IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6165/12

In the application for leave to appeal
against the judgment of the court dated
28 August 2014:

THE CITY OF CAPE TOWN Applicant

And

SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED Respondent

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL
DELIVERED: 8 OCTOBER 2014

BINNS-WARD J:

[1] The City of Cape Town has applied for leave to appeal against the judgment of this court delivered on 28 August 2014 in the interlocutory application brought by SANRAL to keep out of the public domain certain of the documents in the administrative record made available by it in terms of rule 53 for the purpose of the judicial review application instituted by the City in respect of the decision to declare certain parts of the N1 and N2 national roads as toll roads. The relief sought by SANRAL in the interlocutory application was described at para 12-16 of the principal judgment. In summary, SANRAL sought to keep the documentation described in schedule NOM 1 to its notice of motion in the interlocutory application out of the public domain until it had delivered its answering affidavits in the review application. It sought to keep the documents listed in schedule NOM 2 permanently out of the public domain on the grounds that they were confidential. The application for the NOM 1 - related relief was found to be unnecessary because of the combined effect of

the implied undertaking rule and the provisions of Uniform Rule 62(7). The application for the NOM 2 -related relief was dismissed because it was held that SANRAL had failed to make out a case for it.

[2] Leave to appeal is sought against those parts of the judgment that held that the combined effect of rule 62(7) and the implied undertaking rule rendered the NOM 1-related part of SANRAL's application unnecessary because the City was in any event prohibited, before the hearing of the review application, from publishing or disseminating documents it had obtained from SANRAL in terms of rule 53, unless it obtained leave from the court to do so, or the disclosing party had consented thereto. The effect of those findings found expression in para 1-4 of the order that was made. The findings also influenced the decision not to make any order as to costs because it was evident from its opposing affidavit in the interlocutory application that the City had considered that it was at liberty to publicly disseminate the documentation SANRAL had disclosed in terms of rule 53(1)(b), or certainly so much of it as it had used in its supplementary founding affidavit, before the hearing of the review application. The City's complaint lies against para 3 of the order and the determination on costs.

[3] SANRAL was represented at the hearing of the application for leave to appeal, but, save for submitting that the effect of para 3 of the order was merely explanatory in character, they advanced no argument on the merits of the application. Their presence was directed at securing the position in the interim should an appeal follow. In this regard, SANRAL filed an application in terms of rule 49(11) contingently upon leave to appeal being granted. Mr Wasserman indicated, however, that SANRAL would oppose any appeal that might ensue.

[4] Counsel for the City accepted that the determination of the application for leave to appeal is regulated by s 17 of the Superior Courts Act 10 of 2013.
Mr Budlender directed my attention to the unreported judgment of this court (per Greisel J, Samela J concurring) in South African Land Arrangements CC and Others v Nedbank Ltd [2013] ZAWCHC 162 (29 October 2013), which supports the City's position in this regard and is binding on me. The decision which the City wishes to impugn on appeal was in any event given in the determination of an application made after the commencement of the Act.

[5] Section 17(1) of the Superior Courts Act provides:

> Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
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> (a) (i) the appeal would have a reasonable prospect of success; or
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> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
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> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
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> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

Paragraphs (a), (b) and (c) of s 17(1) operate conjunctively to posit the requirements that must be satisfied. It is only the requirement stated in paragraph (a) that allows for some latitude. It may be satisfied in either of the ways contemplated in sub-paragraphs (i) and (ii). But in all cases satisfaction of the requirements stated in all three of the paragraphs appears to be required. It is plain that the object is to limit the circumstances in which the High Court as a court of first instance may grant leave to appeal against any of its decisions.

[6] I am willing to assume in favour of the City that the requirements in paragraphs (a) and (b) of s 17(1) have been satisfied. I am not, however, able to form the opinion that I am required to have in terms of s 17(1)(c) before I may grant the application for leave to appeal. The real issue in the case is the legality of the decision to declare certain national roads within the Western Cape province as toll roads. Any decision on appeal in the interlocutory application will have no effect whatsoever on the determination of the real issue in the main case, and thus would not 'lead to a just and prompt resolution of the real issues between the parties'.

