2440

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No: 17141/12

In the matter between:

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, DEPARTMENT OF TRANSPORT	Second Respondent
THE MEC, DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG	Third Respondent
THE MINISTER, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fourth Respondent
THE DIRECTOR-GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fifth Respondent
NATIONAL CONSUMER COMMISSION	Sixth Respondent
NATIONAL TREASURY	Seventh Respondent

FILING SHEET: SUPPLEMENTARY FOUNDING AFFIDAVIT

Herewith presented for service and filing:

SUPPLEMENTARY FOUNDING AFFIDAVIT

SIGNED at JOHANNESBURG on this the 16th day of JULY 2012

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TO:
The Registrar of the above Honourable Court, **PRETORIA**

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Accepted
Without Prejudice
WERKSMANS

Received a copy hereof on this the 17 day of JULY 2012

For: First Respondent's Attorneys

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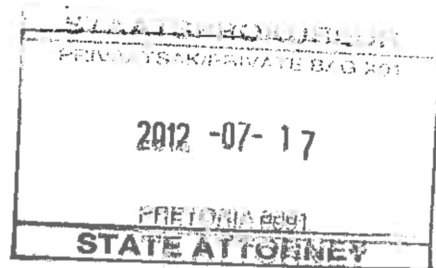

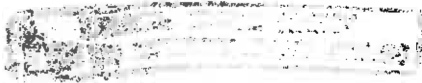

Received a copy hereof on this
the ___ day of JULY 2012

10.40
For: Second, Third, Fourth &
Fifth Respondents' Attorneys

AND TO:
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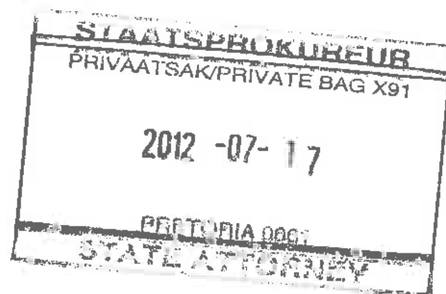

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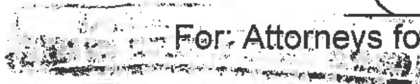

For: Attorneys for the Seventh Respondent

2443

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No: 17141/2012

In the matter between:

OPPOSITION TO URBAN TOLLING ALLIANCE	First Applicant
SOUTH AFRICAN VEHICLE RENTING AND LEASING ASSOCIATION	Second Applicant
QUAD PARA ASSOCIATION OF SOUTH AFRICA	Third Applicant
SOUTH AFRICAN NATIONAL CONSUMER UNION	Fourth Applicant

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	First Respondent
DEPARTMENT OF TRANSPORT REPUBLIC OF SOUTH AFRICA	Second Respondent
THE MEC, DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG	Third Respondent
THE MINISTER, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fourth Respondent
THE DIRECTOR GENERAL: DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Fifth Respondent
NATIONAL CONSUMER COMMISSION	Sixth Respondent
NATIONAL TREASURY	Seventh Respondent

SUPPLEMENTARY FOUNDING AFFIDAVIT IN TERMS OF RULE 53(4)

I, the undersigned,

LEOPOLD JEAN JOSEPH PAUWEN

do hereby make oath and state that:

1. I am a member of the First Applicant and general manager of the Second Applicant, currently residing at 17a Mervyn Road, Glenhazel.

2. I am duly authorised to depose to this supplementary founding affidavit on behalf of the First to Fourth Applicants.

3. The facts contained herein are, to the best of my knowledge and belief, both true and correct and are, unless otherwise stated or the contrary appears from the context, within my own knowledge. Where I rely on information conveyed to me by others, I believe such information to be correct and have no reason to believe otherwise. Where I make submissions of a legal nature herein, I do so on the advice of the Applicants' legal representatives.

4. For the sake of convenience, I shall refer to the parties in this affidavit as I did in the founding and replying affidavits. I shall use the same abbreviations as those explained in the founding affidavit.

