



# Annual Report

2015 -2016

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# OUTA Chairman's Report: 2015- 2016

South Africa - a nation in limbo and hungry for change



The recent turn of events on South Africa's political stage suggests that 2016 will probably go down as the most significant year of change in our nation's young, but fragile democracy. The change that awaits us, however, has two possible directions to take.

The first is the low road of 'economic destruction', prompted by several years of extractive behaviour by an out-of-touch political elite with corrupt tendencies, who are intent on clinging to power as the credit rating agencies prepare to pull the junk status trigger on our dwindling economy.

On the other hand, the high road of 'economic disaster avoidance' is one that will pull us into a new trajectory that places our nation on a journey of recovery, staving off the downgrade and sparking a new attraction for much needed investment.

The high road option depicts a close shave with economic disaster, the actuality of which is only possible through the prompt and courageous action by the ruling party to implement the timely, but inevitable removal of President Jacob Zuma. The outcome of this concerted effort has expectations of job creation and poverty alleviation through renewed economic stimulation. It also raises hopes of a nation prepared to root out the cancer of corruption.

Some two decades after the shackles of apartheid were removed to build an inclusive economy for all, far too many citizens remain outside the bounds of even a meager glimpse at prosperity, burdened with poor service delivery, dismal education standards, shocking health services and limited security protection.

A growing public frustration festers into our democratic nation's highest number of annual protests, igniting the call for rapid change that will remove the manacles of mounting debt, inefficiency and extractive governance that does our country no favours.



While the political elite remains tightly gathered to prevent the impeachment of President Zuma, forces from all quarters bring pressure to bear on his dwindling position of power. With his integrity in tatters, the nation suffers in limbo, waiting for its leader to be pushed.

The student "#FeesMustFall" campaign late in 2015 gave us a glimpse and taste of an unbridled youth that has the power to ignite the forces of change. This was followed a few months later by another powerful force released by several banks and audit houses who signaled a new message of reluctance to transact with cronies connected to the corruption club.

The expectation of change in many metropolitan and municipal areas during the forthcoming local elections, provides a heightened sense of anticipation.

## OUTA is taken to new heights

There is nothing that beats the ability to strengthen the resilience and determination of civil activism than a state owned entity which lacks transparency and behaves with arrogance, as it ignores the need to meaningfully engage with the citizens on matters that impacts their lives.

After four years of challenging the e-toll debacle, OUTA has grown into a broader civil action movement, intent on taking its learning and expertise into other areas of state squander, maladministration and corruption.

Since 2012, SANRAL has tried its best to see OUTA fold under the pressure of its attrition through lawfare and a multi-million Rand propaganda campaign. Instead, quite the opposite happened and OUTA's executive has enabled a stronger and larger organization, with growing funding to employ the talent required to conduct more research, investigation, engagement, communication and litigation.

The organisation's sustainability is built on providing a value based offering to society, and treating its funders and donors as members of a movement for social change. Installed with good CRM and accounting systems, connectivity and a suitable manpower structure, OUTA switched from the Opposition to Urban Tolling Alliance on 22 February 2016, to the Organisation Undoing Tax Abuse thereby formalizing the transition to a broader role.

...Chairman's report continued over page.

## Staying the course on the e-toll debacle

Formulating and defining the various campaigns to be undertaken with our broader mandate has begun and we are not short of choice. However, we must choose our challenges carefully, to ensure maximum impact in relation to our limited but growing capacity. Presentations and activity have already been executed in the areas of Eskom's excessive tariff hikes, as well as Treasury's plans for a questionable carbon tax.

A fundamental change in OUTA's new strategy has been the introduction of a dedicated internal legal department. This decision has provided OUTA with the ability to build its own legal cases at a significantly reduced expense to the organization. This decision and action has also generated extreme efficiency in the organisation's ability to launch the collateral challenge against SANRAL's threats of civil summonses for non-payment of e-tolls.

In addition, OUTA has met with and secured the services of a formidable legal counsel to take this challenge as far as it needs to go. Our arguments and facts which surround the unlawful and irrational introduction of e-tolls have been gathered and preparations for the looming e-toll courtroom showdown are largely complete. We have invested our time and resources wisely and carefully to glean the myriad of information from past legal papers and new evidence that has come to light. Furthermore, valuable insights and facts have also been extracted from the City of Cape Town's challenge which put paid to SANRAL's irrational and questionable plans to toll the N1 and N2 Winelands region.

