

IN THE NORTH GAUTENG HIGH COURT
(PRETORIA)

Case number: 17141/12

In the application for leave to intervene:

NATIONAL TREASURY Applicant

In re:

OPPOSITION TO URBAN TOLLING ALLIANCE First Applicant

SOUTH AFRICAN VEHICLE RENTING AND LEASING ASSOCIATION Second Applicant

QUADPARA ASSOCIATION OF SOUTH AFRICA Third Applicant

SOUTH AFRICAN NATIONAL CONSUMER UNION Fourth Applicant

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD First Respondent

THE MINISTER OF TRANSPORT REPUBLIC OF SOUTH AFRICA Second Respondent

THE MEC OF ROADS AND TRANSPORT, GAUTENG Third Respondent

THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS Fourth Respondent

DIRECTOR-GENERAL, DEPARTMENT OF
ENVIRONMENTAL AFFAIRS

Fifth Respondent

NATIONAL CONSUMER COMMISSION

Sixth Respondent

NOTICE OF MOTION

TAKE NOTICE that, at the commencement of the hearing of the main application on 24 April 2012, the above-mentioned applicant will make an application for an order in the following terms:

1. Authorising that this application be heard as a matter of urgency in terms of Rule 6(12)(b), and condoning any non-compliance with the Rules of this Honourable Court.
2. The Department of National Treasury ("Treasury") is granted leave to intervene as the seventh respondent in the main application.
3. For further or alternative relief.
4. The costs of the intervention application to be paid by such respondents as oppose it, jointly and severally; alternatively, to be reserved for later determination.

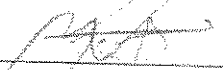
TAKE NOTICE FURTHER that the affidavit of ANDREW ROBERT DONALDSON will be used in support hereof.

STATE ATTORNEY
M BIKO
TEL: (021) 441 9200

TAKE NOTICE FURTHER that if you intend opposing this application, you are required to file notice of such opposition and any answering affidavit by no later than 17h00 on Friday 20 April 2012.

DATED AT CAPE TOWN ON THIS 18TH DAY OF APRIL 2012

STATE ATTORNEY

Per: 

M BIKO

Attorney for Applicant
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(Ref: 929/12/P2)

C/O THE STATE ATTORNEY
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0001

TO: THE REGISTRAR
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NATIONAL TREASURY

Applicant

In re:

OPPOSITION TO URBAN TOLLING ALLIANCE

First Applicant

SOUTH AFRICAN VEHICLE RENTING
AND LEASING ASSOCIATION

Second Applicant

QUADPARA ASSOCIATION OF SOUTH AFRICA

Third Applicant

SOUTH AFRICAN NATIONAL
CONSUMER UNION

Fourth Applicant

and

THE SOUTH AFRICAN NATIONAL ROADS
AGENCY LTD

First Respondent

THE MINISTER OF TRANSPORT
REPUBLIC OF SOUTH AFRICA

Second Respondent

THE MEC OF ROADS
AND TRANSPORT, GAUTENG

Third Respondent

THE MINISTER OF WATER
AND ENVIRONMENTAL AFFAIRS

Fourth Respondent

DIRECTOR-GENERAL, DEPARTMENT OF
ENVIRONMENTAL AFFAIRS

Fifth Respondent

NATIONAL CONSUMER COMMISSION

Sixth Respondent

TREASURY'S FOUNDING AFFIDAVIT

I, the undersigned,

ANDREW ROBERT DONALDSON,

do hereby make oath and say that:

1. I am the acting Director-General of the Department of National Treasury ("Treasury") and am authorised to bring this application.
2. The facts contained in this affidavit are true and correct and, save where the contrary appears, are within my knowledge. To the extent that I express matters of opinion regarding, in particular the application of public finance principles in South Africa, I believe that I am qualified to do so. I attach in this regard a *curriculum vitae*, marked "A", from which my academic qualifications and vocational experience in public finance are apparent.
3. Where I make legal submissions, I do so on the advice of my legal advisers.
4. The names of the parties are not accurately reflected in the headers to the applicants' papers. The correct descriptions are reflected above.



A. INTRODUCTION

5. This is an application to intervene in the urgent application to interdict the levying and collection of tolls on certain roads in the Gauteng Province. In Part B of the latter application, the applicants seek to review and set aside: (a) the declaration of those roads as toll roads, (b) the decision by the second respondent, the Minister of Transport, to declare the said roads toll roads, and (c) the decisions of the fourth and fifth respondents to grant certain environmental authorisations in respect of the above roads.

6. Treasury will, if admitted into these proceedings, oppose the relief sought by the applicants in both parts of their application. This affidavit, given the urgent circumstances in which Treasury has been compelled to deal with the matter, will however deal only with Part A. If necessary, further affidavits will be filed at a later stage to deal with Part B. There are three bases on which Treasury will, if admitted, oppose the application, namely that:

6.1. the urgency of the application is self-induced by the applicants;

6.2. there is no proper basis for the interdictory relief sought on an interim basis, pending a hearing of the main matter (Part B), and it would have serious consequences with regard to the sustainability of road infrastructure financing in particular and public finance more generally; and

6.3. as regards Part B, the application to review and set aside the impugned decisions in any event bears no reasonable prospect of success.