THE PURPOSE AND STRUCTURE OF THIS AFFIDAVIT

5. This is a supplementary founding affidavit filed in terms of Rule 53(4).

6. The Applicants will file simultaneously herewith an amended notice of motion, which has been amended in terms of rule 53(4) of this Court's rules. A copy of the amended notice of motion is attached hereto as "SA1". For the convenience of the parties and this Court, I attach both a clean, final version of the amended notice of motion, as well as a version on which the changes to the original notice of motion have been tracked. This will enable the parties and this Court to see easily the amendments to the notice of motion which have been made. I explain the basis of the amendment in more detail below.

The record

7. After the determination of the application for the relief sought in Part A on 28 April 2012, the following records were filed by SANRAL, the Minister of Transport and the Minister of Environmental Affairs:

   7.1 The record filed on 16 May 2012 by SANRAL was contained in 16 volumes and was paginated from pages 1 to 5280.

7.2 The record filed on 1 June at 13h31 by the Minister of Transport and the Minister of Environmental Affairs was contained in two volumes and was paginated from pages 1 to 950.

7.3 The record filed on 1 June at 13h31 by the Minister of Environmental Affairs (incorporating what was before his delegee, the Director General) was contained in three volumes and was paginated from pages 951 to 3082.

7.4 The supplementary record filed on 12 June 2012 at 15h38 by the Minister of Transport was contained in one volume of unnumbered pages.

7.5 "*Further Requested Documents*" produced by SANRAL on 12 July 2012 supplementing documents that were filed on 16 May 2012 in incomplete form or which had been omitted from SANRAL's record despite being relevant. I will refer to this file and its contents below.

8. It is not feasible for me to attach extracts from the record to this supplementary founding affidavit. I am advised that the entire record will be placed before this Honourable Court in a separate bundle for purposes of the hearing of Part B.

9. I shall refer to the record as follows:

9.1 The records filed by the state attorney on behalf of the Ministers of Transport and Environmental Affairs are largely duplicated in the record filed by SANRAL ("the SANRAL record"). I shall therefore refer primarily to the documents contained in the SANRAL record, and shall identify particular documents with reference to the separate pagination of that record.

9.2 Because it is at times instructive to draw a distinction between what has been filed by SANRAL and what was actually before the Minister of Transport or the Minister of Environmental Affairs and his delegee, the Director General, I shall also at times refer to:

9.2.1 the record and supplementary record filed by the Minister of Transport ("the Transport Minister's record"); and

9.2.2 the record filed by the Minister of Environmental Affairs ("the Environmental Minister's record").

9.3 I shall refer to all of the above-mentioned records collectively as "the record".

9.4 In order to distinguish references to the record from references to the affidavits already filed, I shall refer to the latter as "the pleadings".

10. The Applicants stand by all of the review grounds pleaded in their founding affidavits. Having perused the record, the Applicants now wish to supplement those review grounds (as they are entitled to do in terms of Rule 53(4)).

11. I am advised that the record confirms and strengthens the grounds set out in the founding affidavit in support of the reviewing and setting aside of

    11.1 the toll declarations referred to in paragraph 1.1 to 1.7 of the Notice of Motion ("the toll declarations");

    11.2 the approvals of the Minister of Transport corresponding to the aforesaid toll declarations referred to in paragraph 2 of the Notice of Motion ("the Minister's approvals"); and

    11.3 the environmental authorisations referred to in paragraph 3.1 to 3.7 of the Notice of Motion ("the environmental authorisations").

12. I shall indicate below in what respects the record supports and bolsters the review grounds pleaded by the Applicants in their founding affidavit.

13. I am advised that the record also gives rise to several new grounds for the reviewing and setting aside of the toll declarations, the Minister's approvals and

the environmental authorisations. I shall set out these new review grounds below.