[7] It is apparent that the only reason why the City has applied for leave to appeal against the judgment is because its effect was to restrict the extent to which it could publish or disseminate parts of the administrative record disclosed to it by SANRAL prior to the hearing of the judicial review application. Giving publicity to the documents reluctantly made available to it by SANRAL in terms of compulsory

disclosure processes in terms of the rules of court is, of course, quite extraneous to the purpose for which the disclosure was required in terms of rule 53(1)(b), namely the facilitation of the preparation of the City's case in the pending judicial review application. The application for leave to appeal thus falls to be considered astute to the effect of the determination of the interlocutory application on the principal proceedings between the parties. A judgment on appeal against the determination of the interlocutory application would undoubtedly be of general legal interest for many of the reasons identified by the City's counsel in their detailed argument,[1] but it will not contribute in any manner whatsoever to the to a just and prompt resolution of the issues between the parties in the review.

[8] Nothing in the judgment against which the City wishes to appeal restricted or adversely affects its right, or indeed that of any other party to the principal proceedings, to access to or use of the documentation made available by SANRAL for the purpose of the review application. The judgment also does not have the effect of in any manner restricting the public's or the media's access to any of the disclosed documentation that is employed in the review when the main case goes to a hearing. Furthermore, nothing in the judgment prevents the City (or any other party), should it consider that exemption from the incidence of either rule 62(7) or the implied undertaking rule is merited in the peculiar circumstances of the case, from making application for such exemption in order to provide publicity to the information in the documents before the review application is heard. The judgment, unoriginally, acknowledged the availability of such relief as an incidence of the court's power to regulate its own process. There was, however, no application by the City before court for leave to use the documents compulsorily made available to it in terms of rule 53 for purposes extraneous to the pending review. SANRAL in any event has no objection to much of the administrative record being made publically available either now, or, in the case of the documents listed in schedule NOM 1 to its notice of motion, as soon as it has delivered its answering papers.

[9] It might be inferred from the fact that the application to restrict dissemination applied only to identified parts of the administrative record (those documents listed in schedules NOM 1 and 2, respectively) that SANRAL had no objection to the remainder being made generally available. The application for leave to appeal

[1] The oral argument was supported by 53 pages of written submissions.

suggests that the judgment prohibits publication of the documents that SANRAL has no objection to being published. It does not; see para 55 of the judgment. In answer to my enquiry during argument, Mr Budlender advised that the City had not asked SANRAL whether this was indeed so. Delivery of the answering papers is due by 17 October 2014 in terms of the applicable case management directions, which were made by agreement between the parties. Mr Wasserman advised that SANRAL expects to comply with the timetable. The 'NOM 1' related relief sought by SANRAL would thus, even had it been granted, have ceased to operate when the answering papers were delivered. There is no application by SANRAL to cross-appeal against the refusal of NOM 2-related relief.

[10] The judgment thus does not have any effect on the determination or conduct of the main case of the nature that the interlocutory judgments did in either of the two judgments on which Mr Budlender relied in contending for the appealability of the decision: Shepstone & Wylie and Others v Geyser NO 1998 (3) SA 1036 (SCA) (at 1042D-E) and Clipsal Australia (Pty) Ltd v GAP Distributors 2010 (2) SA 289 (SCA). Shepstone &Wylie concerned the appealability of a judgment in respect of the provision of security for costs and Clipsal Australia was about the appealability of a judgment staying a contempt application, which in the peculiar circumstances of the case amounted to the determination of a special defence raised in the principal case. The interlocutory order made in the context of criminal proceedings that was held to be appealable in National Director of Public Prosecutions v King 2010 (2) SACR 146 (SCA), also referred to by Mr Budlender, was distinguishable for similar reasons. In the current case, the judgment does not prevent the City from publishing the documents when they are used when the main application is heard. It also does not prevent the City from seeking leave from the court to publish them earlier than that. Neither the implied undertaking rule, nor rule 62(7) prevents the court from revisiting the question of the publication of any part of the record in main application before the hearing of the review. Thus, quite apart from the effect of s 17(1)(c) of the Superior Courts Act, the judgment is not appealable in terms of the test stated in Ecker v Dean 1937 SWA 3 at 4, approved in both Shepstone & Wylie and Clipsal Australia:

> The usual test, ie whether the order finally disposes of portion of, or a certain phase of, the issue between the parties does not really fit circumstances such as these, for the claim for security was a separate and ancillary issue between

> the parties, collateral to and not directly affecting the main dispute between the litigants. . . . (I)t is not a procedural step in attack or defence at all but a measure of oblique relief sought by one party against the other on grounds foreign to the main issue, ie the financial situation of one litigant, this relief to be effective if at all only after judgment. The order determining this collateral dispute is therefore final and definitive for at no later stage in the proceedings can the applicant obtain the substance of what has been refused to him. If he has been prejudiced by the order his prejudice is irremediable.

