reference was made in *Visser*…at page 527). The right of the public to have insight into the file after the case has been disposed of derives from the fact that a court is legally a court of record.' (my translation)

matter is called in court. The learned judge's analysis of the reported cases (he made no reference to *Bell v Van Rensburg* or *Ex Parte Bothma,* supra) led him to the conclusion that such publication would be unlawful only if it published defamatory matter – the publication of such matter not being privileged if the case had not been called in court – or if its publication were substantially prejudicial to the fairness or effectiveness of the hearing in the pending proceedings. In this regard, Wunsh J expressed himself as follows at 440G-I:

> I am unable to extract from these cases a general principle that no reference may be made to the contents of a summons, application or notice of appeal, which does not reflect adversely on the plaintiff, applicant or appellant, without his or her consent. The correct principle is that a person cannot publish material in such documents in which a litigant disparages or defames a party before the documents are dealt with in open court. By then the victim would have been able to take all steps open to it to deal with the allegations, and the plaintiff, applicant or appellant would have exercised his or her intention of proceeding with the matter. Further, that statements may not be published concerning a matter which is *sub judice* which would affect the administration of justice, ie if the publication could influence the cases. (*Maeder v Perm-Us (Pty) Ltd* 1939 CPD 208.)

[34] The factual context of the case in *Romero* was, however, quite distinguishable from that in the current matter. The case concerned an application to interdict the publication of an article concerning the listing of the applicant in the Government Gazette in connection with a business practice deemed to be harmful in terms of the relevant legislation. The article referred in passing, and only in general terms, to a pending application instituted by the applicant for the review and setting aside of the decision to determine the applicant's activity as a harmful business practice. The information published in the Government Gazette was a matter of public record and a copy of the application papers had been made available to the journalist by the applicant's attorney.[17] Wunsh J recognised that the circumstances by which the information in issue had come into the hands of strangers to the pending proceedings could have a bearing on the lawfulness of its publication before the case was called. At p 443H, the learned judge remarked as follows in that regard: '*I would add a rider: publication of the contents of a court document before it is a subject of open court proceedings may be illegal if the document was procured unlawfully, for example by being removed from a party's possession without its consent or by being copied from the original in*

[17] The attorney had contended that the papers had been made available against an undertaking of confidentiality by the reporter, but the judge held on the facts that it was most unlikely that an agreement of the nature contended for by the attorney had been concluded.

the court file without the requisite leave in terms of Rule 62(7) (cf Janit and Another v Motor Industry Fund Administrators (Pty) Ltd and Another 1995 (4) SA 293 (A) at 303F - 304A)'.[18]

[35] In the current case the content of the bid documents which underpin the passages that SANRAL wants to keep out of the public eye until it has delivered its answer was disclosed to the other parties in the review application in terms of the rules of court. It is only by virtue of that compulsory disclosure that the City, as the applicant in the review, obtained access to it and became able to use it for the purpose of supplementing its case. If the registrar complies with rule 62(7), which she obviously should, the City's supplementary founding affidavit should therefore be available only to the other parties and to any person able to show a 'personal interest' in the pending review. It has been argued,[19] I think correctly, that the expression 'personal interest' in the context of rule 62(7) connotes something equivalent to a direct legal interest; it does not cover mere curiosity.

[36] Rule 62(7), however, only regulates access to the content of a court file in the registrar's office. That begs the question whether any other party who has any part of the record in its possession, say on receipt of delivery to it of papers in the cause, may disclose it to strangers to the action. The court in *Ex parte Bothma* was plainly of the view that it was not proper for that to happen. However, as I have noted, the court cited no authority in point in support of its view, and, moreover, it refrained from doing anything effective to enquire into or sanction what it considered to be an infringement of the rule. The judgment in *Romano* did not engage with that question because in that case, as mentioned, the applicant who sought to suppress the dissemination of the material had itself (through its attorney) supplied it to a journalist. Thus, apart from the guidance that may be derived from the judgments in *Independent Newspapers*, which were also given in distinguishable circumstances, there does not appear to be any South African jurisprudence directly in point.

[37] The City's counsel (Mr *Budlender* SC, assisted by Ms *Bawa*, Mr *Paschke* and Ms *Saller*) appeared to contend that the judgment in *Romero* was dispositive of the question whether there was any restriction on the right to publish particulars of pending court proceedings before they are called in court. Let me therefore begin an attempt to answer the question stated above by saying at once that I find myself in general agreement with the

---

[18] *Janit and Another v Motor Industry Fund Administrators (Pty) Ltd and Another* 1995 (4) SA 293 (A), referred to by Wunsh J, also involved a quite distinguishable set of facts. In that matter a party who had unlawfully obtained tape recordings of board meetings had disclosed them in his discovery affidavit and thereafter threatened to publish their content to the media. Interdict proceedings followed to pre-empt the carrying out of the threat. The facts did not implicate the 'implied undertaking rule' discussed below.

[19] *Erasmus Superior Court Practice* at B1-405 [Looseleaf Service 37, 2011].

statement of the law in *Romero*. The judgment confirms that no privilege attaches in respect of the publication of defamatory matter in the content of the court file in a pending matter before the matter is mentioned in open court. Privilege would attach to a fair and accurate report of defamatory matter referred to in the course of an open hearing, assuming no order exceptionally limiting publication was of effect. The judgment also confirmed that it would be unlawful to publish details of the evidence in a pending case not yet before the court if the publication would be likely to prejudice the fairness of the hearing or prejudice the determination of the case. In the latter respect, I consider that the judgment in *Romero* did no more than confirm an incident of the *sub judice* rule.

[38] The facts of the *Romero* case meant, however, that the judge gave no consideration to the rule identified by the English courts ('the implied undertaking rule') that documents given in the course of discovery may be used by the other parties only for the litigation in which they are engaged, and not for any 'collateral or ulterior' purpose. The rule not considered in *Romero* is relevant in the current matter because, as observed previously in the judgment in the interdict application, there is a close correspondence between the effect of the provision in terms of rule 53(1)(b) by the respondent of an administrative record in review proceedings and discovery in action proceedings.[20] Both procedures impose a regime of compulsory disclosure of documents and information.

[39] In *Crest Homes plc v Marks* [1987] 1 A.C. 829, [1987] 2 All E.R.1074 (HL), at 1078 (All ER), Lord Oliver of Aylmerton observed:

> It is clearly established and has recently been affirmed in this House that a solicitor who, in the course of discovery in an action, obtains possession of copies of documents belonging to his client's adversary gives an implied undertaking to the court not to use that material nor to allow it to be used for any purpose other than the proper conduct of that action on behalf of his client (see *Home Office v Harman* [1982] 1 All ER 532, [1983] 1 A.C. 280). It must not be used for any "collateral or ulterior" purpose, to use the words of Jenkins J. in *Alterskye v Scott* [1948] 1 All ER 469, approved and adopted by Lord Diplock in Harman's case, p. 302. Thus, for instance, to use a document obtained on discovery in one action as the foundation for a claim in a different and wholly unrelated proceeding would be a clear breach of the implied undertaking: see *Riddick v Thames Board Mills Ltd* [1977] QB 881. It has recently been held by Scott J. in *Sybron Corporation v Barclays Bank Plc* [1985] Ch 299 - and this must, in my judgment, clearly be right - that the implied undertaking applies not merely to the documents discovered themselves but also to information derived from those documents whether it be embodied in a copy or stored in the mind. But the implied undertaking is one which is given to the

[20] *City of Cape Town v South African National Roads Agency Ltd and Others* supra, at para 49.