New documents and information

14. Apart from the record,the Applicants have, since the hearing of the application for the relief sought in Part A, come into possession of new documents and information that I shall make reference to below.

15. The most significant of these is an extract from the contract concluded between SANRAL and Electronic Toll Collection Joint Venture ("the ETC Contract"). The Honourable Court will recall that, at the hearing of Part A, SANRAL was invited to disclose this contract in the answering affidavit in order that the actual cost of e-tolling could be before the Court. Astonishingly, SANRAL declined to do so.

16. I shall indicate below that the ETC Contract confirms and strengthens several of the grounds of review set out in the founding affidavit.

The structure of this supplementary founding affidavit

17. My affidavit will be organised as follows:

17.1 I begin by supplementing the grounds of review. In so doing, I deal with the manner in which the record buttresses existing grounds and gives

rise to new grounds. I shall deal firstly with the toll declarations and the Minister's approvals, and thereafter with the environmental authorisations.

17.2 I then set out further facts in support of the granting of condonation for the delay in launching the application for review under PAJA.

THE RECORD IS DEFECTIVE

18. Before turning to deal with the supplementary review grounds, it is necessary to state at the outset that the SANRAL record is incomplete.

19. On reading the SANRAL record, the legal representatives of the Applicants identified:

19.1 a number of documents in the record in which sections or pages (often those sections apparently dealing with SANRAL's funding proposals) had been omitted;

19.2 a number of documents that were obviously relevant and were referred to in documents contained in the record, but that had been omitted from the record.

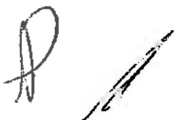
20. On 22 June 2012, the Applicants' attorneys addressed a letter to SANRAL's attorneys of record, Werksmans, requiring the production of the above. I attach a copy of the letter dated 22 June 2012 hereto as "SA2".

21. The Applicants' attorneys simultaneously requested the production of the remaining parts of the contract between SANRAL and ETC JV as well as the toll-operator tender documentation. This was relevant to this application in order to determine:

    21.1 the correctness of the allegations by SANRAL in the pleadings concerning the disproportionate cost of tolling; as well as

    21.2 the correctness and reliability of the new evidence submitted on affidavit by SANRAL in the application for leave to appeal to which I refer to below.

22. SANRAL's attorneys replied on the same day indicating that the documents or parts of documents that the Applicants had found to be missing from the record would be requested from SANRAL and produced in due course. SANRAL's attorneys required the Applicants' attorneys to justify the relevance of the ETC contract and related tender documentation. I attach a copy of the Werksmans letter dated 22 June 2012 hereto as "SA3".



23. The Applicants' attorney furnished a comprehensive explanation of the relevance of the ETC contract and related tender documentation in a letter dated 27 June 2012 which I attach hereto as "SA4".

24. Notwithstanding the explanation which demonstrates the relevance of the ETC contract and related tender documentation to anticipated issues in the proceedings, SANRAL has refused to provide such documentation. It communicated its stance in a letter dated 29 June 2012, attached as "SA5".

25. Moreover, notwithstanding the indication that the documents or parts of documents identified to be missing from the record would be delivered and the awareness that such documents were required by the Applicants as a matter of urgency by 27 June 2012, SANRAL's attorneys have to date failed to produce all of them.

26. On 12 July 2012, SANRAL's attorneys delivered a file containing some of the documents requested. Unfortunately, some of the documents produced were plainly not the documents requested:

    26.1 The final page of the 3 page briefing notes accompanying SANRAL's letter of 3 August 2005 to the Transport Minister (page 428 to 430 of the SANRAL record) was not produced. Instead, SANRAL has produced an altered document in response which I attach as "SA6". The altered

nature of the document appears from the numbering "*1 of 2*" and "*2 of 2*" instead of "*1 of 3*" and "*2 of 3*", the presence of the letters "*P.T.O.*" at the bottom of the new document in comparison to the document in the SANRAL record, as well as some differences in content.