7. The application for interim relief was, quite clearly, considered and researched over a substantial period. Even the steps taken to constitute the first applicant, for this special purpose, took weeks. All this in relation to a matter where, on the applicants' own papers, Cabinet approved the Gauteng Freeway Improvement Project ("GFIP") nearly five years ago and its official launch was announced on 8 October 2007 (FA p 160 paras 92-93). The actual publication of toll tariffs, the applicants admit, took place more than fourteen months ago (FA p 178 para 147). As regards the applicants' attempt to call in aid public outcry and inconsistent public statements, on their own papers as long ago as 6 November 2011, the Department of Transport ("DOT") "issued a statement clarifying that the instruction to halt tolling ... did not include phase 1 of the GFIP" (FA p 183 para 173).
8. The applicants were clearly obliged to ensure that all necessary steps, such as constituting the first applicant, were accomplished at the very latest by December 2011, if they wished to restrain on an interim basis, before a court is able to grapple with the legal and factual issues raised by the review, the putting into operation of a massive road infrastructure financing system with material implications for the general public and State finances.
9. This is the more so when the applicants took time to prepare a founding affidavit running to some 166 pages and, with annexures, occupying two lever arch files. They must have anticipated a detailed response, one moreover raising factual disputes. SANRAL's answering affidavit runs to 312 pages (excluding annexures). In these circumstances, I cannot adequately deal with all the allegations touching upon the rights and interests of Treasury, and I will not seek at this stage to answer the allegations in the founding affidavit *ad seriatim*. I do not admit the allegations with



which I do not deal. I must respectfully reserve Treasury's right to deal with any matter with which it has not been able to deal in this affidavit.

10. I have read the affidavits filed on behalf of SANRAL and the second and third respondents. Their grounds of opposition to the application are supported and will not be repeated here.

B. TREASURY'S POSITION IN SUMMARY

(1) Urgency of the intervention application

11. The application for intervention is urgent on any approach. The application itself, I note, was only served on the respondents who were cited, on 26 March. I learnt of the application through the media at about this time. I immediately thereafter had discussions with colleagues within Treasury regarding the serious implications for the fiscus of any delay in the commencement of the GFIP toll collection system. Following consultation with the Director-General and the Minister of Finance, it was agreed that Treasury should seek to intervene. It was first possible to procure a set of the founding papers just before the commencement of the Easter weekend. Counsel were called on the morning of 11 April, a first telephonic consultation conducted on the afternoon of the same day, further telephonic consultations followed over the following two days, and a senior Treasury representative together with junior counsel instructed to attend the preliminary meeting convened by the Deputy Judge President in his chambers on Friday 13 April. The lengthy founding papers had to be copied, collated and dispatched to counsel. Thereafter the voluminous answering affidavits were also briefed to counsel.

15/4/01

12. In the meanwhile material relevant to the preparation of this affidavit was urgently investigated, and a first draft of this affidavit commenced during the weekend of 14/15 April. This was then emailed to senior counsel on the evening of 16 April, and settled during the course of 17 and early 18 April.
13. The urgency of this application is the result of the extremely late stage at which the applicants have seen fit to launch the main application, itself on a purported basis of urgency. I note that despite the very considerable fiscal and financial implications of the relief sought by the applicants, and the extended period of time since public announcement of the GFIP and the toll proposals, there has been no attempt on the part of the applicants to engage with Treasury on their concerns or proposed alternative financing arrangements. I submit that there has been no delay on the part of Treasury in seeking to intervene.

(2) Basis of intervention

14. Treasury seeks leave to intervene as a respondent, because on the applicants' own explicit allegations, it (as the Department of State – in fact the only Department of State explicitly required by the Constitution, in terms of section 216(1), to be constituted – mandated with the control of public finance) is directly and substantially affected by the relief sought. I expand upon this below.
15. Treasury is uniquely in the position not only to place before Court pertinent evidence regarding the effect of the interim relief sought. It also, on the applicants' own case (Record p 275 paras 450 and 451), has an interest quite separate and distinct from each of the six respondents cited as parties by the applicants. The potential effect on South

Africa's public finances of the relief sought is as particular as it is significant.

(3) No case made out for an interim interdict

16. I am advised that an interim interdict has been described as a drastic remedy, only to be allowed by the courts in circumstances which justify it. For the reasons developed below, Treasury contends that the applicants' dealing with the Part A relief is perfunctory as regards the facts (FA pp 270 to 276) and purely recitative as regards the legal requirements – even then, fundamentally misconceived in contending (on the skimpiest facts) for a mere apprehension “of harm” (FA p 271 para 432). Nowhere is any case of *irreparable* harm, arising from a period of a few weeks before the hearing of the Part B relief, even alleged, let alone made out on the facts.
17. In contrast, it will be shown, the interim relief sought is such as would have very serious public finance implications for South Africa. The balance of convenience, it will be shown, is overwhelmingly against the complete halt of the carefully-scheduled and long-planned initiation of tolling in respect of the GFIP on 30 April. The Court is asked in its discretion, in the light of the compelling public interest involved, to exercise its discretion against granting the relief the applicants so belatedly seek.

(4) Treasury's co-operation in achieving an expedited hearing of the main application

18. The applicants' attempt to press ahead for urgent relief is also to be considered in the light of a further fact. This is that, I am advised, the legal representatives of Treasury at the earliest stages (on the evening of Thursday 12 April and at the pre-hearing

meeting with the Deputy Judge President on Friday 13 April) conveyed through their colleagues acting for the first and second respondents that Treasury would do all things to achieve an expedited determination. The Deputy Judge President, I am advised, indicated that he could make a judge available for the purpose in May, but the applicants would not countenance any period in which tolling in respect of the GFIP was in operation, even if this was a matter of weeks.

19. I turn now to aspects of the above which require amplification.

C. TREASURY'S DIRECT AND SUBSTANTIAL INTEREST

20. Justifying the grant of the interim relief they seek, the applicants say at paragraph 450 (Record p 275) of their founding affidavit: "[i]n any event it is not clear that SANRAL will suffer great financial prejudice should e-tolling be interdicted." This is because:

"... [A]pparently the South African Government has guaranteed in relation to GFIP that should SANRAL not be able to comply with one month of its payment obligation, the Government will assume the whole debt on SANRAL's behalf." (para 451.1)

21. In effect the applicants contend that one organ of State will suffer no prejudice because the full burden of the prejudice is to be borne by the State, and hence ultimately the public. The illogic with respect stands revealed. Public finances stand to be exposed not only to the immediate financial harm associated with the proposed interim relief, but also to the irreparable reputational damage associated with the calling of guarantees associated with SANRAL debt. It is self-evident that, on the applicants' own understanding of the situation, Treasury is a necessary party to these proceedings and should therefore have been joined.