> court ordering discovery and it is clear and is not disputed by the appellants that it can, in appropriate circumstances, be released or modified by the court.

I referred to the implied undertaking rule in *Mathias International Ltd and Another v Baillache and Others* [2010] ZAWCHC 68, 2010 JDR 0234 (WCC) at para 48, and held, in the context of Anton Piller proceedings, that the applicant's supporting affidavit in the *ex parte* application brought in that case to obtain a search and seizure order had contained such an implied undertaking.

[40] The notion of an 'undertaking' is, however, somewhat misleading. The use of the term arises from the original requirement in the early 19th century of an express undertaking.[21] Its continued use is convenient in the context of characterising breaches of the rule as contempt of court in the sense of involving the breaking of a notional undertaking to the court. In *Bourns Inc v Raychem Corp* [1999] 1 All ER 908 at para 16, Laddie J put the position more realistically when he explained that the fiction of an implied undertaking was in fact an expression of the existence of a legal obligation:

> The implied undertaking not to make collateral use of documents disclosed on discovery arises automatically as an incident of the discovery process. It is in no sense implied as a result of dealings between the parties. The discloser may well not have thought of the implications of giving discovery and the disclosee may well not have turned his mind to the matter of what use he can make of the documents outside the action. Had he thought of it, he might well have wanted full freedom to do what he liked with the material, particularly if his own discovery is non-existent or very limited. So the obligation is not to be likened to a term implied in a contract between the parties to the litigation. On the contrary, it is an obligation to the court, not the other party, which is implied. It is for that reason that its breach is treated as contempt. The obligation is imposed as a matter of law.[22]

---

[21] The relevant history is sketched in *Hearne v Street* [2008] HCA 36 at para 105, with reference to *Williams v The Prince of Wales Life, &c, Co* [1857] EngR 176 (in which the court required the plaintiff to give an undertaking as a precondition to its preparedness to make any order in respect of his claim) and *Reynolds v Godlee* [1858] EngR 233.

[22] Cf. also *Prudential Assurance Co Ltd v Fountain Page Ltd* [1991] 3 All ER 878 at 885, approved by Straughton LJ in *Mahon v Rahn* [1997] EWCA Civ 1770; [1998] QB 424 in the opening passage of his judgment s.v 'The rule in civil proceedings'. In *Prudential Assurance* loc cit, Hobhouse J noted '[t]*he expression of the obligation as an implied undertaking given to the court derives from the historical origin of the principle. It is now in reality a legal obligation which arises by operation of law by virtue of the circumstances under which the relevant person obtained the documents or information. However, treating it as having the character of an implied undertaking continues to serve a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; likewise, it is an obligation which the court has the right to control and can modify or release a party from. It is an obligation which arises from legal process and therefore is within the control of the court, gives rise to direct sanctions which the court may impose (viz contempt of court) and can be relieved or modified by an order of the court*'.

[41] SANRAL's counsel contended for the application of the implied undertaking rule in support of the relief sought in SANRAL's notice of motion. The question whether such a rule applies in this country was considered in some depth by Malan J in *Replication Technology Group and Others v Gallo Africa Limited In re: Gallo Africa Limited v Replication Technology Group and Others* 2009 (5) SA 531 (GSJ). That case involved an application by a respondent in a pending contempt of court application to strike out material in the supporting papers in the contempt application. The material comprised information obtained by applicant in the contempt application in the course of discovery that had been made by the respondent in related arbitration proceedings. Malan J dismissed the application to strike out. In doing so, the learned judge appears to have accepted that cogent grounds existed for the application of the implied undertaking rule in South Africa, but assuming, without determining, that it did apply, he was able to distinguish the applicant's entitlement to rely on it on one of the recognised exceptions to the rule, which allowed the use in contempt proceedings of material obtained through discovery in the related principal proceedings. In that regard Malan J followed the approach enunciated in *Dadourian Group International Inc & Ors v Simms & Ors* [2006] EWCA 1745, [2007] 2 All ER 329 (CA) at para 12, in which Arden LJ observed that contempt of court proceedings are integral, not collateral, to the action in respect of which they are launched. Malan J therefore found, in other words, that the material was being used permissibly in the context of the proceedings in respect of which it had been disclosed through discovery.

[42] It appears from the discussion of the implied undertaking rule in *Replication Technology Group* that it applies also in Canada[23] and, in respect of civil action proceedings, in Australia.[24] In Australia, as in England, the so-called 'implied undertaking' is now characterised as a substantive legal obligation.[25] Malan J also pointed out that its application

---

[23] See *Juman v Doucette* 2008 SCC 8, [2008] 1 SCR 157; incorrectly cited in *Replication Technology Group* as '*Juman v Douchette*'.

[24] In para 22 of the judgment of Toohey J in *Esso Australia Resources Ltd v Plowman* [1995] HCA 19, (1995) 183 CLR 10 (the Australian authority referred to by Malan J) the observation was made '*In conventional litigation, documents which are disclosed and produced by one party to another pursuant to the rules of court relating to discovery of documents are subject to an implied undertaking that they will not be used for any purpose other than in relation to the litigation itself.*'

[25] See *Hearne v Street* supra, at para 3 (per Gleeson CJ). The relevant law in Australia was summed up as follows in the joint reasons of Hayne, Heydon and Crennan JJ at para 96 of the judgment as follows (footnotes excluded): '*Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents*

in South Africa appears to have been accepted in the judgment in *Crown Cork* supra. In the latter case, Schutz AJ quoted with approval the remark by Lord Denning MR in *Riddick v Thames Board Mills Ltd* [1977] 3 All ER 677 (CA) at 678 that '[t]*he reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, ie in making full discovery.*' Malan J also drew attention to the Master of the Rolls' further remarks at 687g-688a: ''*The* [document] *was obtained by compulsion. Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party, or anyone else, to use the documents for an ulterior or alien purpose. Otherwise, the courts themselves would be doing injustice ... In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, or for bringing a libel action, or for any other alien purpose.*' In *Crown Cork*, Schutz AJ furthermore expressly approved the following dictum by Megaw LJ in *Halcon International Inc v The Shell Transport and Trading Co and Others* (1979) RPC 97[26] at 121: '*But it is in general wrong that one who is thus compelled by law to produce documents for purposes of particular proceedings should be in peril of having these documents used by the other party for some purpose other than the purpose of those particular legal proceedings and, in particular, that they should be made available to third parties who may use them to the detriment of the party who has produced them on discovery*'.

[43] As noted by Malan J at para 8 and 9 of his judgment in *Replication Technology Group*, '[r]u*les of discovery constitute an inroad into an individual and a corporation's right to privacy in terms of s 14 of the Constitution…. The rationale for the imposition of the implied undertaking is the protection of privacy: "Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard*

---

produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits'.

[26] Incorrectly cited in note 18 to the judgment in *Replication Technology Group* as (1997) RPC 79.

that right. The purpose of the undertaking has been to protect, so far as is consistent with the proper conduct of the action, the confidentiality of a party's documents. It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings …" However, it is also suggested that the implied undertaking is owed not only to the court but also to the party providing discovery since the latter is entitled to release his opponent from this undertaking by consenting to a collateral use. A further basis for the rule is the promotion of full discovery. The interests of the proper administration of justice require that there should be no disincentive to full and frank discovery.'[27]

[44] The judgment in *Romero* did not discuss any of these considerations because the context of the case did not demand it. I am thus of the view, contrary to the submissions advanced on behalf of the City, that the judgment is of limited assistance to the determination of the current matter. *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA), 2007 (9) BCLR 958, [2007] 3 All SA 318, on which the City's counsel also relied, is distinguishable for similar reasons; the facts of the case did not implicate the implied undertaking rule.