26.2 The document produced in response to the request for the proposal "*presented to Cabinet in October 2006*" referred to in the Cabinet Memorandum on page 1842 of the record is the presentation by the Transport Minister to Cabinet in 2007, which appears at pages 1838 to 1840 of the SANRAL record and is marked "*July 2007*";

26.3 The document produced in response to the request for the "*feedback document*" of "*Gautrans and the municipalities*" referred to in the minutes of the Gauteng Network Integration Committee on 25 November 2005 at page 530 of the SANRAL record is a document dated June 2006, namely the 2006 proposal at page 629ff of the SANRAL record.

27. SANRAL also failed to produce two documents alleging these were not in SANRAL's possession, namely the documents referred to in paragraph 2.3 and 2.5 of the Applicants' attorneys' letter dated 22 June 2012 referred to above.

28. It is highly suspicious that SANRAL alleges it has no copy of the "*Main Agreement*" since:

    28.1 this agreement between SANRAL and the Gauteng Provincial Government which is not contained in the SANRAL record is referred to on page 3656 of the SANRAL record in a follow up agreement between the same parties, namely the "*Transfer of Road and Memorandum of Agreement*" dated 2 April 2008 which is in the record; and

    28.2 according to Sibusiso Buthelezi, the Head of the Department of Public Transport, Roads and Works at the time (as to which see pages 3201 to 3203 of the SANRAL record) in the document I attach as "SA7", this agreement contains detail on how SANRAL and the provincial government planned to share revenue received from tolling and *inter alia* impermissibly use such revenue on projects other than the maintenance, upgrading and improvement of the toll roads themselves.

29. The failure to produce the correct documents, whether by means of the giving of the wrong documents or the failure to produce the correct documents at all, has rendered the record incomplete.

30. Although the record is defective, the Applicants have been advised to file this supplementary founding affidavit with a full reservation of their rights:

30.1 SANRAL and the other Respondents have applied to the Constitutional Court as a matter of urgency for leave to appeal against the grant of the interim order of this Honourable Court in Part A. They have done so *inter alia* on the basis that SANRAL and Treasury will suffer irreparable harm because the review will take considerable time to finalise. The application for leave to appeal has been brought under Constitutional Court Case No. 38/12 ("the Constitutional Court leave to appeal").

30.2 In the circumstances, in order to avoid the undue delay of the hearing of the review and in order to prevent the Applicants from being prejudiced in the Constitutional Court leave to appeal, the Applicants have filed this supplementary affidavit without having sight of the documentation that SANRAL is unjustifiably withholding.

30.3 The Applicants reserve the right to supplement this affidavit if and when the documentation presently being withheld by SANRAL is produced, whether voluntarily or by order of this Honourable Court.

THE TARIFFS NOTICE

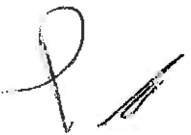
31. After the present application was launched on 23 March 2012, three notices were published in the Government Gazette in an attempt to create a legal infrastructure for the imposition of e-tolling on the GFIP roads:

    31.1 On 13 April 2012, Notice 310 was published in the Government Gazette setting the tariffs to be paid on the GFIP roads ("the Tariffs Notice"). A copy of the Tariffs Notice is annexed marked "SA8".

    31.2 On 18 April 2012, Notice 320 entitled "Conditions of Toll" was published in the Government Gazette ("the Conditions Notice"). A copy of the Conditions Notice is annexed marked "SA9".

    31.3 On 18 April 2012, the Transport Minister published draft regulations regarding proposed exemptions from e-tolling on the GFIP roads in Notice 338 of 2012 ("the draft Exemption Regulations"). A copy of the draft Exemption Regulations is annexed marked "SA10".

32. Since none of these documents had been published at the time when the application was launched, the Applicants could obviously not be expected to have had regard to them in their founding papers. The founding papers did



however anticipate that it would be necessary for the Tariffs Notice to be published at least 14 days in advance of the commencement of tolling (see founding affidavit paragraph 191 page 187 and notice of motion paragraph B4 page 10).