## E- tolls: a failed scheme trapped by pride and the dilemma of sunk costs

As we move closer to three years after the launch of the e-toll debacle, one wonders what preserves the authorities' interest in a scheme which has failed to achieve any semblance of meaningful long term success. Has the e-toll saga become the ultimate dilemma of a sunk cost into a bridge too far to turn back on?

Despite the fact that sufficient evidence points to a bad decision, will it be the combination of a blinkered vision and arrogant pride that continues to throw good money after bad in a desperate attempt to keep the e-toll scheme limping along?

OUTA's position paper "Beyond the Impasse" published in September 2014, revealed a number of insights to portray the e-toll scheme's doomed existence as an effective funding mechanism to service the GFIP bonds. While we have no doubt that SANRAL's latest round of coercion will produce some degree of uptake, it will be insufficient to significantly change their fortunes in the medium to long term.

Recent media polls have confirmed OUTA's opinion and views of a heightened public resolve to remain strong and defiant on this matter. History is filled with many examples of state victimization strategies that achieve temporary traction when people are placed under duress, but which are met with greater resistance and a backlash further down the line.

## In Closing

It is our sincere hope and trust that all state run departments and entities in South Africa will become more efficient and better managed to provide good service to the nation at the lowest possible cost of expenditure.

It is also our desire that all supplier contracts and tendered services submitted to the state are conducted with complete transparency, without favour and undue processes in securing the best deals for the nation.

We long for all heads of government departments and state owned entities to be consistent in their display of impeccable service oriented leadership, thereby ensuring the best possible outcomes and delivery of good service to all whom they serve.

It is furthermore our desire that South Africa's government takes meaningful steps to address the wasteful expenditure and corruption, whilst developing investor friendly policies to create jobs and reduce the scourge of poverty.

The OUTA team will do its best to help and urge our Governing authorities to achieve this positive energy and seek improved outcomes going forward.

Wayne Duvenage  
OUTA Chairperson  
May 2016



# A new vision for OUTA

Our vision: A more prosperous South Africa with effective, practical tax policies and efficient, corrupt free tax spending



Ensuring that we remain apolitical and relevant, our vision guides our work into three areas of focus:

## 1. Tax Policy

**Governments are generally notorious for finding ways to increase their state revenues. The methodology of improving tax revenues generally takes place in one or more of the following three areas or ways:**

- i. **Improved efficiency** in collection of existing taxes: i.e. collecting revenue from all who qualify more effectively, ensuring that those who should be paying relevant taxes, are doing so. This is regarded as good practice and effort by tax offices and the South African Government has done a good job in this area over the past two decades.
- ii. **Increased rates and tariffs:** This is normally fine when attempting to keep pace with inflation or reassessments and realignment of tax brackets to increase or reduce tax pressure in specific sectors or segments of society. This practice can become contentious and problematic when the annual increases over time amount to an excessive charge, which begins to drive negative behaviour and a backlash or other action by society to circumvent the excessive charges. A good example of this has been the ongoing and excessive increase of vehicle license charges, specifically to the trucking industry, as well as the fuel levy, which has increased by over 140% over the past decade.
- iii. **Introduction of New Taxes and Tax Policies:** This happens when government generates new and additional revenue streams to provide additional revenue to Treasury's "tax pot". This is done to either change society's behaviour (eg: the Carbon Emissions Tax on New Vehicle Sales) or to simply increase the taxes on society in specific areas.

OUTA's work in the area of tax policy evaluation seeks to ensure that rational and meaningful introduction of taxes takes place and that society does not become overburdened or negatively affected by some of the above, specifically in (ii) and (iii) above.

## 2. Tax Regulations

It is important that when introducing new or managing existing taxes, the regulatory environment is both efficient and is effectively applied. Government (at various levels) will suffer from a crisis of legitimacy if they introduce taxes which they are unable to enforce, collect or manage. When this happens and/or when the public questions the rationale of a specific tax and stop paying it, the inability to enforce the non-payment thereof will eventually render that tax irrelevant. Examples of such irrelevant taxes are traffic fines (which have essentially become a tax/revenue at local government level), TV licenses, e-tolls and others.

## 3. Conduct

This is the third and will probably become the most active area of our work in the future, being that of addressing the maladministration, waste and corrupt use of state revenues and expenditure. We have a 5-step methodology to address our work and effort around unacceptable conduct which is explained in the following piece.

# OUTA's Methodology: Dealing with unacceptable Conduct

A nation may have the best tax policies and regulations in place, but when the state's revenues are subject to maladministration and corruption, society experiences a diminishing return from their hard earned taxes.