[45] The City's submissions did not suggest that the rule against the collateral use of discovered documents (and, by parity of reasoning, also documents obtained in terms of rule 53(1)(b)) did not apply in South Africa. Counsel for the City did not argue that the dicta in the South African jurisprudence to which I have referred, which indicate a recognition that the limitation on the use of discovered documents imposed in terms of the English rule applies locally, were misconceived. The City's argument, as I understood it, was that the acknowledged privacy considerations in play in the application of the implied undertaking rule have to be balanced with the implications of the receiving parties' right to freedom of expression, including the right to impart information. The City's counsel argued that the appropriate balance between the competing constitutional claims fell to be struck by making the rule applicable only to information derived from discovered documents of a truly confidential character. Accepting the argument would entail essentially discarding the implied undertaking rule because the special treatment of confidential information in the

[27] The quotations in the passages cited from *Replication Technology Group* are from Paul Matthews and Hodge M Malek, *Disclosure* (2007) at 451-4.

course of litigation has always been dealt with quite independently of the rule and on the basis that different considerations apply.

[46] The approach contended for by the City finds some philosophical support in the position adopted by Lord Scarman in his dissent (co-authored with Lord Simon of Glaisdale) in *Home Office v. Harman* [1983] 1 A.C. 280. Lord Scarman, however, did not suggest that the implied undertaking rule should be discarded. He merely reasoned that its application should cease once the discovered material had been employed in open court, which is, in fact, the current position in England. The approach contended for by the City's counsel is, moreover, not one that is followed either in England (where similar freedom of speech rights are applicable under the European Convention on Human Rights[28]), or in Canada (where the right to freedom of expression is incorporated in section 2 of the Charter s.v 'Fundamental Freedoms'[29]).

[47] In the Canadian Supreme Court's judgment in *Juman v Doucette*[30] at para 5, Binnie J upheld a broad interpretation of the implied undertaking rule and observed that it covered *'innocuous information that is* [not] *confidential*…' and, at para 25, he underscored the point, stating '*Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in Slavutych v. Baker, 1975 CanLII 5 (SCC), [1976] 1 S.C.R. 254. The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order*'.[31]

[48] The information in issue in *Juman v Doucette* was liable to support serious criminal charges against the party who had made discovery. The Supreme Court of Canada held that

---

[28] Article 10 of the ECHR provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[29] Section 2(b) of the Canadian Charter provides '*Everyone has the following fundamental freedoms:..(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication*'.

[30] Note 23 supra

[31] The notion that the implied undertaking rule operates independently of of any obligation existing under the general law relating to confidentiality was also stated by Lord Keith of Kinkel in his speech in *Home Office v Harman* supra, at 541c (All ER).

the importance of the implied undertaking rule required that in matters in which contesting considerations merited departures from it, such departures should occur only with the prior leave of the court. In Canada, an applicant seeking modification of or release from the implied undertaking rule is required to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation.[32] (The decision in *Edmonton Journal v Alberta* [1989] 2 SCR 1326, to which counsel for the City directed attention, in which the Supreme Court of Canada struck down s 30 of the Alberta Judicature Act[33] as impermissibly infringing the Charter-given right to freedom of expression did not implicate the implied undertaking rule. The import of the judgment as to the permissibility of publishing details of pending cases not yet called in court was in material respects essentially similar to that of the judgment in *Romero*.)

[49] A common law right of public access to court files obtains in the United States of America, but as observed by the US Supreme Court in *Nixon v Warner Communications, Inc* [1978] USSC 59; 435 U.S. 589:

> '… the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." … Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption…, or as sources of business information that might harm a litigant's competitive standing, ...
>
> It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

---

[32] *Jumain v Doucette* supra, at para 32.

[33] Section 30(2) provided:

'No person shall, before the trial of any proceedings had in a court of civil jurisdiction in Alberta or, if there is no trial, before the determination of the proceedings within Alberta, print or publish or cause to be printed or published anything contained in a statement of claim, statement of defence or other pleading, examination for discovery or in an affidavit or other document other than

(a) the names and addresses of the parties and their solicitors, and

(b) a concise statement of the nature of the claim or of the defence, as the case may be, in general words such as, "the claim is for the price of goods sold and delivered", or "the claim is for damages for personal injuries caused by the negligent operation of an automobile", or as the case may be.'

Sharon Rodrick notes in her article to which reference was made earlier[34] that there is considerable debate in America as to which documents filed at court constitute 'judicial documents'. Thus, in many states the position appears to be that a document that has been filed at court qualifies in terms of the common law right to access only if it is 'material on which a court (has relied) in determining the litigants' substantive rights'.[35] On that approach there is little real distinction in regard to accessibility with the position that obtains in England and Australia.

[50] In his judgment in the High Court of Australia in *Hearne v Street* supra,[36] Kirby J observed that there had been recognition in England and elsewhere that the concept of the implied undertaking rule was 'looking rather threadbare'.[37] The learned judge acknowledged that there are cogent arguments in support of the maintenance of the rule,[38] but also listed a number of factors that militated in support of a fundamental reformulation of the applicable law.[39] The latter included the notion that '[t]*he rule ... is burdensome on free expression in contemporary Australian society, and is arguably too absolute*'. Kirby J expressed himself in favour of a reformulation of the rule, but found that the context of the matter before the Court, especially the acceptance by all the parties thereto of the traditional approach for the purposes of their arguments, made the occasion unsuitable for an undertaking of the exercise. Similar limitations apply in the current matter because the City's arguments in support of a degree of openness that would entail a fundamental departure from the implied undertaking rule were premised on the assumption that the judgments in *Romero* and *Independent Newspapers* were directly in point. In consequence, the arguments did not substantially engage with the possibility of reformulating the implied undertaking rule. Thus, while I am also inclined in favour of a reformulation of the rule to, in general, allow public access to the content of the court file, including any information subject to the implied undertaking rule that has been included in the pleadings or affidavits, once a matter has been set down for hearing, rather than only after the matter has been called in court, because this would

---

[34] At note 15.
[35] At note 119 to her article, Rodrick cites the following cases as illustrative of the proposition: '*Anderson v Cryovac Inc*, [1986] USCA1 479; 805 F 2d 1, 12–13 (1st Cir, 1986). See also *United States v El-Sayegh*, [1997] USCADC 284; 131 F 3d 158 (DC Cir, 1997) (in which a plea agreement filed to enable a court to rule on the Government's motion to seal the agreement, which was later withdrawn when the plea agreement fell through, was held to be not subject to the common law right of access as it had played no role in the adjudicatory process)'. See also *Re Boston Herald*, [2003] USCA1 54; 321 F 3d 174, 180 (1st Cir, 2003).
[36] Note 21.
[37] At para 49.
[38] At para 51.
[39] At para 52.

conduce to more effective open justice without unduly impinging on the parties' rights of privacy, I do not consider that the current case affords a suitable basis to undertake the exercise. It is one that in any event probably would be more appropriately addressed by the Rules Board after a process of public participation.

