NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT. PRETORIA)

CASE NO. 17141/2012

DATE:13/12/2012

In the matter between:

OPPOSITION TO URBAN TOLLING ALLIANCE	**1ST APPLICANT**
SOUTH AFRICAN VEHICLE RENTING AND LEASING ASSOCIATION	**2nd APPLICANT**
QUADPARA ASSOCIATION OF SOUTH AFRICA	**3rd APPLICANT**
SOUTH AFRICAN NATIONAL CONSUMER UNION	**4th APPLICANT**

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED	**1ST RESPONDENT**
THE MINISTER, DEPARTMENT OF TRANSPORT REPUBLIC OF SOUTH AFRICA	**2nd RESPONDENT**
THE MEC, DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG	**3rd RESPONDENT**
THE MINISTER, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	**4th RESPONDENT**
THE DIRECTOR-GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	**5th RESPONDENT**
NATIONAL CONSUMER COMMISSION	**6th RESPONDENT**
NATIONAL TREASURY	**7th RESPONDENT**

JUDGMENT

LI VORSTERAJ:

[1] The Applicants apply for the following relief:

1.1 In order that the decisions of the First Respondent to make the following declarations in terms of section 27(1)(a) of the SANRAL Act be reviewed and corrected or set aside:

1.1.1 the declaration of National Road N1, Section 20: from Armadale to Midrand as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 349 in Government Gazette No. 30912 dated 28 March 2008;

1.1.2 the declaration of National Road N1, Section 21: from Midrand to the Proefplaas Interchange as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 350 in Government Gazette No. 30912 dated 28 March 2008;

1.1.3 the declaration of National Road N3, Section 12: from Old Barn Interchange to the Buccleuch Interchange as a continuous toll road and the establishment of electronic toll points, dated 28

March 2008 and published as Government Notice No. 351 in Government Gazette No. 30912 dated 28 March 2008;

1.1.4 the declaration of National Road N4, Section 1: from Koedoespoort to Hans Strydom Drive and as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 352 in Government Gazette No. 30912 dated 28 March 2008;

1.1.5 the declaration of National Road N12, Section 18: from Diepkloof Interchange to Elands

Interchange as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 353 in Government Gazette No. 30912 dated 28 March 2008;

1.1.6 the declaration of National Road N12, Section 19: from Gillooly's Interchange to the Gauteng/Mpumalanga Provincial Border as a continuous toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 354 in Government Gazette No. 30912 dated 28 March 2008;

1.1.7 the declaration of National Road R21 (also known as the P157-1 and P157-2) - Sections 1 and 2: from Hans Strydom Drive to Rietfontein Interchange (N12); Province of Gauteng, as a toll road and the establishment of electronic toll points, dated 28 March 2008 and published as Government Notice No. 800 in Government Gazette No. 31273 dated 28 July 2008;

1.2 An order that the decisions of the Second Respondent in terms of section 27(1)(a) read with section 27(4) of the SANRAL Act to grant approval to the First Respondent to make the declarations listed in paragraphs 1.1.1 to 1.1.7 above, be reviewed and corrected or set aside.

[2] In the notice of motion the Applicants also claimed for the review and setting aside of a number of environmental authorizations in terms of Section 24 of the National Environmental Management Act, 107 of 1998. Those claims are not persisted with by the Applicants and have been withdrawn, against the Third and Fourth Respondents in this case. Consequently, the Third and Fourth Respondents did not participate in the hearing of this matter. The Sixth Respondent also did not participate in the hearing.

[3] The Applicants also apply for condonation for the late service and filing of the review application in which the aforesaid relief is claimed by the Applicants. That application is

necessary to overcome the difficulty caused by the fact that the review application was served and filed by the Applicants well outside the time limit of 180 days specified by the Promotion of Administrative Justice Act
("PAJA"). That application for condonation is disputed by all the
Respondents who participated in the arguments at the hearing of this matter.
It is convenient to deal with the merits of the application first. I do so below,

[4] A concise factual history of events which gave rise to this application for review and which is common cause on the papers before me, is the following:

4.1 During 1996 a White Paper on National Transport Policy was compiled. In that document transport was recognized as one of the Government's five main priority areas for socio-economic development. Tolling was recognized as a possible method to derive income necessary to provide for road development and infrastructure improvements without imposing demands on National Treasury.