When maladministration and corruption is left unabated or unchallenged, the negative consequences of growing wasteful expenditure and corruption is a fragile or failed state, which leads to a public backlash against government at all levels.

This is currently a situation which is fast developing and becoming more evident in the levels of poor service delivery, wasteful expenditure and the resultant public protests which have become a factor of every day life in the country.

Corruption and maladministration can and should be managed through a series of processes, but when the governing officials are participants or themselves caught up in the malaise of wasteful state expenditure and corruption, their ability to tackle these problems are minimised, leaving much of the exposure and enforcement thereof to civil society.

## 5- Step Approach

In its endeavours to deal with corruption and maladministration, OUTA has introduced a 5 step approach to guide its efforts and resource allocation toward the issues it takes on.

### STEP 1- Research and Investigation:

By conducting meaningful and thorough research, OUTA set out to ensure that the issue raised or presented for our attention, is one that is real, significant and relevant.

### STEP 2- Engaging the Powers:

This step provides an opportunity for those implicated in the issue, to respond, explain, rationalize and/or rectify the situation.

### STEP 3- Exposing the Powers:

Once Step 2 has been exhausted and we believe the situation/issue remains serious enough, we then expose the matter along with the people implicated, to the public, media and the authorities. This step is undertaken in the hope that greater exposure may lead to a rectification of the situation/ behaviour.

### STEP 4- Mobilisation:

Should Step 3 not have the desired effect, we begin to conduct other activities to highlight the issue or problem, once again seeking a situation of sufficient discomfort to the perpetrators to continue with the unacceptable behaviour and conduct. This may be through various forms of communication, protest, marches etc.

### STEP 5- Litigation:

When the unacceptable behaviour or situation persists, we begin the process of using the laws of the land and our constitution to correct the matter through various avenues of litigation, mediation and arbitration available to society.

To some, OUTA is perceived as a team of rabble-rousing individuals who have nothing better to do than to throw stones at government and to nurture civil disobedience. To others, OUTA is a necessary entity that deals with issues head on, in a hard and confrontational manner.

The reality is that the organization was born out of a necessity to tackle an arrogant organization such as SANRAL, on a serious issue (the e-toll debacle), which required a hard approach to overcome. At all times however, OUTA has comprised of a team of professional individuals who have a wealth of experience, project management, business leadership and social needs. This experience was put to good use in exposing the irrationality and unlawfulness of the e-toll decision and is one which has the support of society at large.

The OUTA team is very aware of the need and desire to live in a country that is well governed and which is not subjected to anarchy or a full blown tax revolt. Having said that, we also believe that unjust policies and laws, which deter growth and are deemed as irrational or unsustainable for their purpose, must be challenged. In doing so, challenges of this nature often require a tough stance and hard line approach. Sadly, many governments (and ours is no exception) don't like or know how to handle criticism and react in a negative manner by rebuking their critics.

However, if they were to embrace their critics, by inviting them in to genuinely hear the reasons for the opposing views and opinions on matters, they may just learn more and introduce lasting and meaningful solutions to so many of their problems.

OUTA's executive team is focused on good research and structure to tackle the issues it has selected. OUTA will always remain determined and professional in its quest to seek the improvement of state performance. Contrary to the belief and opinion of SANRAL's leadership (and that of their allies), it is not OUTA's intention to see the demise of the state or its institutions. We are all too aware of the skills and expertise which lie within such SOE's that do good work. But we are also aware of how SOE's can and is often abused by people in authority, by allowing the costs of service delivery to escalate to unacceptably high levels, or new inefficient processes to develop, leading to extractive behaviour and unnecessary additional (often corrupt) processes which leaves society poorer as a result thereof.

OUTA's work is aimed at seeking a change of mindset and attitude on matters that conflict with one premise and one premise alone being: Is the decision, action and/or behaviour by the tax policy, regulations or the conduct of the authorities being done in the best interests (costs, efficiencies and effectiveness) of the people of South Africa, and/or the prosperity of the nation at large? If not, we will challenge it.

# TRUST – The social glue required for effective governance

The extent of citizen disengagement with a nation’s leadership, is a factor of the level of trust that the people have in the government’s ability to take the nation to new heights of prosperity.