22. In this regard, it is necessary to deal more fully with the concern rightly noted at paragraph 11.8 of the answering affidavit for the second and third respondents. They say:
- “Any default by SANRAL of its obligations will therefore prejudice not only SANRAL but also the South African Government and may very well have negative consequences for the sovereign rating of the Country. Ratings Agencies have already raised concerns in this regard.”
23. Treasury is the State department whose responsibility it is to safeguard the country's finances. It is required by section 216(1) of the Constitution to ensure “transparency and expenditure control in each sphere of government.” Since SANRAL is a State-owned enterprise and in part dependent upon State funding, Treasury is the arm of government through which any funding of the GFIP would have to be made if toll-funding is interdicted.
24. In the context of this application, SANRAL's creditors may be expected to call up the guarantee by Treasury of the funding of GFIP if interim relief is granted. SANRAL, which is to fund its debt through toll collections, stands the risk of defaulting, in which case Treasury would have to take over the payment obligation. This, as I will explain later, would have material consequences for South Africa's standing as a secure and trusted borrower (quite apart from the ratings of SANRAL by credit agencies which, if downgraded, must adversely affect its own ability to raise finance and therefore compound the dependence on Treasury as ultimate guarantor). Of course were the Part B relief to be granted, the position is an *a fortiori* one.
25. For the above reasons, I submit that Treasury has a real and material interest in both parts of the application and ought therefore to be allowed to intervene in these

proceedings.

D. SELF-INDUCED URGENCY

26. The matter is not urgent, in the required sense, because the urgency is of the applicants' own making. Prayers 2 and 3 of Part A of the notice of motion seek to interdict the levying and collection of tolls in respect of the roads there identified, pending the determination of Part B. It is however immediately apparent that the applicants have been aware for significant periods of time of the various matters they attack under Part B, yet on their own papers have done nothing to prepare their application prior to 22 February 2012.

27. The relief in Part B seeks to set aside:

27.1. "[T]he declaration as continuous toll road and establishment of electronic toll points" the roads in respect of which the collection of tolls is sought to be interdicted in Part A.

But the declarations attacked in Part B have been known to the applicants since 28 March 2008 and 28 July 2008.

27.2. The second respondent's approval of SANRAL's application to make the above declarations.

But on the applicants' version (set out at paragraph 112 of the founding affidavit), this approval was granted between 14 December 2007 and 28 March

2008.

27.3. The environmental approvals by the fourth and/or fifth respondents.

But on the applicants' own version, these approvals were granted on 7 November 2007, 23 November 2007, 18 February 2008, and 19 February 2008.

28. It will be readily apparent that the applicants were aware as early as July 2008 that the relevant respondents had taken the decisions impugned in Part B of the notice of motion. This is particularly so because, on their own papers, they had known since July 2007 that Cabinet had taken the vital decision which, left unreversed as it has been, has made all the subsequent decisions an entirely predictable sequel (Record p 160 paras 93-94). No explanation is given for the failure to take all necessary preliminary steps for the application now brought. They therefore had sufficient time in which to prepare this application, so that it could be launched, at the latest, after the decision of 6 November 2011 (Record p 183 para 173).
29. The excuse that the first applicant had not been formed begs the question: the applicants in effect seek to rely on their own delay to explain their delay. There was no good reason why the first applicant should not have been constituted if not in 2008, then certainly in 2011. In any event, the excuse is insubstantial even in its own terms. The applicants seek to make their case on the facts pertaining to a handful of individuals. No reason is given why these, or other individual members of the first applicant, or the second applicant, or the third applicant, or the fourth applicant, could not have brought the application in their own names. Nor is any reason given why a

commercial alliance such as the second applicant, comprising multinational car-hire firms such as Avis and Europcar (Record p 273 para 438), did not prudently prepare such an application by November 2011, at the very latest.

- 30. The contrived basis on which it is contended that “harm” – explicitly not *irreparable*, but yet such as should halt forthwith the GFIP – is asserted is perhaps most graphically illustrated by the latter aspect. It is asserted that “some” of the members of the second applicant, including the two named multinationals, expect to incur what are termed “new basic costs” which are “in excess of R1 million per annum” for the administration of the e-toll. However, such information as I could obtain in the time available demonstrates the insignificance of this additional cost. For instance, I understand that Avis recently reported an operating profit of R911 million.
- 31. Even accepting the insubstantial reasons offered by the applicants for their prior failure to prepare the application, on their own showing they should at the very latest have brought it immediately upon the budget speech of 22 February 2012, which spelt out that tolling was indeed going ahead on 30 April 2012. The applicants however waited almost a month before issuing this application on 23 March 2012. They did not need a month to obtain a simple interdict. Indeed, they did not need to draft an application of such prolixity; they chose to do so. This might have been one of the reasons they took so long to launch the application. Or they chose to assemble their array of litigants, as a matter of legal or other strategy. Whatever the explanation, the delay is plainly of their own making.
- 32. For all the above reasons, I submit that the applicants have not shown that the matter is urgent in the sense required, I am advised, by this Court. Such urgency as there may

be is, I submit, self-created.