33. However on 21 April 2012, following the filing of these notices,the Applicants applied for leave to amend their notice of motion *inter alia* so as to insert a prayer into Part B seeking the review and setting aside of the Tariffs Notice. At the same time, the Applicants applied for leave to file a supplementary affidavit setting out their grounds for challenging the Tariffs Notice.

34. The Respondents opposed both applications on the basis that they would require additional time to deal with these issues.

35. Prinsloo J dismissed both applications on the basis that the Respondents would require additional time to deal with the new issues.

36. In the course of opposing both applications, the Respondents stated in argument that the Applicants would in due course be entitled in terms of Uniform Rule of Court 53 to amend their notice of motion so as to challenge the Tariffs Notice.

37. In the light of this invitation, it had indeed been the Applicants' intention to impugn the Tariffs Notice when they supplemented their founding papers in

terms of Uniform Rule of Court 53(4). Surprisingly, however, the Tariffs Notice was withdrawn after the High Court gave its judgment in the interim relief application. This occurred on 31 May 2012, when the Transport Minister published Notice 451 of 2012 withdrawing the Tariffs Notice with immediate effect. A copy of Notice 451 of 2012 is attached as "SA11".

38. On 5 June 2012, SANRAL also withdrew the Conditions Notice. It did so in terms of Government Notice 438, a copy of which is attached as "SA12".

39. The withdrawal of the Tariffs Notice and the Conditions Notice means that there is currently no legal infrastructure in place to provide for e-tolling. Moreover, it means that the Transport Minister has in effect manufactured a situation in which there is no Tariffs Notice that can be challenged when the Applicants exercise their rights under Rule 53(4).

40. In their application for leave to appeal to the Constitutional Court against the judgment of Prinsloo J, the present Respondents stated that "before tolling can recommence [sic], a new notice will be issued under section 27(3) of the SANRAL Act, which will stipulate the toll payable and the date from which it will be payable" (para 92). The Applicants place on record that, as and when the new tariffs notice is published by the Transport Minister, they will (if so advised) apply for leave to amend their notice of motion and to supplement their founding papers so as to challenge the new notice.

THE TOLL DECLARATIONS AND THE MINISTER'S APPROVALS ARE IRREGULAR BECAUSE E-TOLLING IS UNWORKABLE

41. Section 27(1)(b) of the SANRAL Act provides that SANRAL may levy and collect a toll for the driving or use of any vehicle on a toll road, "which will be payable at a toll plaza by the person so driving or using the vehicle, or at any other place subject to the conditions that the Agency may determine and so make known" (**emphasis added**). The important point for present purposes is that the toll is payable by the person "driving or using the vehicle". It is not payable by the owner of the vehicle (unless he or she also happens to be the person driving or using the vehicle at the relevant time).

42. Section 27(1)(b) applies to all tolls, whether they are collected electronically or at a physical toll plaza. It means that, when a car drives under an e-toll plaza, the person "driving or using" the vehicle will be liable to pay the toll. This will be the driver (or the passenger), without regard to whether he or she also happens to be the registered owner of the vehicle. In other words, the owner of the car is not liable to pay the toll if he or she is not driving or using the car on that occasion. It follows that SANRAL will have to recover the e-toll from the person who was "driving or using" the vehicle, even if he or she is not the registered owner of the vehicle.