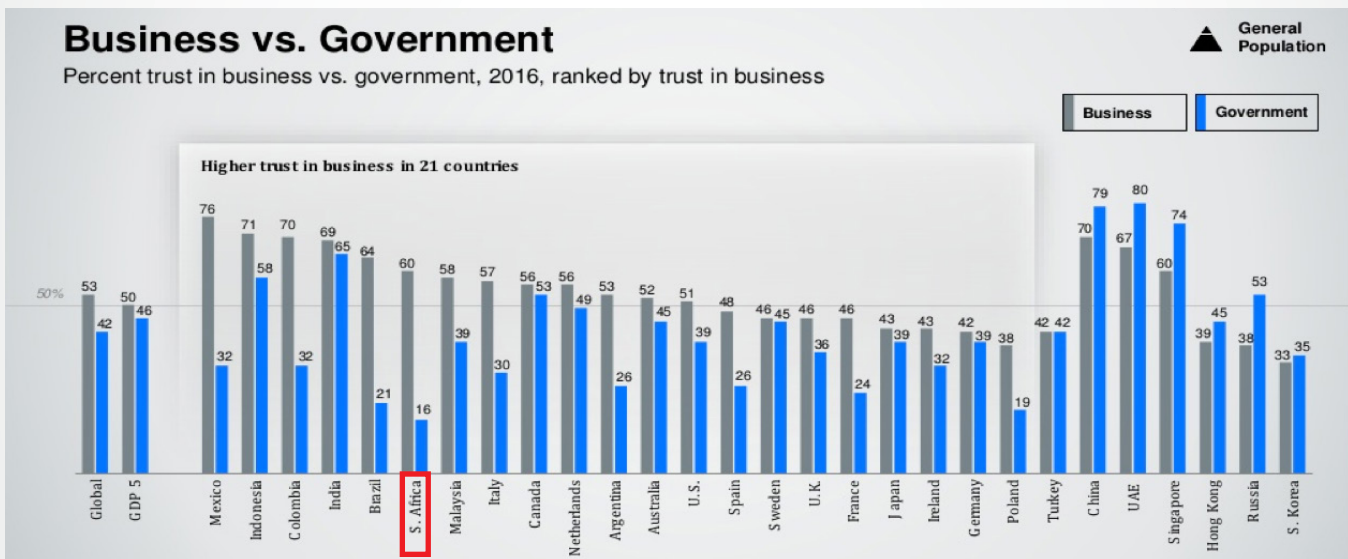
When public trust is at an all time low, a nation’s citizens search hard for elements of truth. They dissect every word in search of truth and meaning from politicians and the less convincing they are, the more angry and disengaged at nations people become.

When this happens, Governments begin to attract the wrath of people who take advantage of opportunities to disengage. This leads to heightened civil disobedience, especially against laws that appear to be unjust and in contravention of rationality. Al Gore, the ex vice president

of the USA once said...“Civil disobedience has an honourable history. When the urgency and moral clarity cross a certain threshold, civil disobedience is quite understandable, and it has a role to play.”

Mistrust generates second guessing and places a strain on state/ citizen relationships. Heightened mistrust in leadership lowers productivity, and places a hidden tax on every transaction. Gross levels of mistrust, leads to a fragile state of affairs and causes positive energy and input to escape from the system of good governance.

Corruption is the single biggest citizen issue that erodes trust in government. According to Transparency International’s Global Corruption Barometer of the 2015 report, 83% of South Africans believe that corruption has increased in the past year.

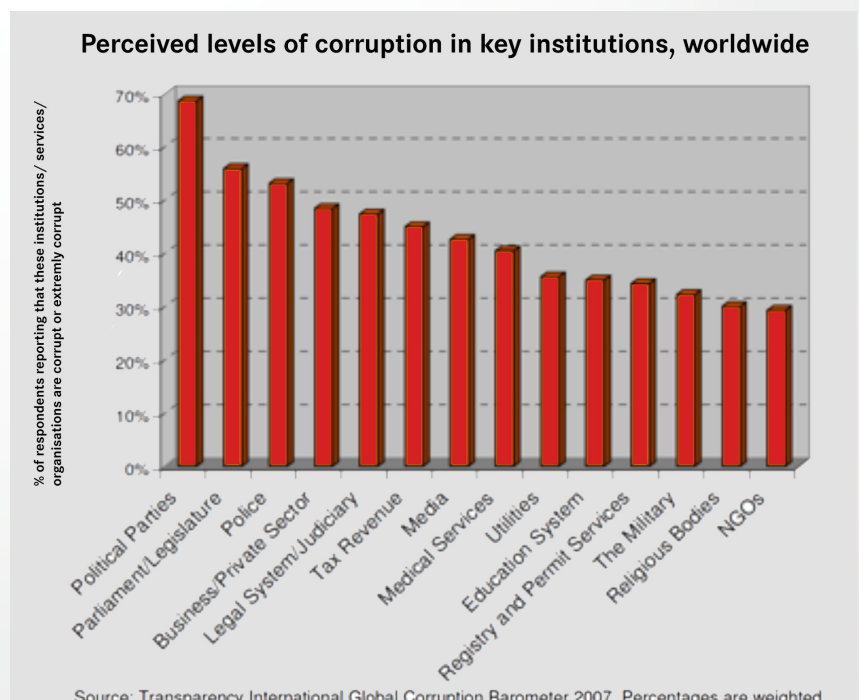


Source: 2016 Edelman Trust Barometer Q11-14.