E. NO IRREPARABLE HARM

33. When regard is had to the interest sought to be protected by the interim interdict – namely, the asserted financial interest of certain Gauteng motorists – it is clear that there is no *irreparable* harm that the applicants will suffer if the interdict were refused. It is doubtless for that reason that the applicants do not even make the bare allegation (Record pp 271-273 paras 432-441) in dealing with what they term “harm”. If it is not that reason, then the applicants have simply brought the application on the mistaken premise that harm which is not shown, cogently on the facts, to be irreparable suffices to obtain the drastic relief they seek.
34. Quite apart from the failure of the applicants to plead and prove in their founding affidavit an essential element of their case (which I am advised may not be rectified by seeking belatedly to address the deficiency either by reference to the respondents’ affidavits, or in their own reply), the simple point is that the known facts indicate that no irreparable harm is to be suffered by the applicants between now and the final hearing which can take place in a matter of weeks. If, in due course, this Court finds that the levying and collection of tolls are invalid, those who have paid will in law be entitled to claim reimbursement from SANRAL. There is no allegation in the founding affidavit that SANRAL would in that case not be in a position to meet any repayment claims properly made against it, nor is there any reason for such an assumption.
35. Accordingly, I submit that whatever harm certain Gauteng motorists may suffer, it is

not irreparable. Where in an application the harm alleged by the applicants is, as here, reparable, I am advised and submit that interim relief must be refused.

F. NO *PRIMA FACIE* CASE MADE OUT

36. There are particular considerations, pertinent also to Treasury's application to intervene, particular to issues of public finance why the applicants do not even make out a *prima facie* case for the relief they seek on an interim basis.
37. The applicants, in essence, complain that the declaration of toll roads by SANRAL and the approval thereof by the second respondent were so unreasonable that no decision-maker could have taken such decisions (page 141 para 29.2). A number of reasons are then advanced in support of this ground, but the main ones are that:
- 37.1. "the expense of levying and collecting toll in the manner proposed is so disproportionate to the costs sought to be recovered that it cannot reasonably be expected of users of the proposed toll network to bear such costs" (page 141-142, para 29.2.1);
- 37.2. it will be impossible to enforce the road tolling scheme (page 142, para 29.2.2);
- 37.3. SANRAL and/or the second respondent failed to apply their minds to the social impact assessments before them (page 142, para 29.2.6).
38. In elaborating upon the "disproportionate" ground of review, the applicants rely on, and attack, the GFIP Steering Committee Report annexed as "NA12" to SANRAL's

answering affidavit. Their critique of the report is at pages 199 to 210 of the founding affidavit. I will not here deal with everything the applicants say in this regard: others are better placed to do so. I shall only concentrate on those aspects of the critique which touch upon Treasury's position.

39. The applicants say (at page 207 para 243) that there is the option of a "ring-fenced" fuel levy which, instead of the user-pays principle adopted by GFIP, could be used to recover SANRAL's costs. The applicants state that the objection to this, so far as Treasury is concerned, is that it is not Treasury's policy to "ring-fence" revenue.
40. I am reluctantly obliged to point out what is obvious – the "ring-fencing" or not of revenue has no determinate bearing on the question how required revenue is to be *raised*. Irrespective of whether the fuel levy or any other revenue sources is "ring-fenced" – and Treasury does indeed have in-principle reservations about the ring-fencing of general revenue sources – the GFIP is a major investment programme that generates benefits to its users, and it follows from ordinary public finance principles that the investment and ongoing operating and maintenance costs of the GFIP should, through some form of benefit charge, be recovered from GFIP beneficiaries. The application of these principles is authorised by law, has been carefully considered as a matter of policy by Treasury, and has been applied by Cabinet through its decision of July 2007.
41. The user-pays principle is not contended to be an exclusive or dispositive principle of public finance. Its application however in the present context is one which was considered in depth and ultimately adopted by Treasury, after consideration of conceivable alternatives. Its application in the present context, as already noted, was a



matter taken to Cabinet itself. Its approval by Cabinet involved important and fundamental policy choices. The rejection of a ring-fenced fuel levy as an option in the present context is based upon sound fiscal and revenue principles. The reasons why Treasury rejected a ring-fenced fuel levy and adopted the user-pays principle in relation to GFIP are the following:

41.1. GFIP will provide a higher-than-standard infrastructure. It is in general undesirable to fund such facilities, whose costs are necessarily high, out of the general revenue fund. This is especially so in a developing country where claims on the general revenue fund comprise a very wide range of social, economic, developmental and public service obligations, and available funds are unavoidably limited in relation to these needs.

41.2. Ring-fencing revenue collection weakens the integrity of the budget process by reducing transparency and inefficiency in resource allocation. Decisions about allocating resources must be made annually in the budget. Ring-fencing compromises this essentially democratic means of spending revenue collected from citizens. That there may be particular instances of ring-fenced revenue (as the applicants allege at page 208 para 245.1), often for historic reasons, is no principled basis for initiating or extending another category of ring-fenced revenue collection, thereby exacerbating the transparency and allocative efficiency concerns. Ultimately, moreover, it is for policy-makers, elected by and accountable to those they represent, to choose between various forms of revenue collection. What the applicants in effect seek is a directive by the Court, cutting across a decision by Cabinet of several years' standing and a sequence of ministerial and other decisions, regarding what the Court may

consider to be a more efficient and transparent way of collecting revenue and paying for infrastructure. I am advised that for reasons to be argued such an intervention in public finance would be both unprecedented and in fundamental breach of the division of powers.