[51] The legal obligation imposed in terms of the implied undertaking rule applies not only to the parties to whom discovery is made, but also to third parties such as the parties' legal representatives, court officials, expert witnesses and indeed, any person who comes into possession of the information knowing that it was obtained by way of discovery, or equivalent compulsion in terms of the rules of court. Thus, in the Appellate Division of the Supreme Court of Western Australia's judgment in *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316 at 334-335, Anderson J (Pidgeon and Ipp JJ concurring) said: 'The implied undertaking is binding upon anyone into whose hands the discovered documents come, if he knows that they were obtained by way of discovery'. As the High Court of Australia noted in related vein in the joint reasons of Hayne, Heydon and Crennan JJ in *Hearn v Street* supra, at para 111:

> If this principle did not exist, the "implied undertaking" or obligation on the litigant would be of little value because it could be evaded easily. That is why Lord Denning MR said in *Riddick v Thames Board Mills Ltd* [[1977 3 All ER 677 (CA)]: "The courts should ... not allow the other party - or anyone else - to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice."[at 687g] And in the same case [at 694d] Stephenson LJ also said: "[I]t is important to the public and in the public interest that the protection should be enforced against anybody who makes improper use of it." Use with knowledge of the circumstances would be improper use.

The ambit of the operation of the obligation, if it applies in South Africa, would thus render the confidentiality undertakings stipulated by SANRAL legally superfluous, save insofar as concerns material that is independently deserving of being kept private such as information that is confidential in the true sense of the word (see e.g. *Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C), *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) at 428 – 432 and *Alum-Phos (Pty) Ltd v Spatz and Another* [1997] 1 All SA 616 (W) at 623-624), which would be susceptible to protection even beyond the time when the restrictions under the implied obligation rule had ceased to apply.

[52] Returning to home shores. Five provisions of the Bill of Rights appear to me to bear on the provision of an answer to the question; viz. the right of everyone to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court

(s 34); the right of access to information (s 32); the right to freedom of expression, and, in particular, its inclusion of the freedom to receive or impart information or ideas and the freedom of the press and other media (s 16); the right to dignity (s 10) and the right to privacy (s 14). None of these rights is absolute in nature. All of them are subject to limitation on the basis provided in terms of s 36 of the Constitution. In the context of litigation, the applicable procedural law would be a pertinent consideration in the application of s 36. Furthermore, situations frequently arise when the exercise of the respective rights can bring them into tension or competition with one another in a practical sense. In such situations it is necessary to weigh the competing considerations in the scales to determine the applicable limits of the expression of the respective rights concerned. It is the exigencies of the given situation that will determine on which side the scales should incline because there is no order of preference in respect of the rights.

[53] The procedure of discovery (of which rule 53(1)(b) is an incident) in our law of civil procedure is taken from the English law.[40] Discovery is a procedure peculiar to jurisdictions whose civil procedural law is based on that of England. It is apparently not encountered in the European civil law jurisdictions.[41] The limited South African jurisprudence in point, to which I have referred above, appears to recognise that there is good reason to apply the implied undertaking rule as an incident of discovery in our own law of civil of procedure. There has, however, as far as I am aware, been no explicit determination that it does apply, although the judgment in *Crown Cork* supra at 1098C-F might be read to have had that effect. The judgments of the Constitutional Court in *Independent Newspapers*, on which the City's counsel placed some emphasis, do not address the question. As Moseneke DCJ stated in the majority judgment,[42] the issue before the Constitutional Court in that matter was 'whether an appellate court record, under the authority and direction of [the] court, should be made available to the media and the public'.[43] As mentioned earlier, the material concerned had been referred to in open court during earlier stages of the principal proceedings in the magistrates' court and in the High Court. Thus nothing in the implied undertaking rule, as it is currently applied in the common law jurisdictions, would – absent the imposition of special restrictions by a court - have prevented access to it by the public, or publication of it in the media. The essence of the matter before the Constitutional Court in *Independent*

[40] *Crown Cork* supra, at 1099A.
[41] *Home Office v Harman* supra, at 534f-h (All ER) (per Lord Diplock).
[42] At para 51.
[43] My underlining.

Newspapers entailed the determination of a contention by one of the parties to the principal proceedings that material that would ordinarily have been in the public domain as a consequence of the prior conduct of the case should be kept under seal. The Minister for Intelligence Services was seeking an order in effect distinguishing the evidence in issue in that case from the ordinary incidence of the operation of the principle of open justice. The implied undertaking rule was of no assistance to the Minister in *Independent Newspapers* because the material had already been referred to in open court.[44] *Independent Newspapers* thus concerned the quite discrete question of whether and how a court should determine the question of keeping secret or restricting access to material in court proceedings that ordinarily would have been accessible by the public by virtue of its prior use in open in such proceedings. Moseneke DCJ's statement[45] about the 'default position' has to be understood in the context of what was in issue in the case.

[54] The implied undertaking rule operates in support of the constitutional right of everyone to privacy. Properly applied, rule 62(7), quite incidentally, has a similar effect. I propose to discuss each of them in that context and with regard to the rights they potentially adversely affect.

[55] Like freedom of expression, privacy is not an absolute right. The implied undertaking rule and rule 62(7) do not stand in the way of an appropriate balancing of the two potentially contesting rights. The court may permit an inspection of the record at any time if it is appropriate to do so, and due cause is shown for a departure from the usual consequences of the rules. The rules also do not in any way impinge on the essence of open justice in the sense of the ability of the public and the media to scrutinise court proceedings. They both cease to apply, at the latest, when the matter is placed before the court for hearing. I would venture that in matters concerning questions of public interest the court would incline favourably to any application to allow general access to the content of a court file at an earlier stage, once pleadings in the case have closed and application has been made for a hearing date, or such a date has been fixed. The effect of the implied undertaking rule would not be materially curtailed by such an approach. Information or material susceptible to

---

[44] The wide import of the concept of reference in open court in the modern context to include material that the judge was required to read for the purpose of preparing for the hearing, including documents referred to in the heads of argument was confirmed in *Smithkline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] EWCA Civ 1781, [1999] 4 All ER 498 (CA), and I can conceive of no good reason for our courts to take a more restrictive approach. The implied undertaking rule, understood in the manner explained in *Smithkline*, does not appear to me to derogate from the principle of open justice; certainly not insofar as the concept entails the openness of court proceedings to public scrutiny.

[45] At para 43.

privacy protection under the rule would by that stage have been affected by reference in or attachment to the pleadings or affidavits in the case which is proceeding to trial or argument. It is also relevant to note that it is open to any party who has disclosed documents or information under compulsion in terms of the rules of court to waive the benefit of the protection against the extracurial use of the material afforded in terms of the implied undertaking rule. In the current matter, SANRAL appears to be willing to do so in respect of the material described in schedule NOM 1 once it has delivered its answering papers.

[56] I am not persuaded that either rule 62(7) or the implied undertaking rule unacceptably impinges on the right of access to information. The right of access to information in terms of s 32 of the Bill of Rights is regulated in terms of the Promotion of Access to Information Act 2 of 2000 ('PAIA'). In terms of the applicable principle of subsidiarity, the ambit of the right is prescribed by the provisions of the statute.[46] To the extent that access is sought after the commencement of proceedings, s 7(1)(b) of PAIA clearly excludes access to information in a court file from the provisions of the statute. Legal proceedings commence upon the issue of the initiating process in a case - a summons in action proceedings, or a notice of motion in proceedings brought by way of application. Up to the stage of the hearing of the case, rule 62(7) regulates access to such information. There has not been any challenge to the constitutionality of the subrule. There is thus no basis laid in the papers before me for any contention that restricted access to the content of the court file in the manner provided by the subrule infringes any person's constitutional right to access information. On the contrary, the subrule provides an important administrative basis to support the implied undertaking rule. It operates to limit the possibility of the court registry unwittingly infringing the implied undertaking rule because the persons to whom the registrar is permitted to allow access to the court file would be directly party to the implied undertaking, or entitled, by reason of their direct legal interest in the subject matter of the litigation, to access to documentation disclosed in the case by the parties to the case in terms of the applicable rules of court. The implied undertaking rule also does not prevent access to information in any unacceptable way. It does not prevent discovered material being employed in court. On the contrary, it is widely recognised as a mechanism that encourages fuller disclosure and thus, indirectly, assists towards a court being able to get to the truth of a matter; thus promoting the better

[46] See *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) at para 4.

administration of justice. The operation of both rules is amenable to being managed by the court to meet the special exigencies of a given case.