Political parties, parliament and policing structure appear as the most concerning entities when it comes to the perception of corruption on the international stage.

When it comes to business vs. government, aside a few Eastern based countries, government weighs in lower than business on the subject of trust. South Africa has a particularly large disconnect, and is rated the country with the lowest trust in government out of 28 countries surveyed by the Edelman Trust Barometer, as depicted in their 2016 Global Study.

Leadership without trust is an oxymoron. Governments are unable to lead a nation with great effectiveness when a significant portion of its people lacks a belief and high level of trust in their ability doing the job. Sometimes, as is seen to be the case in South Africa, a skewed tax base used to feed to fear of the unknown, combined with a history of revolution, can lead to a political situation of a mistrusted government being able to retain sufficient power, albeit under declining conditions.



Source: Transparency International Global Corruption Barometer 2007. Percentages are weighted.

# OUTA participates in Carbon Tax submissions

Following Treasury's call for submissions and comments on government's proposed Carbon Tax Policy due to be introduced in 2017, OUTA decided to assess the rational, purpose and practicality of the introduction of yet another complicated tax into the South African revenue system.

At a high level, while OUTA supports the notion of using punitive measures to reduce Green House Gas (GHG) emissions in the global challenge to address climate change, we do not believe the carbon tax policy currently proposed by Treasury is right for South Africa. In short, we feel it will not have a significant impact on the change of behaviour related to energy consumption and GHG emissions.

The carbon tax will simply become a business cost that will be passed on to the consumer and the resultant taxes raised will not be ring-fenced for direct use in the stimulation of the green economy. As far as we're concerned, Eskom's excessive tariff hikes over the past decade has become a tax and has been the driver of reduced energy consumption and carbon emissions in South Africa.

OUTA is pleased that Treasury is conducting a meaningful stakeholder process to gauge the input from all sectors of society on this matter. We look forward to collaborating with other entities as we formulate a position that makes sense for an appropriate solution to this new tax.



# OUTA delves into Eskom's State of Affairs

OUTA presented its objection to additional electricity increases at the National Energy Regulator (NERSA) hearings for Eskom's Regulatory Clearing Account (RCA) application on 5th February 2016. We did so against the backdrop of a series of ongoing tariff hikes which have pushed the cost of electricity to unacceptable and crippling heights. In addition to the high price of electricity to the consumer, the ongoing inefficiencies and questionable business practices of Eskom which require serious challenging and answers. OUTA found it unacceptable that insufficient time was provided to the public, to effectively assess the reasons whereby NERSA granted

Eskom a 9,4% tariff hike. As far as OUTA is concerned, the regulations require that the public are entitled to 30 days notice after receipt of the detailed reasons for NERSA's decision. And yet, this had not happened in February and March this year.



OUTA's executive therefore believed it was necessary

to seek an interdict against the tariff hike due on 1 April 2016. Unfortunately, our application was unsuccessful. As a result, OUTA has decided to appeal this decision, not only to correct the court's interpretation of his challenge, but also to have the costs order against OUTA reversed, as it is highly unusual for a public interest body to be encumbered with the state's legal costs in such matters of litigation, especially when such litigation was not regarded as vexatious or unnecessary.

## The grossest case of state coercion and citizen victimisation in democratic South African history

Out of frustration that the public had largely ignored their offer of a 60% discount on outstanding e-toll debt, SANRAL turned up the heat in the first quarter of 2016 by using external collection agencies and a heightened marketing campaign, which included threats of legal summonses against e-toll defaulters.

By April 2016, their threats had turned into action, as SANRAL started serving several thousand civil summonses in an attempt to recoup much of the R5,9 billion ring-fenced e-toll debt. This has been regarded as the biggest case of state coercion and citizen victimization since the birth of our new democracy, in that SANRAL is very aware of the need for a test case to bring the collateral challenge and arguments on this matter. It would have been prudent for SANRAL to introduce a test case to examine the pending collateral challenge to their e-toll decision, as this would have saved not only themselves a lot of money and time, but also that of the courts.