- 41.3. As a matter of important principle in public finance in South Africa, citizens who enjoy higher-than-standard infrastructure ought not, as a matter of policy, be subsidized by others who do not. That there may sometimes be regional cross-subsidisation is no reason for extending it here. In any event, it is no basis for asking a court to second-guess what is essentially a polycentric decision.
- 41.4. A ring-fenced fuel levy would break the link between use and payment and would place a strain on the ability of the fiscus to address the maintenance backlogs in respect of the road system, currently estimated at R149.4 billion.
- 41.5. Where the user-pays principle was abandoned (for example in the Nigerian electricity sector), there tended to be a deterioration of infrastructure, which in turn imposes high costs on the economy.
- 41.6. The user-pays principle has other extra-revenue advantages such as the prevention of proliferation of such externalities as congestion and urban sprawl. Tolls are therefore more than merely a revenue-raising mechanism.
- 41.7. The highest income earning quintile in Gauteng will be responsible for more than 94% of the total toll fees paid. Combined with the second highest income

earning quintile, the number rises to 99%. This is perfectly consistent with the government's programme of poverty alleviation.

41.8. Having the ring-fenced fuel levy confined to Gauteng (as has sometimes been suggested) might at first sight appear equitable. But it will lead to tax avoidance, with drivers in peripheral areas (and those in the freight industry) fuelling in surrounding provinces. In any event, this Court is not in a position to assess the relative merits of a localised fuel levy.

42. It follows that no *prima facie* right has been made out by the applicants in respect of the central plank of the applicants' attack on the GFIP – the alleged irrationality and unreasonableness of its funding mechanism.

G. BALANCE OF CONVENIENCE

43. It follows from what has already been stated that the potential prejudice to the public interest and to Treasury if the interim interdict is granted, is serious.

44. The total debt incurred by SANRAL to fund GFIP in the first phase is R20 billion. SANRAL procured the funding from the money markets by issuing bonds through its Domestic Medium Term Note. These are effectively repayable loans. A total of R19 billion of that debt in respect of the first phase has been guaranteed by the South African government acting through Treasury. Under the Note, should SANRAL fail to implement GFIP, that is, should it fail to collect tolls from 30 April 2012, that will be an event of default triggering the immediate repayment of the entire loan. In practice, this will mean that the guarantee stands to be called upon.

45. The consequences for South Africa in that event could be very serious. The credit rating of SANRAL in the money markets in the first instance will be severely affected, since it raises money by issuing bonds. The credit rating of South Africa, and therefore the government's ability to raise sovereign debt, would be in jeopardy, since governments raise money by selling government bonds. If a country cannot raise funds because it has been downgraded, it follows that it cannot meet some of its commitments, which in South Africa's case include such pressing needs as poverty alleviation, and reduction of unemployment.
46. The seriousness of these risks may be gauged by the recent downgrading of SANRAL by Moody's, a credit rating agency. I attach as annexure "B" a report by Moody's, dated 29 February 2012, in which the rationale for the downgrading is precisely the uncertainty regarding the launch on 30 April 2012:

"Lower than anticipated toll income will significantly delay SANRAL's return to historically strong financials and a moderate gearing position. We expect SANRAL to face the challenge to recover the delay of the GFIP operations and enforce toll collection, supported by a new legislation to be introduced by the central government.

The abovementioned pressures are mitigated by the recent allocation of ZAR5.8 billion from the national government designed to partially compensate for the reduction in e-toll fees and to ensure sufficient funding to its road agency over the medium term. Notwithstanding this budget allocation, the lack of clarity in the government's transport policy strategy and opposition against the expansion of the toll road network in the country raises concerns on the company's future business model."


47. It is clear from this that the continued uncertainty over the ability of SANRAL to collect tolls – exacerbated in large part by the opposition exemplified by this application – will jeopardise not only the overall outlook for an entity as essential as SANRAL but for the country's credit rating.

48. In contrast, the applicants have attached affidavits of a few members of the public who, it is said, will suffer harm if the interdict is not granted. As already noted, it is not alleged that the harm is irreparable. Nor on the face of the sketchy facts advanced is it apparent that the operation of GFIP for a matter of weeks before a hearing of Part B in the course of May would have that effect on any one of these individuals. It is not to belittle their circumstances to say that the harm that the whole country stands to suffer is immensely greater if the interdict is granted. It is also a fact that they, together with other South Africans, will have to pay anyway (directly or indirectly) even if the interdict succeeds. This is because a way of funding GFIP will have to be found, and in the absence of the toll collection system this can only be by resort to the national revenue fund, with the attendant higher tax burden and re-allocation of funds which would be necessary in consequence. The poverty alleviation programmes and infrastructure maintenance to which I referred earlier stand in consequence to be affected, should the toll collection system be rejected.
49. As against this, as already noted, if after the determination of Part B it were to transpire that the tolls should not have been exacted, there is no impediment to the reimbursement of those who have paid by the relevant agency.
50. It follows from what I have said above that the balance of convenience overwhelmingly favours the operation of the GFIP tolling system for the interim period pending this Court being able to make a full and proper determination of the important issues raised by the Part B relief.

H. CONCLUSION


51. It is in my submission clear that Treasury has made out a case to be admitted into these proceedings. Second, I respectfully submit that the matter is not urgent, and the applicants have not made out a case for an interim interdict.

WHEREFORE I pray that Treasury be admitted into these proceedings and that the urgent application be dismissed.



ANDREW ROBERT DONALDSON

The deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Cape Town on this the 18th day of April 2012, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

HENDRIK ALBERTUS BEUKES
 Advokaat van die Hooggeregshof
 van Suid-Afrika.
 Kommissaris van Ede uit Hoofde van
 Reg 2477 van 18 Nov 1984.