[57] I am thus of the view that if there be any doubt that the judgment in *Crown Cork* has not already done so, the time has come to hold unequivocally that the implied undertaking rule does form part of our law and that it is of application in respect of material disclosed by a respondent in review proceedings in terms of rule 53(1)(b), save to the extent that any part of the record on review was not already a matter of public record before its disclosure in the litigation. For the reasons discussed above, the rule serves an important purpose; not only in upholding the constitutional right to privacy, but, equally importantly, in promoting the effective administration of justice. Its application is susceptible to adjustment to meet the exigencies of any case that might afford sufficient reason to depart from its ordinary incidence. There is no sound reason, in my view, to call its constitutional compatibility into question.

[58] Rule 62(7) imposes a duty on the registrar access to the court file in pending proceedings. It permits the registrar to give only any party to the cause and any person having a personal interest therein, in the sense discussed above, access to the documents in the court file. The effect of the subrule in the context of the current case is that many persons who have not signed the aforementioned confidentiality undertakings could obtain access. Any authorised representative of the City, for example, would qualify as representative of a party to the cause and be entitled to inspect the file. The subrule does not, however, oust the right of any person to apply to court for access to a file. The court retains an overriding discretionary power in such matters by virtue of the inherent power, confirmed in terms of s 173 of the Constitution, to protect and regulate its own process taking into account the interests of justice.

[59] To make the affidavit and annexed material subject to narrower access than provided in terms of rule 62(7), SANRAL would have to establish confidentiality in the true sense or such similar basis for exclusivity, or show that its wider availability would be prejudicial to the fair and just determination of the case. SANRAL has not sought to show any of these things in respect of the material identified in schedule NOM 1. Its object in respect of the NOM 1 material is merely to avoid premature publicity to evidence obtained by the City through rule 53(1)(b). As I have sought to explain, that material is in any event protected from premature disclosure to persons who are not parties to the application by operation of law.

[60] Counsel submitted that rule 62(7) is not complied with by the court registry in this Division. No allegation to that effect is contained in the papers. Assuming, however, that the allegation made from the bar is to any degree well founded, there is no good reason for such non-compliance. As their title implies, the rules of court are intended to apply uniformly in the High Court. Their currency has been confirmed in the recently promulgated Superior Courts Act, 2013.[47] A member of the registrar's staff that ignores rule 62(7) and thereby assists in or gives rise to an infringement of the implied undertaking rule (which, as explained above, applies as a rule of law of general effect) puts him or herself at risk of being held in contempt of court. Contempt by a court official would be considered particularly seriously. I can record that in consequence of the allegation made from the bar I have personally directed the attention of the Chief Registrar to the subrule and she will, in addition, be provided with a copy of this judgment. I am advised that additional measures have already been instituted by the Chief Registrar to promote compliance with rule 62(7).

[61] It is plain that the relief sought in regard to the material identified in schedule NOM 1 to the notice of motion is predicated on the assumptions that the court file in the review application is generally open to the public and that, after the filing of its supplementary founding papers, the City would be at liberty to distribute them, including to the media, uninhibited by the restraint of the implied undertaking rule. The City appears to have shared those assumptions. I have sought to show that the predicate for that part of the application is misconceived. To the extent that the arguments advanced on behalf of the City might indicate that the City has laboured under a misapprehension as to import of its obligations under the implied undertaking rule or the reach of the Constitutional Court's judgments in *Independent Newspapers*, I have no reason to believe that it will not act in accordance with the precepts expressed in this judgment. It is evident that the City has thus far conducted itself with caution and adherence to the confidentiality undertakings that it has given. Some assurance that it will continue to do so, no doubt on the advice of its competent team of legal advisors, is provided by its freely provided undertaking, given before delivery of this judgment, that it would not make available an unexpurgated copy of its supplementary founding papers until after SANRAL had been afforded an opportunity to bring an application for leave to appeal should this judgment go against the Roads Agency.[48]

---

[47] See s 51 of Act 10 of 2013.

[48] The undertaking was given in response to a request by SANRAL's counsel that in the event of my deciding the secrecy application adversely to SANRAL I should direct that the confidentiality undertaking continue to apply until SANRAL had been afforded an opportunity to exercise any right it might have to apply for leave to

[62] The relief sought by SANRAL in respect of the material in schedule NOM 1 is therefore unnecessary. No purpose would be served by granting it. The orders sought would amount to prior restraint orders. If any such order were to be disregarded or infringed, the person concerned would lay him or herself open to being committed for contempt of court. Breach by any person of the obligation imposed by the implied undertaking rule would likewise give rise to liability for contempt of court. The species of contempt involved in either situation would be so-called 'civil contempt'; in other words, the court would engage with the contempt on the application of the offended party. The contempt would not be dealt with by means of criminal proceedings, as in a case of contempt in which there has been a scandalising of the court. The *sub judice* rules in South Africa have traditionally been applied by means of contempt proceedings, rather than prior restraint orders.[49] In the context of the issue raised by the relief sought with reference to schedule NOM 1, this strikes me as the more appropriate approach in the circumstances.

[63] The City's counsel referred in argument to a number of considerations that they submitted militated in favour of immediate public access to the information that SANRAL wishes to withhold, at least temporarily, from the media. But there was no counter-application by the City for an order granting it leave to depart from the incidents of rule 62(7) or the implied undertaking rule.

Schedule NOM 2 –related relief

[64] The reasoning given in respect of the relief sought in respect of the material described in schedule NOM 1 is equally applicable, of course, in respect of that described in schedule NOM 2. As mentioned earlier, SANRAL's counsel conceded that the relief sought in respect of schedule NOM 2 should not extend beyond the hearing of the review. It would be for the court hearing the review to determine to what extent the content of the papers before it should not be open to the public. It is nevertheless appropriate to deal discretely, albeit relatively briefly, with the NOM 2- related relief in order to do some justice to the detailed argument addressed to me on the subject and in the hope that doing so may avoid, or at least curtail, preliminary issues that the review court might otherwise have to determine. It is also perhaps necessary to determine this part of SANRAL's application to clarify the basis on which those parties to the review application who have not entered into special

---

appeal. My reference to this request should not be taken to imply any indication, one way or the other, as to whether a right of appeal might exist, or, if it does, that an appeal would operate to suspend any independently existing relevant rights or obligations.

[49] Graeme Hill, '*Sub Judice* in South Africa: Time for a Change', (2001) 17 SAJHR 563 at 573 and 575.

confidentiality agreements with SANRAL may have access to the City's supplementary founding papers.