43. The imposition of liability to pay tolls on the person "driving or using the vehicle" creates few difficulties where the toll is paid at a physical toll plaza. However, it creates insuperable difficulties in the case of e-tolling because SANRAL simply has no way of identifying the person who was "driving or using the vehicle" in circumstances where that vehicle does not come to a halt. At best for SANRAL, all that it may be able to access is the identity of the registered owner of the vehicle. This was made clear in the memorandum that was adopted by the SANRAL board when it resolved to approach the Transport Minister in order to have the GFIP declared as toll roads:

> *"If a particular vehicle does not have a have a transponder, then the Back Office Personnel will attempt to identify the registered owner of the vehicle by using the National Traffic Information System (eNATIS) which houses the national vehicle registration database. If the owner of the vehicle is identified by means of eNATIS, the toll road operating company will send the vehicle owner an account and perform various actions to attempt to achieve payment of the toll."* (SANRAL record page 1419 and 1420) (**emphasis added**).

44. The problem is obvious: knowing the registered owner of the vehicle will not assist SANRAL in identifying the person "driving or using the vehicle" in order to exact toll.

45. Moreover, section 73(1) of the National Road Traffic Act 93 of 1996 does not assist SANRAL in such circumstances. It provides as follows:

> *"Where in any prosecution <u>in terms of the common law relating to the driving of a vehicle on a public road, or in terms of this Act,</u> it is necessary to prove who was the driver of such vehicle, it shall be presumed, in the absence of evidence to the contrary, that such vehicle was driven by the owner thereof."*
>
> (**emphasis added**)

I am advised that this presumption would not apply where liability to pay tolls in terms of section 27(5) of the SANRAL Act is in issue.

46. In short, the entire system of e-tolling is unworkable because the registered owner of the vehicle is the centrepiece around which the system is built, but liability is imposed by the SANRAL Act on the person who happens to be "driving or using" the vehicle. When the person "driving or using" the motor vehicle is not the registered owner and does not pay tolls voluntarily, SANRAL has no way of ascertaining the identity of the person liable to pay the toll. It therefore has no way of requiring that person to pay e-tolls.

47. The record suggests that SANRAL was alive to this problem:

47.1 On 7 December 2006, Mr Alli on behalf of SANRAL addressed a letter to the Transport Minister (page 1175 of SANRAL record). Mr Alli stated as follows (SANRAL record page 1176):

> *"Since traditional toll collection methods are unsuitable for this type of road network, a free flowing tolling system (a component of the intelligent transport system) – otherwise known as electronic toll collection – will be utilised. This may require amendments to the SANRAL and Road Traffic Acts. The identification of the amendments, if any, to the respective Acts is underway. The results of which will guide us to request your office to pilot the legislative amendments through Parliament."* **(emphasis added)**

47.2 On 15 March 2007, Mr Alli addressed a further letter to the Transport Minister (page 1217 of SANRAL record). The letter stated that there were various teams working on e-tolling, one of which was dealing with "legal requirements for collection of tolls and enforcement for non-payment of tolls" (SANRAL record page 1219).

47.3 In April 2007, SANRAL prepared a PowerPoint presentation entitled "Gauteng Freeway Improvement Project: Feedback and Progress" (page 1280ff of SANRAL record). Under the heading "ORT Concepts:

Non-payment", the presentation stated as follows (SANRAL record page 1328):

"Include non-payment of toll as offence in terms of AARTO act".

Under the heading "Project Programme", the presentation stated as follows (SANRAL record page 1400):

"Legislation changes – if required: August 2007".

47.4 On 24 May 2007, Mr Alli addressed a memorandum to the Board of SANRAL seeking approval for the strategy of e-tolling in respect of the GFIP (SANRAL record page 1402). The memorandum explained the operation of the e-toll system as follows (SANRAL record page 1420):

"If the owner of the vehicle is identified by means of eNATIS, the toll road operating company will send <u>the vehicle owner</u> an account and perform various actions to attempt to achieve payment of the toll.

<u>It is the intention that the non-payment of toll should be classified as an infringement in terms of the Administrative Adjudication of Road Traffic Offences Act, Act no 46 of 1998, also known as the AARTO</u>

Act. It is also planned to make payment of all Gauteng tolls a prerequisite for the annual renewal of the licence of the vehicle." **(emphasis added)**

47.5 On 13 November 2007, a presentation was made to the SANRAL Board (page 2501ff of the SANRAL record). Under the heading "Functions of VPC [i.e. Violation Processing Centre]", the following was stated (SANRAL record page 2506): *"Initiate AARTO or other Legal Processes"*. This was followed by the following rhetorical question (SANRAL record page 2508):

"Will AARTO be in place in time for ORT?"