[11] Mr Budlender sought to circumvent what I identify be the obstacle to success in the application for leave to appeal occasioned by the requirement in s 17(1)(c) by arguing that the 'real issues' referred to in the provision pertain to the issues in the interlocutory application and not to the issues in the review. I do not think that that construction of s 17(1)(c) is correct. In my view, the phrase 'the real issues between the parties' pertains to the issues in the main case; viz the legality of the decision to declare parts of the N1 and N2 national roads as toll roads. The provision in s 17(1)(c) appears to me to be intended to articulate, albeit more stringently and absolutely,[2] the principle articulated by the Appellate Division in Zweni v Minister of Law and Order 1993 (1) SA 523 (A) against the appealability of interlocutory decisions that go to matters that are only preparatory or procedural in nature relative to the conduct of the principal case, and which do not dispose of at least a substantial portion of the relief claimed in the main proceedings.[3] Having regard to the jurisprudential history reviewed in Zweni and the ordinary meaning of the words 'the real issues between the parties' read in the context of the manifestly appeal-limiting objects of s 17(1), I am of the view that s 17(1)(c) has the import that this court may not grant leave to appeal unless the judge is satisfied that a decision on appeal would lead to a just and prompt resolution of the issues between the parties in the main case.

[12] The City maintains, however, that the judgment has 'far-reaching consequences for our civil procedure, for open justice and for the constitutional rights which are implicated' and contends that these considerations afford good reason for it to be reconsidered on appeal. That argument implies that considerations of the nature

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[2] In this regard I am mindful of the qualifying remarks about the judgment in *Zweni v Minister of Law and Order* made in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F and in *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) at para 51.

[3] Cf. also *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 729H-730E.

contemplated by s 17(1)(a)(ii) of the Superior Courts Act might allow a judge to grant leave to appeal even when the requirement of s 17(1)(c) is not met. Whatever the position might have been under the previously applicable statutory regimes,[4] the contention seems to me to be unsustainable on the wording of s 17(1) of the currently applicable statute. I think that in any event there is a measure of overstatement in the City's contention about the effect of the judgment.

[13] The implicated provisions of civil procedure are rule 62(7) and the implied undertaking rule. The constitutional rights that are primarily implicated are the right to privacy and the right to freedom of expression in the wide sense provided in terms of s 16 of the Constitution. The import of 'open justice' was described by the Constitutional Court 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 (CC) at para 39 – 46.

[14] Rule 62(7) speaks for itself.[5] As pointed out in the judgment, its currency has recently been confirmed in terms of s 51 of the Superior Courts Act. As also pointed out in the judgment, the rule does not fetter the City's access to the court record. Its limiting effect is on strangers to the proceedings. The judgment acknowledges that even that effect may be varied by the court on application by any party, including an outsider to the proceedings. There has been no attack on the constitutionality of the rule.

[15] As illustrated in the judgment, recognition of the implied undertaking rule as part of South Africa's civil procedural law is not unprecedented in this country's jurisprudence. Its application is also recognised internationally in democratic countries with comparable systems of civil procedure, including some that operate in the context of Bills of Rights with equivalent provisions to those in chapter 2 of this country's Constitution in respect of privacy and freedom of expression. My attention was not drawn to the judgment of any superior court in this country that suggests that our jurisprudence should strike out on an exceptional path away from that which is well established in comparative jurisdictions.

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[4] Compare, in this regard, the judgments cited in note 2, above.

[5] Rule 62(7) 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*'.

[16] In Independent Newspapers, the Constitutional Court described 'open justice' as 'a cluster … of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice. The constitutional imperative of dispensing justice in the open is captured in several provisions of the Bill of Rights. First, section 16(1)(a) and (b) provides in relevant part that everyone has 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. Section 34 does not only protect the right of access to courts but also commands that courts deliberate in a public hearing. This guarantee of openness in judicial proceedings is again found in section 35(3)(c) which entitles every accused person to a public trial before an ordinary court'. At para 44 the Moseneke DCJ observed 'the cluster of rights that enjoins open justice derives from the Bill of Rights and that important as these rights are individually and collectively, like all entrenched rights, they are not absolute. They may be limited by a law of general application provided the limitation is reasonable and justifiable'. (Underlining provided for emphasis.) The implied undertaking rule does not impinge on the dispensing of justice. It ceases to operate in respect of matter placed before the court when the case comes to being heard. For that very reason an attack on the implied undertaking rule as being inconsistent with the 'open court' principle was rejected by the Canadian Supreme Court in Juman v Doucette [2008] 1 SCR 157, 2008 SCC 8, at para 21-22.