[65] The Chief Executive Officer of SANRAL motivated the relief sought in respect of the material identified in schedule NOM 2 as follows in the supporting affidavit to SANRAL's application:

> **THE SECOND CATEGORY**
>
> 82. It is clear from the correspondence referred to above that the City seeks to file highly confidential and sensitive information in respect of the tender received with an outstanding tender process still to be conducted in respect of the financing of the Project (which process has not been finally concluded) as a public record. This will allow access to and unfair advantage to the other bidders, potential competitors, financial institutions, and the public at large to such documentation.
>
> 83. This will make a complete mockery of a competitive process required for the procurement of goods and services in a transparent and fair manner.
>
> 84. SANRAL's evaluation of the tenders is sensitive not only for the reason of the confidential information discussed in relation to the tenderers, but also as SANRAL will be placed at a massive disadvantage in its negotiations with the Preferred Bidder or if necessary the Reserve Bidder and the financiers concerned if the documentation became public. The release of the documentation and information into the public records may frustrate the successful conclusion of the negotiations with PPC. It is important that confidentiality is observed by all the parties, especially since negotiations are still to be finalized. Such confidentiality is important not only to protect the integrity of SANRAL's evaluation and negotiation strategy, but also to protect commercially sensitive or any proprietary trade information that the bidders might have included in their proposals and which they would not wish to be made known to their competitors.
>
> 85. The second category of documents encapsulate the following sub-categories of documents which require protection-
>
> 85.1 Bidders' commercial information;
>
> 85.2 Debt funding competition;
>
> 85.3 SANRAL's Bid Evaluation.

[66] SANRAL's claim that the competitive character of the tender will be undermined if the information contained in the material identified in schedule NOM 2 is made publicly available is expressed in broad and unsubstantiated terms in the supporting affidavit. The court was in essence invited to independently search through the relevant documentation to ascertain whether a case for secrecy was sustainable. In my judgment that is an unacceptable way for a party to go about establishing a case. The deponent to the supporting affidavit should have explained in some detail why disclosure would have the prejudicial or harmful

effect contended for. The documentation concerned should not only have been identified, but the deponent should also have specified the aspects of its content that would have the allegedly prejudicial effect if publicly disclosed, and explained how this would be occasioned.

[67] It is not apparent to me that the disclosure of the bid documentation would have the effects contended for by SANRAL. As mentioned,[50] its own documentation indicates that the competitive phase of the tender project has been completed. SANRAL is committed to conduct negotiations in good faith with PPC to conclude the concession contract. Overberg Consortium is not in competition with PPC for that purpose. The ambit of contractual negotiation that must occur with PPC is confined to the issues marked-up by PPC in its bid. Should negotiations with PPC fail and it then become necessary for SANRAL to negotiate with the reserve preferred bidder, those negotiations will not necessarily be concerned with the same issues that the negotiations with PPC would have entailed.[51] The degree of correspondence between the two exercises will be determined by the degree of correspondence between the two marked-up draft concession contracts submitted as part of the bids. The supporting affidavit has not directed the court's attention to any such correspondence, or sought to explain its materiality. Indeed, the impression is given that the deponent to the supporting affidavit made his statement before the content of schedules NOM 1 and 2 to the notice of motion were settled. In my view, it is not for the court, in the absence of sufficient indication in the body of the supporting affidavit of a particularised link between the items listed in schedule NOM 2 and the prejudice contended for, to have to search in the voluminous bid documentation to see if a case could be made for SANRAL's position; cf. C*rown Cork* supra, at 1101F. Nor is it for a respondent in such a situation to have to fathom the particularity of the case it is expected to meet.

[68] SANRAL's founding papers failed to link the apprehended harm - described by the deponent in the broadest terms - with particularised aspects of the documents concerned. There is no excuse for this, especially considering that the parties had agreed that the court would be requested to hear the interlocutory applications *in camera*.

[69] SANRAL's counsel relied heavily on the judgment in *Bridon International Gmbh v International Trade Administration Commission and Others* 2013 (3) SA 197 (SCA) in support of this leg of the applicant's case. *Bridon*, however, is distinguishable for a number

[50] Para [9], above.
[51] See para [10], above.

of reasons. Firstly, it was common ground in that matter that the information in issue was confidential and commercially highly sensitive, whereas the confidentiality and commercial value of the information in the current matter is disputed by the City. Secondly, the party claiming confidentiality in *Bridon* had, as part of the process of initial disclosure, provided a motivated explanation of why each part of the documentation in respect of which it claimed confidentiality fell to be treated as such, which explanation had been assessed and accepted by an independent statutory panel of relevant experts, whereas in the current matter explanation and motivation by SANRAL has been distinctly lacking. And thirdly, the manner in which the treatment of the confidential information fell to be handled in the context of the proceedings in *Bridon* was regulated by certain statutory provisions peculiar to the case, which were held by the court also to apply in the context of judicial review proceedings; whereas in the current matter there is no equivalent statutory scheme.

[70] In the context of the indication that the competitive phase of the tender contract has been completed, I am also not persuaded that there is any cogency in SANRAL's allegation that material bearing on the evaluation of the bids should be kept secret. The procurement process involved was bound to occur in a manner compliant with the principles stated in s 217 of the Constitution.[52] Those principles include transparency. The transparency requirement is an articulation of the Constitution's founding premise of a state that values and gives effect to the concepts of accountability, responsiveness and openness. It is thus unsurprising that in *Transnet Ltd and Another v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA), 2006 (4) BCLR 473; [2006] 1 All SA 352, at para 55-56, it was recognised that bid information that might enjoy confidentiality during the competitive phase of a tender process, would no longer do so once the contract was awarded. For the reasons already mentioned, it does not seem to me to be material that in the current matter the selection of the preferred bidder did not, by itself, result in the conclusion of the tender contract.

[71] As recognised in *Transnet* supra loc cit, any person who participates in a tender process subject to the s 217 of the Constitution and the related legislation, such as the Preferential Procurement Policy Framework Act 5 of 2000, must appreciate that much of the information that they disclose in the process may be susceptible subsequently to public scrutiny, certainly that much of it that is relevant to an assessment of compliance by the

[52] Section 217(1) of the Constitution provides:

> *When an organ of state in the national, provincial or local sphere of government, or any other institution identified 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.*

organ of state concerned with the competitive and cost-effective character of the procurement concerned. Any such public assessment will entail a consideration not only of the bid of the successful tenderer, but also of the unsuccessful bids, because a comparative assessment is necessary to determine whether there has been compliance with the applicable constitutional and statutory requirements. The undertaking by SANRAL in the tender documentation to maintain the confidentiality of the bidders' information, save as otherwise required by law, falls to be understood in that context. As Howie P noted in *Transnet* at para 56, 'Parties cannot circumvent the terms of [the applicable legislation] by resorting to a confidentiality clause'.

[72] In any event, for the reasons provided at length in respect of the material itemised in schedule NOM 1, the public and other bidders like the Overberg Consortium (which is not a party in the review application) will not have unregulated access to the court file before the review hearing. If the pace at which the exchange of papers is proceeding in the pending review is maintained during the remainder of the pre-hearing process, the completion of the papers and the accomplishment of a state of hearing readiness are unlikely to be achieved for some months yet. As I mentioned earlier, nothing about the interdict prohibiting the conclusion of a concession contract before the determination of the review barred SANRAL from proceeding with the negotiation process. No reason has been offered as to why that process should not be completed before the papers in the review application become more generally available.