48. Notwithstanding SANRAL's apparent awareness of the problem, the record contains no evidence to suggest that SANRAL took any steps to put in place whatever legislative amendments were considered necessary to render e-tolling a viable system.

49. On the contrary, in his answering affidavit in Part A, Mr Alli continued to adopt the following position (para 309.6 at page 1053 of the pleadings, with emphasis added):

"In relation to the issuing of summonses and legal notices, the current process for conducting these activities exists throughout the country in

relation to road traffic users. <u>The application of these principles to the e-tolling system is similar and there are therefore no anticipated logistical difficulties that will cause the system to become impractical</u>."

50. This statement ignores the fact that SANRAL will be required to claim from the person driving or using the vehicle, rather than the registered owner, in order to recover e-tolls. Mr Alli showed a similar lack of appreciation of the position when he stated in his answering affidavit in Part A that "the vehicle renting and leasing industry dealt with the issue of the imposition of road penalties and fines <u>and there is no reason why such a similar process should not be adopted in relation to the recovery of tolls incurred by these drivers while using a rented vehicle</u>" (para 310.3 at page 1054 of the pleadings).

51. These fundamental difficulties were, however, appreciated by the drafters of the Report of the GFIP Steering Committee:

    51.1 Although SANRAL purported to annex a copy of this Report to its answering affidavit in Part A (Annexure NA12 at page 1516ff of the pleadings), the concluding section headed "Recommendations" (para 7 on page 1589 of the pleadings) has apparently been redacted. I call upon SANRAL to explain how it came about that this section was redacted. Should SANRAL decline to offer an explanation, I will ask this Honourable Court to draw an inference that SANRAL deliberately

redacted the section because it contains material that is adverse to SANRAL's case.

51.2 Fortunately, the missing section appears in the version of the Report annexed to the second and third respondents answering affidavit in Part A (at pages 1912 to 1916 of the pleadings). This missing section identified the need for legislation to be enacted or for Regulations to be made dealing with "enforcement and recovery of tolls". It then concluded with the following warning (page 1915 of the pleadings):

> *"Failure to do will place SANRAL at great risk of being subject to valid legal challenges from many angles and being unable to effectively implement and enforce tolling."*

51.3 It will be obvious from what I have already stated that this warning has not been heeded by SANRAL.

52. By virtue of what is stated above, I submit that the Transport Minister's decision to approve the declaration of the toll roads and SANRAL's decision to declare the toll-roads were arbitrary and irrational (within the meaning of section 6(2)(e)(vi) and section 6(2)(h) of PAJA) because e-tolling (to their knowledge) was unworkable. This is one of the reasons why enforcement is practically impossible (as alleged in paragraphs 250 to 275 of the founding affidavit). For these reasons, the decision to approve and declare the toll roads also amounts

to a violation of section 25(1) of the Constitution. The imposition of tolls and fines in terms of an irrational and unworkable system constitutes an arbitrary, irrational and unreasonable deprivation of the property of those subjected to the system. Further legal argument to this effect will be advanced at the hearing of the matter.

53. It would be no response for SANRAL to suggest that the necessary legislative amendments may still be put in place, because SANRAL and the Minister were required to satisfy themselves that the system of e-tolling could be rendered workable and enforceable *at the time when the relevant decisions were made*. Unless they satisfied themselves regarding the content of the legislative amendments and that they could be introduced in time for the commencement of e-tolling, the decision to declare the toll-roads was irrational. This is particularly so because the record suggests that what was contemplated was a legislative amendment that would allow for the recovery of e-tolls in the same way as the recovery of traffic fines. However, SANRAL's own estimate was that there is "currently 10%-20% recovery of traffic fines in SA" (SANRAL record page 1329). If SANRAL envisaged a legislative amendment that would allow for 10% to 20% of e-tolls to be collected, this would in and of itself have been irrational and unreasonable.