4.2 During January 1998 the Gauteng Government published a proposed toll road strategy for Gauteng. That document recognized the lack of traditional funding for the development of Gauteng roads and accepted in principal the use of tolling as a funding mechanism.

4.3 In December 2001 the Gauteng Government published a further report which was a macro-economic analysis of the Gauteng toll road strategy. The use of toll was considered as a means of funding of the costs associated with road development and expansion.

4.4 In August 2005 the First Respondent (SANRAL) prepared a Gauteng Freeway Improvement Proposal (GFIP).

4.5 Thereafter a macro-economic analysis and projections relating to road infrastructure was prepared for Gauteng Government. In that document toll was considered as a means of funding and the costs in relation to roads infrastructure.

4.6 In August 2006 SANRAL appointed an independent consultant to conduct specialized toll and traffic research studies and modeling for the GFIP. From 2006 until mid 2007 SANRAL made several presentations to the Gauteng Provincial Government, and Metropolitan Councils and Portfolio Committees. As part of that process the Provincial and Metropolitan Council representatives participated in cluster meetings which focused on traffic and toll studies that were being conducted. These studies explored, inter alia, the most equitable toll strategy and the impact of tolling on the existing road network and the proposed freeway network. SANRAL also appointed independent experts to provide a traffic and toll feasibility study report. In these reports detailed financial aspects of the proposed tolling of GFIP was considered and analyzed.

4.7 The aforesaid actions undertaken by SANRAL culminated in the submission by the National Department of Transport of the GFIP toll

road scheme as a proposal to National Cabinet. That proposal dealt with the various funding models and advocated a user-based toll scheme with the electronic recording of tolls. The proposal indicated that the anticipated toll that would be applicable if the scheme was adopted would be in the region of 50 cents per kilometer. That estimated tariff was also reported to the media at the time.

4.8 In July 2007 Cabinet approved the implementation of the GFIP as a State implemented toll scheme and in October 2007 the then Minister of Transport officially announced the launch of the GFIP. As a result of the acceptance by National Cabinet of the GFIP toll road scheme, the toll road declarations which are the subject of review in this case, took place. The said toll road declarations took place in the exercise of the powers provided for in Section 27(1)(a) of the SANRAL Act to SANRAL and the Minister of Transport (Second Respondent) respectively.

[5] During March 2012 the Applicants lodged the present application for a review. Subsequent to that, during April 2012 an application was brought by the Applicants for an urgent interdict restraining the implementation of the toll road scheme. Pursuant to that application, an interim interdict was granted. That decision was taken on appeal to the Constitutional Court which upheld the appeal and set-aside the interim interdict order. An important judgment was given by the Constitutional Court which affected the grounds of review which the Applicants relied upon when the application was first launched in a material respect. The Applicants originally relied upon the alleged failure to take into account the costs of the GFIP scheme as well as the alleged costs of operating the scheme and failure to disclose those costs to the general public in the published notices inviting comments on the scheme as the basis for the allegation that relevant considerations were not taken into account, irrelevant considerations were taken into account and the alleged unreasonableness of the decision of the Second Respondent to approve of the proposal submitted to it by SANRAL and the subsequent declaration by SANRAL of the toll roads as I have already referred to above. The Constitutional Court, in its judgment said the following:

“(94) The main thrust of the respondents’ review is the alleged unreasonableness of the decision to proclaim the toll roads. But unreasonable compared to what? The premise of the unreasonableness argument is that funding by way of tolling is unreasonable because there are better funding alternatives available, particularly fuel levies. But that premise is fatally flawed. The South African National Roads Agency Limited has to make its decision within the framework of Government policy. That policy excludes funding alternatives other than tolling. It is unchallenged on review. But the High Court order effectively went against it. Since the making of the policy falls within the proper preserve of the executive and was, on the papers before the Court, perfectly lawful, the order undermining it was inappropriate. ”

"(95) No fundamental rights of the respondents beyond that of just administrative action are at

stake here. The Courts in this country do not determine what kind of funding should be used for infrastructural funding of roads and who should bear the brunt of that cost. The remedy in that regard lies in the political process."

[6]It is clear from the above dicta in the Constitutional Court judgment that the grounds of review in this review application is confined to the question of just administrative action or otherwise in the process of declaration of the toll roads. It is also clear that the costs of tolling, the merits of using toll as a means to finance the GFIP scheme and the proposed e-toll tariffs which would be necessary to finance the scheme, are irrelevant considerations for purposes of this review. Those considerations fall within the preserve of executive government and therefore outside the jurisdiction of this Court.