[73] SANRAL claimed in broad-brush and unsubstantiated terms that third party proprietary information would be prejudiced were the redacting relief sought by it not granted. The City denied that its supplementary founding affidavit contained any such information. This was met in reply by SANRAL simply with a bald denial. As emphasised by counsel for the City in argument, SANRAL's founding papers claimed, incorrectly, that a number of identified categories of documentation had been included in the City's affidavit. PPC's 'engineering model' and 'financial model', the bidders' funding plans and the 'proprietary information' of financial institutions were some of these. These documents are not, in fact, part of the City supplementary founding papers, although a general outline of the preferred bidders' funding plans is to be found in the BAFO evaluation report, which is an annexure to the papers. The funding plans have in any event served their purpose, which was to provide some assurance that the respective bids were predicated on a feasible financing

structure.[53] It was evident from the outset, however, that the actual financing of the project would be determined by the outcome of a funding competition to be conducted after the conclusion of the concession contract, which might, and I would venture probably will, result in a materially different financing structure to those postulated in the bidders' respective funding plans. 'The debt funding competition will be open to all potential funders (local or international), including the Funding Advisors of the Reserve Tenderer and other unsuccessful tenderers.'[54] SANRAL has a determining role in the outcome of the debt funding competition.

[74] SANRAL contended in its supporting affidavit that disclosure of the information identified in schedule NOM 2 would result in a breach of its obligations in terms of a number of statutory instruments, namely PAIA, the Public Finance Management Act 1 of 1999, the Supply Chain Management Regulations, and National Treasury Practice Note SCM 4 of 2003. These claims, advisedly, were not persisted in at the hearing.

[75] As to the BAFO evaluation report and related documents, which are contained in vol. 2-5 of the City's six volume supplementary founding papers, SANRAL's counsel sought support for their argument that these should be excluded from general access from the unreported judgment of Schwartzman J in *VF Munisi Civils (Pty) Ltd and others v Johannesburg Water (Pty) Ltd and others* [2006] ZAGPHC 117 (15 September 2006). The judgment determined a counter-application by the first respondent in the case for the delivery-up of the minutes of a bid evaluation committee meeting that had been obtained unlawfully by the first applicant. The counter-application was made in the context of the opposition by the first respondent to an application by the applicants in the case for interim interdictal relief. The minute in question had been annexed to the founding papers in the interim interdict application. Schwartzman J indicated in the opening paragraph of his judgment in the counter-application that it 'should be read with the judgment [he] handed down on 13 September 2006, in which [he] dismissed with costs the Applicants' claim for an interim interdict against the First Respondent'. The earlier judgment is also not reported and counsel did not make a copy available to me. In the result I have been somewhat disabled from obtaining a proper appreciation of the context in which the judgment to which I was referred was given.

---

[53] The character and object of the funding plans that bidders were required to submit are set forth in part 8 of the Invitation to Tender, dated March 2010.
[54] Ibid. Para. 9.3.8.

[76] The passage in the *Munisi Civils* judgment relied upon by SANRAL's counsel is at para 5.1, in which Schwartzman J said '*The minutes of the deliberations of a Bid Adjudication Committee that evaluates and ultimately awards a tender are prima facie not meant to be public knowledge. What happens at such a meeting would, as a rule, only be known to a restricted number of people. The information furnished to those at the meeting gives an insight into the conduct of all tenderers' businesses and, in particular, their strengths and weaknesses that the Committee must obviously keep confidential. Part of this information is included in the Committee's minute. The disclosure of such information to another tenderer would inevitably give it an unfair commercial advantage over fellow tenderers. For this reason I do not intend to set out those parts of the minute that are clearly confidential. The minute has an economic value to the First Respondent in that it can be used by it in the future when similar tenders are being adjudicated. These characteristics establish that the minutes qualify as a document containing confidential information as this term is understood – Alum-Phos (Pty) Ltd v Spatz 1997 (1) All SA 616 (W) at page 623*'.

[77] It is clear, in my view, that the peculiar context of the matter in hand materially informed what Schwartzman J stated in the passage relied upon by SANRAL. This is illustrated by the learned judge's reference to the commercial advantage that would be enjoyed by fellow tenderers if the information were disseminated and his finding that the information had an economic value in that it could be used by the Johannesburg Water in future when similar tenders were considered. It may be assumed that the evidence before the court in *Munisi Civils* had established those characteristics. I am therefore unable to accept that the learned judge's dicta were intended to state a general proposition of law, as SANRAL's counsel's reliance on it would imply. I am not persuaded that the minutes of a bid evaluation tender committee meeting in respect of public procurement are '*prima facie* not meant to be public knowledge' after an award has been made. An unqualified characterisation to such effect seems to me to sit uncomfortably with the requirement of transparency in terms of s 217 of the Constitution. Furthermore, for the reasons given earlier, the evidence does not in any event support the notion that fellow tenderers or SANRAL would enjoy any commercial advantage worthy of protection in the evaluation report. In the current matter the dye has been cast insofar as the selection of the preferred bidders is concerned, and the project is unique in the sense that it is not one in respect of which any equivalent tender invitation is likely to be issued.

[78] SANRAL's counsel sought in oral argument to make up for the deficiency in SANRAL's papers by taking me to certain parts of the City's supplementary founding affidavit and seeking to demonstrate how these illustrated the prejudice that would be occasioned by their disclosure in open court. I have considered the passages to which I was directed in this exercise.[55] I have not been persuaded on my perusal of the documents concerned that their content substantiates a claim to confidentiality at this stage of the contracting process. I reiterate that the supporting affidavit contains nothing that would justify such a conclusion. But even if I should be misdirected in this regard, there is nothing, in my judgment, that would justify preference being given to SANRAL's right of privacy in the material over the ordinary incidence of open justice when the documents are used in the review. It has not been suggested that they are irrelevant in the review. The subject matter is one of legitimate public interest. The assertion of the right to privacy by an organ of state in the circumstances has to be critically assessed against the counterweight of the effect of s 16 and s 34 of the Bill of Rights. The context for the assessment is provided by the founding values of openness and accountability enshrined in s 1(d) of the Constitution. Thus, subject to the application of the implied undertaking rule, I see no reason why, when the review application gets to be heard, they should be kept secret.

PPC's application

[79] In the second matter before me, PPC applied for an order directing that certain identified parts of the City's supplementary affidavit, including the annexures thereto, be redacted and placed in a 'confidential file'. An order was sought that the information placed in the contemplated confidential file would not be disclosed to the public, but only to the court seized of the review and the legal representatives and expert witnesses of the other parties in the review application subject to the provision by the latter of 'appropriate confidentiality undertakings'. Twenty individual portions of the supplementary affidavit were listed in PPC's notice of motion, but at the hearing, the consortium's counsel, Mr *de Waal*, argued in support of only five of them.[56] He explained that relief in respect the other fifteen portions was not being abandoned. He stated that he considered that they fell to be sufficiently protected in terms of the relief sought by SANRAL in respect of the material identified in schedule NOM 1 to its notice of motion.

---

[55] Review record pp. 1342-1356, 1522-1651 and 1664-1673.
[56] Those described in para.s 1.1, 1.2, 1.9, 1.12 and 1.13 of the notice of motion.

[80] The material in the five portions of the City's supplementary affidavit with which PPC's counsel chose to deal in argument was, as I understood his submissions, deserving of protection because of its alleged confidentiality and because its disclosure would prejudice the conclusion of a concession contract. I have considered the portions concerned. It was not apparent to me on such consideration that there was any merit in the allegations of confidentiality. It was not obvious to me how the information would be of any use to any third party, including the Overberg Consortium, at this stage of negotiation of the concession contract. I have already rejected, when determining SANRAL's application, the contention that there is a materially competitive element in the process of the negotiation of the concession contract after the announcement of the preferred bidders.