Instead, SANRAL has chosen to extend their discount offer until 17th May 2016, and sending out more threatening messages that more people will capitulate under duress, and join the scheme.

**Questionable legal practices by SANRAL's lawyers:** During SANRAL's mass submission of thousands of summonses to both the high court and magistrates courts, they have made a number of errors some of which they could face the public issuing summonses without court case

numbers being reflected on the notices issued. Servicing the public with a summons without a case number could lead to the individual receiving a summary judgment against them, not because they didn't want to defend their rights, but because they couldn't.

In addition, when attempting to serve their notice of intention to defend these summonses, the public were sent on the difficult task of finding the issuing law firms offices which were located at a "virtual Regus" office, where acting attorney was present to receive the papers and was available to answer questions pertaining to the summonses, which is the correct manner in which law firms are supposed to transact these matters. Additionally, another serious transgression unfolded, when the contact number and e-mail address of the serving attorneys on the summons was not that of their office, but directed the public to the SANRAL Less60 offices, where there was no-one able to answer the questions pertaining to the summons issued.

Fortunately, OUTA's new strategy and structures, buoyed by rapidly growing financial support from tens of thousands of citizens and businesses, have ensured the organisation is ready for the magnitude of the defence required for its members. Our well prepared team headed by a highly respected senior counsel, will ensure that we take these matters to the highest levels in defence of the rights of our citizen's freedom of movement.



# N2 Wild Coast Toll Road: another case of tax abuse by SANRAL?

The N2 Wild Coast Toll Road scheme between Durban and East London has become an ongoing saga of sheer minded determination to be forced into place, regardless of what the local communities say or that the plan makes no financial sense.

The scheme was designed to shorten the pre-existing N2, a dangerous route that cut inland from Port Shepstone via Kokstad and the Kei Cuttings and back to the coast at East London. Rerouting the N2 along the Pondoland Wild Coast would provide gentler gradients, reduce fuel consumption and promote economic development in one of the poorest and most densely populated provinces. However, the road engineering challenge of the rugged terrain of the Wild Coast and financial cost were formidable barriers.

SANRAL's first effort to meet their economic challenges for this scheme, was to package the solution as a Public Private Partnership deal whereby a construction consortium would receive a thirty year tolling concession to build the road. However, that meant firstly that traffic volumes would not be sufficient to provide a reliable revenue stream, and secondly that the putative local economic benefits would be obvious. Neither assumption proved valid.

Transport economist Allan Jorgensen argued that the expected increase in traffic volumes would never be sufficient because the toll tariffs would have to be exorbitant: certainly way above what the poor rural residents of the Eastern Cape who might benefit from using the roads could afford. Secondly the communities that SANRAL CEO questioned the logic of an expensive new route instead of simply upgrade their existing roads. 'Why create another massive social and environmental footprint?'

SANRAL's solution appeared to be twofold: To erect a toll plaza south of Durban, forcing KZN motorists to pay for a new road they did not use, and secondly to allocate some of its revenues received from National Treasury, to finance the big ticket items of two large bridge crossings over the Mtentu and Msikaba gorges to reduce the outlay for the concessionaires.

However, two foundations of existing transport policy were violated: the user pay principle (because Durban motorists would be paying for a road they were not actually using); and the ring-fencing principle which holds that no public funds may be used to subsidize private tolling concessions.

Environmentalists were already distrustful when it was discovered that the supposedly independent consultancy who did the Environmental Impact Assessment (EIA) report – essentially green-lighting the project – was owned by a director of Stewart Scott, one of the consortium members. The Minister of Environment, Mr M Van Schalkwyk, yellow carded the scheme.

Significantly, the N2 Wild Coast Consortium (N2WCC) has vanished from public sight, and SANRAL has apparently abandoned that financing route and assumed sole responsibility for what was once billed as an "unsolicited bid" from the private sector.

Sanral have not explained how they plan to now fund the project. If it is indeed a Sanral tolling scheme, then public finance investors will become increasingly concerned about Sanral's credit rating, given the failure of the Gauteng e-toll system and Sanral's arrogant refusal to listen to anyone, or acknowledge contextual constraints. The N2 Wild Coast road objectors had hoped to at least persuade Sanral to pursue an alternative alignment further inland, because their major concern was that the proposed route passes within a stone's throw of a large deposit of heavy minerals that an Australian mining company hopes to exploit, against the express wishes of the local residents. Sanral's preferred alignment appears to be purposefully designed to facilitate the mining.