1STE VLOER
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CURRICULUM VITAE

ANDREW ROBERT DONALDSON

Date of Birth: 28-2-1958 *Nationality:* South African

Current employment:
Deputy Director-General: Public Finance, National Treasury, Pretoria

Telephone: 012-315 5727 082 441 5987

QUALIFICATIONS:

- 1978 B.A. (University of Stellenbosch)
(Economics, Political Science, Political Philosophy)
- 1981 B.A. (Hons) in Economics (UNISA)
- 1985 M.A. in Economics (UNISA) (with distinction)
(dissertation: *Aspects of the Economics of Education in Transkei*)
- 1985 M.Phil. in Economics (Cambridge University)
(Econometrics, Financial Organisation, Reappraisal of Keynesian
Economics, Philosophical Issues in Economics)

EMPLOYMENT

- Jul 81-Jun 1983 Lecturer in Economics, University of Transkei
- Jul 83-Jun 1984 Part-time lecturer, Department of Economics and Institute for
Management and Development Studies, University of Transkei
- Occasional consultant to the Department of Finance and the
National Planning Committee, Umtata
- Aug 85-Sep 1986 Head, Transkei Employment Creation Secretariat
- Oct 86-Jan 1987 Project Leader: Demand Study of Technical and Vocational
Education in Transkei, based at Institute for Management and
Development Studies, Umtata
- Feb 87-Jun 1993 Lecturer in Economics, Rhodes University, Grahamstown
- Jul 93-June 95 Deputy Director, Unit for Fiscal Analysis, Department of Finance

- July 95-Nov 1996 Director, Sectoral Advice, Department of Finance
- Dec 96-Dec 2000 Chief Director, Financial Planning: Budget Office, Department of Finance
- Jan 2001-2004 Deputy Director-General: Budget Office, National Treasury
- 2004-present Deputy Director-General: Public Finance, National Treasury

Current responsibilities:

The Public Finance division of National Treasury is responsible for sectoral policy advice, expenditure monitoring and budget planning, and a project management support unit. Published outputs include contributions to the annual *Budget Review*, the *Estimates of National Expenditure*, the *Intergovernmental Fiscal Review* and the *Medium Term Budget Policy Statement*.

Teaching experience:

Post-graduate: Macroeconomics, Public Finance, Economics of Education and Health, History of Economic Thought and Project and Programme Analysis.

Under-graduate: Macroeconomics, Money and Banking, Introductory Microeconomics, Aspects of the South African Economy, Economic History, Comparative Economic Systems.

OTHER ACTIVITIES:

- Coordinator, UNITRA Development Forum seminar series and UNITRA Social Studies seminar series, 1982-1984.
- Examiner and Moderator, Std 8 Economics, Transkei Department of Education, 1982-1983.
- Member of Transkei Industries Training Board, 1986.
- Member of the Board of the Transkei Appropriate Technology Unit, 1987-1989.
- Chairperson, Grahamstown Rural Committee, 1989-1993.
- Treasurer, Grahamstown Initiative Committee, 1988-1990.
- External Examiner, Economics Department of Fort Hare University (1990-1992); Economics Department of the University of the Western Cape (1991-1992); Economics Department of the University of the Witwatersrand (1994-1996).
- Part-time lecturer in the Economics of Education and Health and in Public Finance, Department of Economics, University of the Witwatersrand, 1994-1997.

Handwritten initials 'NB' and a signature 'M.A.' in the bottom right corner of the page.

Editorial adviser: *Development Southern Africa* (1995-1997).

Research and editorial assistance: first and third interim reports of the *Commission of Inquiry into the Tax Structure of South Africa*, 1994-1995.

Member, Committee of Inquiry into a National Health Insurance System, 1995.

Member of the drafting team of the *Growth, Employment and Redistribution* macroeconomic strategy, 1996.

Lecturer on World Bank International Training Programme on *Budgetary Processes and Public Expenditure Management* (2000).

Co-chair, Steering Committee of Public Entities Governance Review Project (2003-2005)

Member of the Board of Directors, South African National Roads Agency (1998-2009).

Member of the Board of Trustees, Government Employees' Pension Fund (2005-2009).

Member of the Interdepartmental Task Team on Social Security and Retirement Reform (2007-present).

SELECTED PUBLICATIONS AND RESEARCH PAPERS:

The Demand for Technical and Vocational Education in Transkei: Final Report (commissioned for a Development Bank of Southern Africa pre-investment study project). IMDS, University of Transkei, 1987.

(with P Wakelin) *Demographic and Economic Characteristics of the Resident Population*: Report 2.2 of the 1985 Transkei Sample Census. IMDS, University of Transkei, 1987.

(with P Wakelin) *Demographic and Economic Characteristics of External Migrants*: Report 2.3 of the 1985 Transkei Sample Census. IMDS, University of Transkei, 1987.

(with P Wakelin) *Demographic and Economic Characteristics of Internal Migrants*: Report 2.4 of the 1985 Transkei Sample Census. IMDS, University of Transkei, 1987.

Fertility and Mortality Estimates: Report 2.5 of the 1985 Transkei Sample Census. IMDS, University of Transkei, 1988.

Towards Progressive Education: Five Awkward Features of the Future. In *Financing of Education*. Education Policy Unit, University of the Witwatersrand, 1989.

Transkei's Development Strategy: an interim report. In *Development in Southern Africa*: Prodder's Annual 1989-90. Human Sciences Research Council, 1989.

The Organization of Higher Education in South Africa. In *Restructuring South African tertiary education* (eds. Nadia Hartman and Ian Scott). UDUSA, University of Cape Town, 1990.