[7] 1 now turn to deal with the specific grounds of review relied on by the Applicants. The grounds for review can be stated to be the following:

7.1 Failure to comply with peremptory provisions of the SANRAL Act which are designed to ensure proper public participation;

7.2 Failure to give adequate notice to ensure proper public participation;

7.3 Unlawfulness of the GPIF scheme resulting in arbitrary and unlawful deprivation of property.

[8] FAILURE TO COMPLY WITH PEREMPTORY PROVISIONS OF THE SANRAL ACT:

To understand this ground of review regard must be had to particular provisions of the SANRAL Act and the interpretation of those provisions contended for by the Applicants.

8.1 Section 27(1) of the Act provides:

“(1) Subject to the provisions of this section, the Agency -

(a) with the Minister's approval -

(i) may declare any specified national road or any specified portion thereof, including any bridge or tunnel on a national road, to be a toll road for the purposes of this Act. "

"(4) The Minister will not give approval for the declaration of a toll road under subsection (1)(a) unless -

(a) the Agency in the prescribed manner, has given notice, generally, of the proposed declaration, and in the notice -

(i) has given an indication of the approximate position of the toll plaza contemplated for the proposed toll road;

(ii) has invited interested persons to comment and make representations on the proposed declaration and the position of the toll plaza, and has directed them to furnish their written comments and representations to the Agency not later than the date mentioned in the notice. However, a period of at least 30 days must be allowed for that purpose;

(b) the Agency in writing -

(i) has requested the Premier in whose Province the road proposed as a toil road is situated to comment on the proposed declaration and any other matter with regard to the toll road (and particularly, as to the position of the toll plaza) within a specified period (which may not be shorter than 60 days); and

(ii) has given every municipality in whose area of jurisdiction the road is situated the same opportunity to so comment;

(c) the Agency, in applying for the Minister's approval for the declaration, has forwarded its proposals in that regard to the Minister together with a report on the comments and representations that have been received (if any). In that report the Agency must indicate the extent to which any of the matters raised in those comments and representations have been accommodated in those proposals; and

(d) the Minister is satisfied that the Agency has considered those comments and representations. ”

[9] Although Section 27(4) of the SANRAL Act and the interpretation contended for by the Applicants was not originally in their founding affidavit advanced as a ground for review, the lack of public participation was so alleged. I shall deal with the amplified ground of review as it was argued before me. The crux of the argument advanced and debated by the Applicants is as follows:

9.1 SANRAL must submit a proposal to the Minister in relation to a proposed declaration of a toll road. That proposal must at least contain basic information relating to the capital costs involved, the costs of collecting toll and the suggested tariff of toll which is envisaged. Without that basic information the Minister cannot give informed consent to the declaration of the toll road in question. The notice that must be given generally of the proposed declaration as provided for in Section 27(4)(a) must therefore at least contain the information about the proposed toll road which serves before the Minister as interested persons who are entitled to notification of the proposed toll declaration, cannot give meaningful comment or representations unless they have sufficient information about the proposed costs of the scheme and the probable tariffs. The Applicants contend that this interpretation is necessary to give to Section 27 of the Act a meaning which accords with the purpose which the obligation to given notice of the proposed toll declaration must serve.

9.2 I cannot agree with this interpretation contended for by the Applicants. It is clear from the Constitutional Court judgment which I have quoted above that the capital costs of the proposed toll scheme as well as the operating costs and likely tariff to be imposed are matters which are not open for comment or public participation by potential interested or affected persons, as those matters fall squarely within the domain of the Executive Government as a

matter of financial policy. The basic assumption on which that argument rests, is flawed. It assumes a right of public participation in relation to matters which are not open to public participation. Section 27(4)(a)(i) and (ii) and 27(4)(b)(i) is clear that it is the physical aspects of the proposed toll road declaration and particularly the situation of the proposed toll plazas which are open for comments and representations by interested and affected parties including the municipalities and the Premier of the relevant Province, and no more. Accordingly, I am of the view that this ground of review is without substance and cannot succeed.