Objectors from both the remote 'under-developed' rural Eastern Cape as well as the densely populated 'developed' urban areas around Durban are ever more convinced that deeply vested interests lie behind the scheme. These are definitely not the interests of the rural poor, as is repeatedly claimed by Sanral's executives.



SANRAL has recently indicated that construction on the two large span bridges is about to commence, even though the high court challenge has yet to be heard. SANRAL may have secured Treasury budget to fund them, but they still need legal clearance. Moreover, KZN motorists from all political parties remain united in their refusal to pay a hefty premium on toll fees to fund a road they won't use. While SANRAL has said it no longer plans to toll KZN residents to generate the required revenue, there has been no explanation as to how they will achieve the necessary revenue for the planned new route, given the high cost thereof.

One can only imagine the following scenario playing out: two magnificent bridges costing taxpayers R2.5 billion stranded like beached whales with no money left to pay for the freeways to connect them, surrounded by rural residents living in hardship and poverty. The motivation to build the road will then be based on a sunk cost which will now make sense to connect, seeing the expensive bridges have been built.

The ongoing N2 Wild Coast Toll Road saga has become a spectacular inefficient, wasteful and obscene abuse of tax, particularly when one considers that it may be wiser to use a fraction of the cost of the new route to upgrade the existing route and to fix up the feeder roads to the coastline areas.

# SANRAL'S consistency: Ignoring the need for meaningful engagement

When reading the judgment issued in June 2015 by Judge D Mojaepelo in the case of State vs. Smit (Case # CC280/04), one receives a strong overview and report about SANRAL's failure to conduct meaningful public engagement process on the tolled route between Nelspruit and Komatipoort. Accordingly, Mr Nicolaas Smit was not found guilty for non-payment of tolls at the Nkomazi toll plaza.

Similarly, the detail reflected in the judgment by Judges Binns-Ward and Boqwana delivered on 30 September 2015 (Case # 6165/2012), depicts another judgment which is scathing of SANRAL and the Minister of Transport's declaration of the N1 and N2 Western Cape freeways. Once again, we find questionable and improper conduct regarding board and ministerial approvals of the scheme, along with flawed public and local government consultation, which led to the setting aside of the declaration to introduce a tolling scheme in the Winelands area.

SANRAL's plans to build and toll a realignment of the Wild Coast's N2 route has been fraught with conflict and multiple re-submissions by SANRAL, with unsolicited bids and questionable public participation processes. The project also lists the construction of two mega-bridges across the Msikaba and Mtentu river gorges at a cost of R1.2-billion and R1.3 billion respectively. The history of this plan, combined with attempts by an Australian company to mine the Xolobeni dunes in the area, has produced a loud outcry from the local Amadiba community who have objected to the road and mining venture.

Combining the above with the outcry from millions of Gauteng motorists who insist that SANRAL's consultative process with the public was virtually non-existent, one wonders what it will take for SANRAL to become the learning organisation that it claims to be.

## The growing role of Civil Society and Digital Media in law making

While politics will always have a meaningful role to play in the democratic nations of the world, it is the slow pace of positive change between elections that often opens the door for civil action movements to hasten the democratic processes of delivery.

The growing need for active citizenry and the public's participation in matters of governance that concern them, is made more possible today by the concerted efforts of civil action groups and movements that pave the way for improved engagement.

Government departments have become notorious for introducing Gazettes and notices for comments in a low key fashion, hoping that the public does not become too aware of these changes. The effect is a society that wakes up to many new laws and regulations over time, forced into place through a majority vote in parliament by a dominant party. Once amended, the new legal landscape becomes difficult to change once the administrative motions are put into place.

Today, that is all changing, thanks to the new digital age, combined with the watchdog mentality of NGO's and the support of civil action entities such as OUTA and others, by a growing citizenry and philanthropic base of donors who yearn for good governance interventions.

Once such successful enablement of public participation in lawmaking, was generated by OUTA's exposure and invitation to the public for participation in a new gazette during December 2015. This Gazette was an attempt by the Department of Transport to introduce new regulations that would subvert the need for meaningful processing of e-toll bills, rendering them as mere traffic infringement notices and fines that would

place a hold on vehicle license renewals for unpaid e-toll bills.

The result of OUTA's encouragement for public participation, saw the influx of over 117 000 submissions made to the authorities on this Gazette notice. This has been put down as the highest extent of public engagement in our new democracy's law making process and we await the explanation of Governments assessment and consideration of this input, when it decides to promulgate the proposed regulations or a variation thereof in due course.