- Competition and co-operation in the education and health sectors: non-racial services in a democratic South Africa. In *Development, employment and the new South Africa* (eds. E P Beukes, et al.). Development Society of Southern Africa, Innesdale, 1991.
- The Current Costs of a Prosperous Future. *Reality*, Vol. 23 Nos 1 and 2, January/March 1991.
- Growth, Congestion and Efficiency: problems in the restructuring of social services. *Stellenbosch Economic Project: Working Documents on the Post-Apartheid Economy No 2*. Centre for Contextual Hermeneutics, University of Stellenbosch, 1991.
- Financing Education. In *Education Alternatives* (eds. R G McGregor and A McGregor). Juta, Cape Town, 1992.
- Restructuring the Social Services. In *Transforming the Economy: policy options for South Africa* (eds. G Howe and P le Roux). Indicator Project SA, University of Natal, with Institute for Social Development, University of the Western Cape, 1992.
- Content, Quality and Flexibility: the economics of education system change. *Spotlight* Number 5/92, South African Institute of Race Relations, Johannesburg, 1992.
- (with A D Roux) Development and the South African Financial Sector. In *Wealth or Poverty? Critical Choices for South Africa* (ed. Robert Schrire). Oxford U P, Cape Town, 1992.
- Restructuring Social Services. In *Wealth or Poverty? Critical Choices for South Africa* (ed. Robert Schrire). Oxford U P, Cape Town, 1992.
- Dependent Transkei: The Economics of a Labour Reserve and a Caretaker Regime. In *Undoing Independence: Regionalism and the Reincorporation of Transkei into South Africa* (eds. A Donaldson, J Segar and R Southall). Journal of Contemporary African Studies, Vol. 11, No. 2, 1992.
- (with R Southall and J Segar) Transkei Beyond the Transition: Towards Good Government or Back to the Frontier? In *Undoing Independence: Regionalism and the Reincorporation of Transkei into South Africa* (eds. A Donaldson, J Segar and R Southall). Journal of Contemporary African Studies, Vol. 11, No. 2, 1992.
- Basic Needs and Social Policy: the role of the state in education, health and welfare. In *State and Market in Post-Apartheid South Africa* (eds. M Lipton and C Simkins). Wits Univ. Press, Johannesburg, 1993.
- Education Planning, Systems and Structure*. Report of the NEPI Education Planning, Systems and Structure Research Group. Cape Town: Oxford Univ. Press/NECC, 1993.
- (with Frederick Fourie, Krige Siebrits and Erwin Obermeyer) *Towards a Fiscal Programme for South Africa*. Discussion Paper, Unit for Fiscal Analysis, Department of Finance. August 1993.
- Government-funded labour-based programmes*. Submission to the Fiscal and Economic Focus Group of an NEF project investigating a Public Works Programme for South Africa. April 1994.
- Learning by Labour-intensive doing: a note on the economics of technological change through public works programmes*. Submission to the Fiscal and Economic Focus Group of an NEF project investigating a Public Works Programme for South Africa. April 1994.
- (with André Roux) Education, employment and income of black South Africans in 1985. *Development Southern Africa*, Vol. 11 No. 1. February 1994.
- Higher Education Policy and Financing Mechanisms*. Paper presented at a workshop on Transformation Processes in South African Higher Education. January 1995.

- Social development and macroeconomic policy. *Development Southern Africa*, Vol 14, No. 3, 1997.
- Financing Infrastructure Development: some long-range considerations*. Opening address: International Symposium on Public-Private Partnerships for 2000 and Beyond. November 1999.
- The Medium Term Expenditure Framework. *IPFA Journal*, May 2000.
- Reconstructing Education: reflections on post-apartheid planning, systems and structure. *Implementing Education Policies: the South African Experience* (eds. Y Sahed and J Jansen) Cape Town: UCT Press 2001.
- Fiscal policy, social development and capital markets*. Paper presented at a Bureau for Economic Research conference on the future performance of the SA economy. June 2001.
- South Africa's growth and transformation: a macro perspective*. Presentation to JP Morgan conference on growth and transformation in South Africa. May 2003.
- Growth and empowerment: accelerating economic development, 2005-2014*. Discussion document prepared for a National Treasury project on economic growth. July 2005.
- Education, Growth and the 'New' Public Finance*. Paper presented at a conference on Investment Choices for Education in Africa. Johannesburg. September 2006. Published in Graeme Bloch, Brahm Fleisch, Linda Chisholm and Mahlubi Mabizela (eds.), *Investment Choices for South African Education*, Wits University Press 2008.
- Agency, information and organisation in the public sector*. Paper presented at a seminar hosted by the Department of Economics, University of Stellenbosch. October 2006.
- Aspects of the New Public Finance. *OECD Journal on Budgeting*. Vol. 6 No. 2. 2006.
- Income security, retirement reform and social development*. Background paper for Conference of the Principal Officers Association – Focus 2007: Securing our pensioners future today – June 2007. (Originally prepared for Bureau for Economic Research Conference, Sandton, May 2007).
- South Africa's Employment Dynamics and Policy Responses*. Paper presented at a workshop on employment – global and country perspectives, New York University. September 2011.

"B"

MOODY'S INVESTORS SERVICE

Rating Action: Moody's downgrades South African National Roads Agency to Baa1/Aa3.za; negative outlook

Global Credit Research - 29 Feb 2012

Johannesburg, February 29, 2012 -- Moody's Investors Service has today downgraded the long-term ratings of the South African National Roads Agency Limited (SANRAL) to Baa1 (global scale, local and foreign currency) and to Aa3.za (South African national scale rating), from A3 and Aa2.za, respectively. The outlook on the ratings is negative.

Today's rating action concludes the review for downgrade initiated on 19 January 2012.

RATINGS RATIONALE

The rating action follows the recent decision of the South African government to further reduce the toll fees on SANRAL's biggest toll road project (the Gauteng Freeway Improvement Project, GFIP). "The downgrade reflects our view of the medium-term fiscal tensions associated with lower-than-anticipated toll income from the GFIP, coupled with the higher operational risks of e-toll revenue collection and the uncertainties on SANRAL's future business model," says Kenneth Morare, Moody's lead analyst for SANRAL.