[10] FAILURE TO GIVE ADEQUATE NOTICE TO ENSURE PROPER PUBLIC PARTICIPATION:

It is common cause that the proposed toll road declarations were published in the Government Gazette and in newspapers circulating in the areas in question. The Applicants contend that this is inadequate and that more

should have been done by SANRAL. The suggestion is made that particular notices had to be put up adjacent to the roads in question to attend possible interested persons of the proposed toll declaration and even that it should have been further ventilated in the public media like radio or television. In terms of Section 4(1) of the Promotion of Administrative Justice Act, 3 of 2000, dealing with administrative action affecting the public, it is specifically provided that an administrator is authorized to follow a procedure which is considered fair and which is empowered by any empowering provision of the legislation in question. In the instant case SANRAL acted in terms of the provisions of Section 27(4)(a)(i) and (ii) of the SANRAL Act. That process was considered to be fair in the circumstances by SANRAL. I have no reason to differ from that conclusion. The publications in the Government Gazette and newspapers circulating in the areas in question were clearly adequate to inform interested persons of the proposed toll declaration. The argument that such notification was inadequate and therefore

unfair, rests on the erroneous assumption that each and every user of the proposed toll roads had a right to be informed, given the importance of knowledge of the proposed expenditure of the scheme and the proposed tariffs that could be levied in due course. Consequently, this ground of review must also fail.

[11] SECTION 25 OF THE CONSTITUTION - UNLAWFUL DEPRIVATION OF PROPERTY: This ground of review, as I understand it, is that toll levies collected from motorists traveling on the declared toll roads and also future toll roads which might come into existence in the process of expansion of the roads infrastructure will amount to an unlawful deprivation of property as is referred to in Section 25 of the Constitution. There are two answers to this contention. Firstly, such deprivation can only take place unlawfully if the toll road scheme is unlawful. Secondly, the payment of toll levies will take place in terms of an act of general application, being the SANRAL Act. I have already concluded that the GPIF scheme is lawful and that the toll road declarations in issue in this application have not been shown to be reviewable on lawful grounds. Consequently, this ground of review or objection must also fail.

[12] It follows that in my view the application cannot succeed.

[13] What remains to be considered is question of costs. The question of condonation for the late filing of the application for review does not arise in view of my judgment on the merits of the application which I have dealt with above. The Constitutional Court ordered that the costs of the appeal before it are to be costs in this review. All the parties that appeared before me are agreed that any costs order that I make should include the costs consequent upon the employment of three counsel. The First Respondent asks me to make a punitive order as to

costs against the Applicants. The basis of that request is that the Applicants, in their effort to overcome the problem of lateness with the lodging of the application for review, submitted that part of that delay was caused by untransparent behaviour on behalf or by SANRAL. Argument was made with reference to particular allegations in the papers filed on behalf of the Applicants. Those allegations are of speculative nature only and is founded on an inference drawn by the Applicants that SANRAL dragged its feet to deal with public participation aspects in view of the World Cup Soccer event that was on its way. It is correct, as counsel for the First Respondent argued, that those allegations amount to no more than inferences which the Applicants seek to draw from the facts as they perceived them at the time. I have given careful consideration to this aspect. The Applicants were, and probably still are, in favour of the upgrading of the freeway road system in Gauteng. When they learnt about the proposed toll tariffs which were ventilated in the media, they became bewildered and concerned. They distrusted SANRAL and resolved to fight the implementation of the GFIP with everything at their disposal. However, I am unable to say that the Applicants acted mala fide even if they went too far in relying on inferences drawn from the papers in their argument. Consequently, I am not disposed to grant a punitive order as to costs. Finally, shortly before the commencement of the hearing of this matter and interlocutory application was brought by the Applicants against inter alia the First Respondent in which disclosure and the provision of copies of certain documents referred to by the Respondents in affidavits which served before the Constitutional Court was claimed. That application did not proceed. I do not think there was any merit in that interlocutory application and that it was wisely abandoned by the Applicants. Nonetheless, the Applicants should bear the costs of that application.

[14] I make the following order:

1. The application is dismissed.

2. The Applicants are jointly and severally ordered to pay the costs of the Respondents excepting the Sixth Respondent which did not take part at the hearing.

3. The Applicants are ordered to pay jointly and severally the costs reserved by the Constitutional Court to the Respondents who participated in that appeal before the Constitutional Court.

4. The Applicants are ordered to pay jointly and severally the costs of the interlocutory application which was abandoned to the Respondents to that application.

[15] The costs orders above include, where applicable, the costs consequent upon the employment of three counsel.

LI VORSTER AJ