# OUTA's determination and resilience survives government lawfare and bullying

Some four years ago, a number of business associations gave birth to OUTA, to challenge an irrational and unjust decision by the South African Government and their State Owned Entity (SOE), the South African National Roads Agency Limited (SANRAL), whose plan was to introduce an elaborate but grossly inefficient and expensive electronic tolling scheme to the existing, but upgraded Gauteng freeway network.

Launched as the Opposition to Urban Tolling Alliance (OUTA), the organisation's initial focus was to seek sanity on the e-toll decision through a series of legal, communication and engagement initiatives. Having survived two years of an expensive legal battle, the organization managed to see its way through to a very momentous Supreme Court of Appeal (SCA) ruling in September 2013, which set aside the prior and shocking High Court judgment by acting Judge Louis Vorster who declared the Gauteng e-toll scheme as lawfully introduced.

The SCA judgment was a momentous one, in that it ensured the public were free to bring a collateral challenge in defence of their rights against a coercive practice by the state, if indeed it could be proved that the e-toll scheme and decision was introduced unlawfully. It was also an extremely important judgment for OUTA, as it set aside the onerous costs order which had been unfairly lumped onto OUTA, who were merely doing their job at challenging and protecting the public from irrational and unlawful governance.

In December 2013, despite all the indications of a scheme that was fraught with serious challenges and signs of failure, the government allowed SANRAL to forge ahead and launch the ill-conceived e-toll scheme. Many believed this was the end of OUTA's role in the matter, but it wasn't. OUTA's management believed it had an important role to keep SANRAL honest, to question their claims and misinformation

and to ensure the public were empowered with knowledge and their rights to launch a defensive challenge, if indeed they believed the scheme was introduced unlawfully or other matters which questioned the schemes integrity of operational efficiency.

Within the first six months, the scheme could not break the 40% mark of compliance, despite an expensive marketing campaign and threats of criminal persecution.

By the end of 2015, the scheme's compliance levels drop to around 10%, despite SANRAL's announcement of an offer of 60% discount to defaulters by Deputy President Ramaphosa in May 2015.

Today, OUTA is poised and ready to tackle the defensive challenge to unmask the scheme's unlawful introduction, combined with a high degree of administrative deficiencies that renders it remiss of its ability to function effectively for the purpose it was intended.



# Excessive costs of road construction raises serious concerns

In February 2016, OUTA released a position paper which highlighted significant differences in the cost of road construction and the rehabilitation by SANRAL on the Gauteng Freeway Improvement Project (GFIP), when benchmarked against international case studies.

The conclusion of this paper (titled Society's Odious GFIP Debt, courtesy of SANRAL, ) is that by OUTA's estimates and GFIP should not have cost much more than R7 billion and, therefore, the project has been grossly overpriced by approximately R11 billion. If this is indeed the case, the costs of e-toll collection system (at a tendered amount of R8,4bn for five years to the Electronic Toll Collection owned by Austrian based Kapsch TrafficCom,) would be grossly irrational when compared to the costs of servicing a development bond of approximately R7 billion rands over a 20 year period.

Recently, SANRAL indicated it would raise civil claims to claw back around R760 million from the identified construction companies implicated in collusive conduct exposed by the Competition Commission in 2013 and then again, not all of this was attributed to the GFIP project. Until SANRAL provides more detail on these civil claims, and assuming that around R500 million is attributed back to the GFIP, it remains a project grossly overpriced at around R10,5 billion (or 150%).

At a media conference on 11 April 2016, SANRAL claimed that

OUTA's paper was "untruthful and inaccurate", accusing OUTA of misinterpreting millions of Euro with billions of Euro's in the nederland impact case study which OUTA had referenced. As it turned out, OUTA was correct in its interpretation of the case study numbers and had not got this wrong, as was claimed by SANRAL. In fact, SANRAL proceeded to make a fool of themselves by claiming that they now built roads at 0.3% of the costs incurred by those constructed in Europe.

It turns out that OUTA's additional research (due to be released in a revision and update of its position paper in mid 2016), will further substantiate the extraordinary high costs of the GFIP and other road construction costs in South Africa. This will place a significant question around the cause of the excessive costs pertaining to road capital expenditure projects linked to state controlled expenditure. If our suspicion is correct, these overpriced road construction costs point to the extraction of tax payers funds through either a clever process of state capture, ineptitude, gross negligence, maladministration or corruption.

Whatever the cause, this situation fuels an unnecessary higher cost of living and poor service delivery in South Africa. It also places serious doubt as to whether the e-tolling of the Gauteng Freeway upgrade was a justified, necessary or rational decision.