[17] Accepting - as the judgment does - that the implied undertaking rule forms part of our law, impugning it as constituting an unreasonable and unjustifiable limitation of any constitutional right would entail quite discrete proceedings. Such proceedings were not before this court.

[18] Having regard to the character of the issue between the parties in the principal case - being the legality of the declaration of certain roads as toll roads - and in the absence of conflicting decisions in the various divisions of the High Court on the applicable principles in respect of the determination of the incidental interlocutory issue, I am therefore in any event not been persuaded that there is a 'compelling reason' why the contemplated appeal should be entertained by an appellate court. If the City has a good reason for wanting to publish or disseminate any of the documents which it has been given in terms of rule 53 that are not covered by SANRAL's

abovementioned partial waiver of the benefit of the implied undertaking rule before the review is heard, there is nothing to stop it applying for leave to do so.

[19] The effect of the overarching general considerations that I have discussed thus far constrains me to dismiss the application. It is therefore not necessary to deal individually with the all of the detailed contentions advanced by the City in the application for leave to appeal. My failure to do so does not mean that I have not considered all of them. It is appropriate, however, to treat briefly of what seem to be the main points so that another court might have the benefit of my views on them should the application be taken further in a forum which might take a different view of the effect of s 17(1)(c) of the Superior Courts Act; cf Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd 2013 (6) SA 520 (SCA), at para 24. I do this because if it had not been for the effect of s 17(1)(c) I would, on balance, have inclined in favour of granting leave to appeal because the incidence of the implied undertaking rule and the effect of rule 62(7) are matters of general importance in the administration of justice in respect of which certainty is desirable, and in respect of which another court might take a different view. I acknowledge in this regard that the earlier judgments in South African jurisprudence which appear to accept the incidence of the rule were more tentative or circumspect in their treatment of the applicability of the implied undertaking rule than the decision in the current matter has been. I also accept that the application of the rule in the context of disclosure in the judicial review process is unprecedented. While for the reasons mentioned earlier I do not consider that there is a compelling reason for the judgment to be reconsidered, these considerations do nonetheless point to the desirability of the achievement of certainty on the questions. However, as I do not wish by these statements to be misunderstood to be appearing to endorse the existence of a reasonable prospect of success in respect of all of the grounds on which the City seeks to attack the judgment, expatiation on some of the grounds is probably appropriate, particularly in the context of the detailed argument addressed to me.

[20] The first ground of criticism raised against the judgment is that the court granted relief that had not been sought by SANRAL in respect of a cause of action that had not been pleaded by SANRAL. It is convenient in this connection to recall what SANRAL had asked for and how its interlocutory application was substantively determined. It sought an order keeping certain documents (identified in schedule

NOM1 to the notice of motion) that it had made available to the City in terms of rule 53 out of the public domain until after it had delivered its answering papers. It also sought an order to protect further identified documents (identified in schedule NOM2) from public disclosure permanently on account of their allegedly confidential character. Thus no 'cause of action', properly so called, was involved; properly characterised, the relief sought was procedural - and entirely incidental to the pending review application. The judgment held that the application for the first head of relief was unnecessary because of the incidence of rule 62(7) and the implied undertaking rule, and that SANRAL had failed to provide a basis in the evidence for the second head of relief.

[21] The first ground of criticism is directed at the declarator in para 3 of the order made. A declaratory order had not been sought by SANRAL. (Paragraph 4 of the order added nothing of substance to para 3; it merely clarified its effect.) I am not persuaded that there is anything in the point that justifies an appeal. The declaratory order did no more than give effect to the basis upon which it was held that the first part of SANRAL's application was unnecessary. It was merely expositionary of the basis upon which the application for the first head of relief was dismissed. That the declarator was merely expositionary is evident when it is considered that even had it not been made, a judgment simply dismissing the application for the first head of relief would have had precisely the same effect because of the ratio decidendi. The appropriateness of the declaratory order is indicated in the context of the implication in the application for leave to appeal (which echoes the City's expressed position in the interlocutory application) that had SANRAL's interlocutory application simply been dismissed with costs, the City considers that it would have been at liberty to deal with the documents disclosed by SANRAL unrestricted by the effect of rule 62(7) or the implied undertaking rule. In the circumstances I consider it unlikely that another court might be persuaded on appeal to hold that the declarator was a product of the court having strayed outside or beyond the ambit of the case it was called upon to decide.