[81] PPC's application suffers in the same way as SANRAL's from the defect that its supporting affidavit (deposed to by someone who, perforce of circumstances, had not himself perused an unexpurgated copy of the City's supplementary founding affidavit) failed to reason or motivate the broad-brush characterisations and conclusions stated in the document. PPC's counsel sought to address this shortcoming by proposing, in a note submitted after the hearing, that the court should give a judgment defining the applicable principles and then leave it to the parties to try to reach agreement on what material should be kept from the public gaze and be available to the other litigants only as against undertakings by them to preserve its confidentiality. This belatedly urged approach was supported with the argument that, in preparing its application, PPC had been confronted with the task of sifting through and evaluating a vast amount of material. It was pointed out that the City's supplementary founding papers, including the annexures, run to approximately 2 500 pages. It was submitted that PPC 'should therefore not be non-suited on the basis that it did not define the passages to which its concerns relate in greater detail'.[57] It was also contended that disposing of PPC's application on the approach suggested would be appropriate because 'the issue of open justice is a novel area of law and the only guidance to be found is the approach of the Constitutional Court in *Independent Newspapers*'.[58]

[82] The City's counsel objected to the court considering the post-hearing arguments put in by the sixth respondent's counsel. It is not necessary to make any determination about the objection because the post-hearing arguments advanced on behalf of PPC have not been persuasive in any event. Firstly, the requirement that allegations of confidentiality justifying

[57] Para 5.5 of the sixth respondent's note dated 8 August 2014.
[58] Ibid. para 5.6.

the extraordinary measure of directing that the information in issue be dealt with in litigation other than in the ordinary way must be sufficiently substantiated in the supporting papers to enable a court to properly assess the claim to confidentiality is well established. If PPC needed more time to prepare its founding papers properly, it should have asked for that timeously. Secondly, although this matter has raised some relatively novel issues – more especially concerning the application of the implied undertaking rule – the notion that it is only in exceptional circumstances that a court will depart from the principle that proceedings before it should be open to the public is by no means novel. It is well established that anyone seeking a departure from the norm of open proceedings is required to motivate the request cogently, so that a court considering such a request can be qualified to weigh it properly with the countervailing considerations that must be taken into account in deciding whether to grant it.

[83] PPC's counsel questioned the relevance to the City's case of much of the material that PPC sought to exclude. He asked why it was necessary to attach the whole of the BAFO evaluation report when only selected parts of it appeared to be relied upon. Irrelevance is not a question that I have to decide. It is a matter to addressed, if appropriate, by a striking out application; not by an application to keep part of the evidence secret.

[84] It remains only to say that I have not been persuaded that PPC is entitled to the relief that it sought.

Orders to be made

[85] It follows that the relief for which SANRAL and PPC applied will not be granted in the terms that they sought. However, in the context of an evident misapprehension by the parties as to the extent to which the material that has been made available by SANRAL in terms of rule 53(1)(b) may be disseminated before the review application is heard, I consider it appropriate to make an order with declaratory effect. The order that I propose to make will also address the concerns of those respondents, such as the fourth and fifth respondents in the review,[59] who have not been favoured yet with unexpurgated copies of the City's supplementary founding affidavits.

[86] On the question of costs, I consider that this judgment effectively affords all the protagonists a measure of success. The application has raised some important issues, the determination of which will, I think, serve the wider interests of the proper administration of

[59] The Western Cape provincial ministers of transport and of finance, economic development and tourism.

justice. In the circumstances it would be just for there to be no order as to costs, with the result that each party will bear its own costs.

[87] As the argument of these applications took place *in camera*, I should perhaps record, lest there be any room for uncertainty, that this judgment is delivered in open court and is not subject to any restriction as to its publication. I am satisfied that nothing in its content prejudices the interests which the parties acknowledged by their agreement to request the hearing *in camera*, or my decision to accede to it. The papers in the current matter shall, however, remain under seal, subordinate to the degree of access permitted to the papers in the review application between now and the hearing of the review, save to the extent otherwise permitted in terms of the order made on 5 August 2014, at the instance of Right2Know and Section16, referred to in paragraph [8], above. This course is indicated in order to maintain the integrity of the implied undertaking rule, which I have held to be applicable in respect of the information that has been in issue in these applications. It would defeat the purpose of the implied undertaking rule if the argument of the current matter were permitted to provide a platform for a claim that the material disclosed by SANRAL had been employed in court in these interlocutory applications and thus should be generally available. It is its employment in the principal proceedings that counts.

[88] The following orders are made:

1. Save to the extent set out in paragraphs 2-4, below, the applications brought by the South African National Roads Agency Limited ('SANRAL') and the Protea Parkways Consortium, pursuant to the order made in chambers by the Deputy Judge President on 18 June 2014, are dismissed.
2. The applicant in the pending judicial review application in case no. 6165/12 (the City of Cape Town) shall deliver its supplementary founding papers in the ordinary manner in accordance with the rules of court.
3. It is declared that the administrative record disclosed by SANRAL in terms of rule 53(1)(b) of the Uniform Rules of Court is subject to the 'implied undertaking rule' explained in the body of this judgment, with the effect that no person, including any recipient of the supplementary founding papers delivered in terms of paragraph 2 hereof, shall be permitted, unless authorised thereto by SANRAL or by the Court, on application, to disseminate, publish, or distribute any part of the administrative record, or any part of any affidavit in the supplementary founding papers that quotes

or substantively reproduces the content thereof, before the hearing of the aforementioned pending review application.

4. Paragraph 3 of this order shall not be construed to derogate from the right of any party in the review application to refer to, or in any other manner deal with, the administrative record in any affidavit to be delivered by it in the review application, provided that the dissemination, publication, or distribution of the affected parts of any such affidavit shall likewise be limited by the implied undertaking rule.
5. The papers in the current interlocutory applications, save to the extent that their partial release into the public domain was authorised in terms of the order obtained on 5 August 2014 at the instance of Right2Know and Section16, shall remain under seal, subordinate to the degree of access permitted to the papers in the review application, between now and the hearing of the review
6. There shall be no order as to costs in either application.

A.G. BINNS-WARD

Judge of the High Court

Dates of hearing:	**4 and 5 August 2014**
Judgment delivered:	**28 August 2014**
Before:	**Binns-Ward J**
SANRAL's counsel:	**JG Wasserman SC**
	GJ Nel
SANRAL's attorneys:	**Fasken Martineau, Johannesburg; Broekmanns Attorneys, Cape Town**
PPC's counsel:	**HJ De Waal**
PPC's attorneys:	**Webber Wentzel, Cape Town**
City of Cape Town's counsel:	**G Budlender SC**
	N. Bawa
	R. Paschke
	K. Saller
City of Cape Town's attorneys:	**Cullinan & Associates, Kenilworth, Cape Town**
National Ministers of Transport And of Water and Environment Affairs' counsel:	**JC Heunis SC**
	E. Van Huyssteen
National Ministers of Transport And of Water and Environment Affairs'counsel:	**State Attorney, Cape Town**
Western Cape Provincial Ministers Of Transport and of Finance, Economic Affairs and Tourism's counsel:	**A. Bhoopchand**
Western Cape Provincial Ministers Of Transport and of Finance, Economic Affairs and Tourism's attorneys:	**State Attorney, Cape Town**