Moody's notes that SANRAL incurred ZAR20 billion in debt (of which approximately 50% is guaranteed by the South African government) to finance the GFIP project and the e-toll revenues are essential to service the debt and absorb concomitant operating costs. This debt issue contributed the most to the rapid increase in SANRAL's debt stock to its current level of ZAR39.7 billion (2012 FYE estimates) and exerted significant pressure on operating margins and cash flows during the project's implementation phase in 2009-2011. Public protests delayed the implementation of tolling operations -- originally scheduled to start in June 2011 -- which caused financial shortfall to SANRAL and delayed the registration procedures of vehicles.

Lower than anticipated toll income will significantly delay SANRAL's return to historically strong financials and a moderate gearing position. We expect SANRAL to face the challenge to recover the delay of the GFIP operations and enforce toll collection, supported by a new legislation to be introduced by the central government.

The abovementioned pressures are mitigated by the recent allocation of ZAR5.8 billion from the national government designed to partially compensate for the reduction in e-toll fees and to ensure sufficient funding to its road agency over the medium term. Notwithstanding this budget allocation, the lack of clarity in the government's transport policy strategy and opposition against the expansion of the toll road network in the country raises concerns on the company's future business model.

WHAT COULD CHANGE THE RATING UP/DOWN

The negative rating outlook reflects Moody's concerns regarding (i) South Africa's deteriorating operating environment, as reflected by the negative outlook on South Africa's A3 government bond ratings; and (ii) the abovementioned concerns regarding SANRAL's operational risks and business model.

SANRAL's ratings could come under pressure in the event of (i) a downgrade of South Africa's government bond rating, and/or (ii) failure of SANRAL's management to deal with increased operational risks and adjust for lower toll income, resulting in a material deterioration of the company's financial metrics and cash flows.

Albeit unlikely, stabilization or upgrade of SANRAL's ratings will require stabilization or upgrade of South Africa's government bond ratings, as well as evidence of SANRAL's capacity to manage the anticipated operational risks arising from the GFIP project and maintain strong cash flows.

SANRAL is wholly owned by the Republic of South Africa, with the Ministry of Transport representing the government as the sole shareholder. The company is accountable to the central government, which established SANRAL's mandate to develop, finance and maintain the national road infrastructure in South Africa.

Moody's National Scale Ratings (NSRs) are intended as relative measures of creditworthiness among debt issues and issuers within a country, enabling market participants to better differentiate relative risks. NSRs differ from Moody's global scale ratings in that they are not globally comparable with the full universe of Moody's rated entities, but only with NSRs for other rated debt issues and issuers within the same country. NSRs are designated by a ".nn" country modifier signifying the relevant country, as in ".za" for South Africa. For further information on Moody's approach to national scale ratings, please refer to Moody's Rating Implementation Guidance published in March 2011 entitled "Mapping Moody's National Scale Ratings to Global Scale Ratings."

The principal methodology used in rating SANRAL was Government-Related Issuers: Methodology Update published in July

2010. Please see the Credit Policy page on www.moody.com for a copy of these methodologies.

REGULATORY DISCLOSURES

Although this credit rating has been issued in a non-EU country which has not been recognized as endorsable at this date, this credit rating is deemed "EU qualified by extension" and may still be used by financial institutions for regulatory purposes until 30 April 2012. Further information on the EU endorsement status and on the Moody's office that has issued a particular Credit Rating is available on www.moody.com.

For ratings issued on a program, series or category/class of debt, this announcement provides relevant regulatory disclosures in relation to each rating of a subsequently issued bond or note of the same series or category/class of debt or pursuant to a program for which the ratings are derived exclusively from existing ratings in accordance with Moody's rating practices. For ratings issued on a support provider, this announcement provides relevant regulatory disclosures in relation to the rating action on the support provider and in relation to each particular rating action for securities that derive their credit ratings from the support provider's credit rating. For provisional ratings, this announcement provides relevant regulatory disclosures in relation to the provisional rating assigned, and in relation to a definitive rating that may be assigned subsequent to the final issuance of the debt, in each case where the transaction structure and terms have not changed prior to the assignment of the definitive rating in a manner that would have affected the rating. For further information please see the ratings tab on the issuer/entity page for the respective issuer on www.moody.com.

Information sources used to prepare the rating are the following : parties involved in the ratings, parties not involved in the ratings, public information, and confidential and proprietary Moody's Investors Service information.

Moody's considers the quality of information available on the rated entity, obligation or credit satisfactory for the purposes of issuing a rating.

Moody's adopts all necessary measures so that the information it uses in assigning a rating is of sufficient quality and from sources Moody's considers to be reliable including, when appropriate, independent third-party sources. However, Moody's is not an auditor and cannot in every instance independently verify or validate information received in the rating process.

Please see the ratings disclosure page on www.moody.com for general disclosure on potential conflicts of interests.

Please see the ratings disclosure page on www.moody.com for information on (A) MCO's major shareholders (above 5%) and for (B) further information regarding certain affiliations that may exist between directors of MCO and rated entities as well as (C) the names of entities that hold ratings from MIS that have also publicly reported to the SEC an ownership interest in MCO of more than 5%. A member of the board of directors of this rated entity may also be a member of the board of directors of a shareholder of Moody's Corporation; however, Moody's has not independently verified this matter.

Please see Moody's Rating Symbols and Definitions on the Rating Process page on www.moody.com for further information on the meaning of each rating category and the definition of default and recovery.

Please see ratings tab on the issuer/entity page on www.moody.com for the last rating action and the rating history.

The date on which some ratings were first released goes back to a time before Moody's ratings were fully digitized and accurate data may not be available. Consequently, Moody's provides a date that it believes is the most reliable and accurate based on the information that is available to it. Please see the ratings disclosure page on our website www.moody.com for further information.

Please see www.moody.com for any updates on changes to the lead rating analyst and to the Moody's legal entity that has issued the rating.

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