[22] Inasmuch as the City appears to contend in the grounds advanced in support of its application for leave to appeal that the implied undertaking rule was not something with which it had been required to engage at the hearing, I do not agree that this was so. The fact that the incidence of the rule was not 'pleaded' by SANRAL in its

supporting affidavit does not affect its applicability as a matter of law in the relevant factual context. The judgments in Home Office v. Harman [1983] 1 A.C. 280, Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others 1980 (3) SA 1093 (W) and 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), amongst others in point referred to in the principal judgment that traverse the rule, were debated in argument by both sides at the hearing. (The City states in its application for leave to appeal that its counsel referred to Home Office v Harman 'insofar as it pertained to the applicability of the sub judice rule, but not the implied undertaking rule', but the civil contempt of court that was the question in issue in Harman arose entirely out of a breach of the implied undertaking rule as it was then applied in England.) It was also argued that SANRAL had relied on the judgment in Replication Technology only to support its contention that the City intended to use the disclosed documents improperly for an ulterior political purpose, and not to invoke the implied undertaking rule. It is indeed so that SANRAL's counsel used the judgment in argument for that purpose, but regulating the use by the recipient of compulsorily disclosed documents for any purpose extraneous to the litigation in which it has been disclosed is one of the central objects of the implied undertaking rule. SANRAL was therefore relying on the authority to contend for the application of the implied undertaking rule, even if its counsel might not have said so as clearly as he could have done. Indeed, the transcript of the argument at the hearing of the interlocutory application, to parts of which the City's written submissions in support of this application for leave to appeal have directed me, confirms that SANRAL's 'fundamental argument' was that the public would not ordinarily have access to the documents in the review application before the review came to hearing.[6] In any event, even had rule 62(7) and the implied undertaking rule not been mentioned in argument at all (which was not the case), that could not justify their being overlooked in the judgment if they constituted applicable law.

[23] It is suggested that the judgment misconstrued the reach of the implied undertaking rule and that, if applicable at all in our law, the rule applies only to documents obtained through discovery in terms of rule 35, and not to documents

[6] Transcript p. 44(4 -15). That 'fundamental' argument had been advanced by SANRAL with reference to the judgments in *Crown* Cork, *Halcon International Inc v The Shell Transport and Trading Co and Others* 1979 RPC 97 and *Replication Technology Group*, amongst others.

obtained by means of compulsory disclosure from a respondent in terms of rule 53(1)(b). The contention appears to be that there is a reasonable prospect that another court might find on appeal that this court erred in equating the compulsory disclosure of documents by a respondent in a judicial review application with discovery in an action. (It was emphasised by Mr Budlender in this connection that there is no equivalent of our rule 53 under the Civil Procedure Rules in England.) The distinction contended for is unlikely to be found to be important in my view. The implied undertaking rule does indeed have its origins in the discovery procedure under English law, but it is applied in England (now codified in terms of the Civil Procedure Rules),[7] Canada[8] and Australia[9] in respect of the compulsory disclosure of documents by a party in any litigious process, whether in terms of a rule of court or a court order. (Disclosure is not automatically part of the English judicial review procedure. It may, however, be directed, and, if it is, the provisions of CPR 31(22), which have codified the implied undertaking rule, would apply. The English Civil Procedure Rules deal with 'disclosure' holistically. Thus, what we call 'discovery' is subsumed under the concept of 'disclosure' in the CPR.) The extension of the original ambit of the rule is unsurprising because it would have been arbitrary and irrational to apply the rule only in respect of compulsory disclosure by discovery and exclude its application to other forms of compulsory disclosure in the litigious processes.

[24] The next salient point raised by the City is that the implied undertaking rule has no place in proceedings for the judicial review of the decisions of organs of state and that this court therefore erred in holding it to be applicable in the circumstances. The basis for the contention was an assertion that the rationale for the rule is the protection of privacy and that an organ of state has no 'right to privacy that requires protection in review proceedings'.

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[7] See, for example, the observation by Lord Hoffmann in *Taylor and others v Serious Fraud Office* [1998] 4 All ER 801 (HL) at 807: '*The implied undertaking in civil proceedings is designed to limit the invasion of privacy and confidentiality caused by compulsory disclosure of documents in litigation. It is generated by the circumstances in which the documents have been disclosed, irrespective of their contents. It excludes all collateral use, whether in other litigation or by way of publication to others*'. The question in *Taylor* was whether the public interest in the administration of justice requires the application of an analogous principle to documents disclosed by the prosecution to the defence in criminal proceedings. It was held that it did.

[8] In *Juman v Doucette* [2008] 1 SCR 157, 2008 SCC 8 the root of the rule was found to lie in affording a measure of protection to litigants bound by statutory compulsion to make disclosure of their documents or information. It was observed (at para 20) that it has been applied to public enquiries.

[9] *Hearne v Street* [2008] HCA 36 at para 96.

[25] Firstly, the City's contention states the rationale for the rule in its modern conception too narrowly; contrast, for example, the discussion of the rationale for the rule by Lord Hoffmann in Taylor and others v Serious Fraud Office [1998] 4 All ER 801 (HL) at 807-812 and by the Canadian Supreme Court in Juman v Doucette supra, at para 23-27, in which other considerations well served by the rule are mentioned. Secondly, organs of state have manifold incarnations. SANRAL, for instance, is a public company. It has a separate legal personality like any company. It is recognised that a company has a right to privacy; cf. e.g. Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC), 2000 (10) BCLR 1079 at para 17-18. The minutes of SANRAL's board meetings, for example, would be private, as would internal memoranda. The fact that it is an organ of state does not affect this; cf. s 44 of the Promotion of Access to Information Act 2 of 2000. Access to information held by a public body is regulated in terms of Act 2 of 2000, or insofar as currently relevant - by reason of s 7 of the Act - in terms of the court's procedures. The latter consideration illustrates one of the roles for the implied undertaking rule emphasised by Lord Hoffmann in Taylor supra, viz. it affords a means for the court to control its process and prevent abuses.[10] SANRAL's character as a juristic person and an organ of state may well mean that a court would be more readily amenable to granting an application for exemption from the undertaking rule in respect of documents compulsorily disclosed by it in litigious proceedings than it would be in the case of private person. It would be a weighty consideration particularly when the litigation concerned a matter of public interest; cf. the observations - admittedly made in the context of SANRAL's claim to keep documents out of the public domain on the grounds of their allegedly confidential character, but no less pertinent on that account for the purpose of the argument currently under consideration - at para 78 of the principal judgment. I accept, however, that another court might be persuaded that the values of openness and accountability might trump the appropriateness of affording the protections of the implied undertaking rule to public body respondents in judicial review proceedings.

[10] See the learned judge's endorsement (at p. 812) of the function of the rule identified by Brooke J in the unreported judgment of first instance in *Mahon v Rahn* (19 June 1996), described by Hoffmann LJ at the top of p. 810 of the judgment in *Taylor*.

[26] The City supplemented its application for leave to appeal in order to introduce, as an additional ground, the contention that by holding that the implied undertaking rule was applicable law the decision resulted in the 'impermissible extension of the offence of contempt of court'. I do not think that is so. Breach of the rule would give rise to a civil contempt. It is not to be equated to disregarding a court order, which it is established constitutes a criminal offence; S v Beyers 1968 (3) SA 70 (A). The fact that no person could be committed to prison for such contempt unless their breach of the rule could be proved beyond reasonable doubt to have been wilful and mala fide does not make the respondent in any such proceedings an 'accused person'; cf. Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at para 42.

[27] Some of the subsidiary grounds advanced in support of the application for leave to appeal suggest a misunderstanding in certain respects of both the operation of the implied undertaking rule and of the content of the judgment. Thus, the contention that this court 'erred in invoking the implied undertaking rule to protect "information or material susceptible to privacy protection"…where no case had been made that there was any information that required such protection as contemplated in the Bill of Rights' proceeds on the fundamentally flawed premise that a case for privacy has to be made out before the rule operates. The trigger for the operation of the rule is the compulsory disclosure of documents or information in terms of the applicable court process; nothing more. So too, no 'finding' of the nature described in para 9.4 of the application for leave to appeal was made in the judgment. The remarks mentioned at para 9.4 were uttered at para 55 of the judgment. They were obiter. They ventured the opinion that a court might be inclined in public interest cases to allow access to the content of the court file when pleadings had closed and a hearing date had been applied for, or fixed.

[28] The application for leave to appeal is dismissed. As SANRAL, in effect, abided the judgment of the court, there will no order as to costs.

A.G. BINNS-WARD
Judge of the High Court