THE TOLL DECLARATIONS AND THE MINISTER'S APPROVALS ARE IRREGULAR BECAUSE APPROVAL WAS SUBJECT TO CONDITIONS

54. In his answering affidavit in Part A, the Transport Minister stated that SANRAL's application in terms of section 27 of the SANRAL Act "was approved by the then Minister of Transport, Mr J Radebe, on 11 February 2008" (paragraph 15 pleadings page 1747). Curiously, the Transport Minister did not find it necessary to annex the letter of approval referred to.

55. The first occasion on which the Applicants obtained sight of the Transport Minister's letter of approval, was when they were furnished with the record. The letter may be found at page 3543 of SANRAL record. It stated as follows (I have inserted the letters in square brackets for ease of reference):

"Attached please receive the signed document giving approval for the declaration of the Gauteng Freeway Improvement Project: N1, N3, N4, N12: proposed declaration of portions of the national road network in Gauteng as toll road sections and the proposed establishment of electronic toll points.

My approval is granted with the requirement that SANRAL achieves the following:

[a] *Whilst the declaration excludes Provincial Roads, the GFIS must be implemented as an integrated open road tolling project. Therefore for further discussions with the Gauteng Province on the inclusion of the Provincial routes in the scheme and the financing and management model for the GFIS.*

[b] *Possible discounts on the Toll Tariffs to various qualifying users.*

[c] *The development of appropriate toll payment methods as well as toll payment enforcement strategies.*

[d] *Managing of potential diversion to the supporting network.*

I look forward to official project commencement."

56. I point out that the attachments to this letter (SANRAL record pages 3545 to 3556) were signed by the Minister but were not completed. Be that as it may, the covering letter makes it plain that the Transport Minister did not give *unconditional* approval for the declaration of the toll roads. On the contrary, he gave approval on condition that ("*with the requirement that*") SANRAL achieved compliance with [a] to [d].

57. I am advised that the effect of this qualification was that the Transport Minister's approval was in effect made subject to a suspensive condition. The suspensive condition was that SANRAL must have "achieved compliance" with [a] to [d] by the time that the toll roads were declared, failing which his approval would be rendered void.

58. The fact of the matter is that conditions [a] to [d] had not been satisfied at the time when SANRAL purported to declare the toll roads. I say so for the following reasons:

58.1 *As regards [a]:* the record contains no evidence to suggest that SANRAL had "further discussions with the Gauteng Province on the inclusion of the Provincial routes in the scheme and the financing and management model for the GFIS".

58.2 *As regards [b]:*

58.2.1 At the time when the toll roads were declared, there were obviously no discounts or discount structures in place. SANRAL had not made any recommendation the Transport Minister, as envisaged by section 27(3)(a) of the SANRAL Act.

58.2.2 In addition, there is no setting out in the record of what the discounts would be and who would constitute qualifying users.

Again, SANRAL had not made any recommendation the Transport Minister, as envisaged by section 27(3)(a) of the SANRAL Act.

58.2.3 Insofar as discounts may be said to encompass exemptions, the Minister of Transport has stated repeatedly that public transport will be exempted from the obligation to pay e-tolls. SANRAL confirmed as much in its answering affidavit in Part A, when it stated that "it has already been indicated by the Minister of Transport that these exemptions will include exemptions granted to qualifying public transport operators" (para 9.6.6 at page 786 of the pleadings).

58.2.4 However, the power to grant such an exemption vests in SANRAL rather than the Minister of Transport. It is a power that is sourced in section 27(1)(c) of the SANRAL Act.

58.2.5 The draft Exemption Regulations were published on 18 April 2012. They were made in terms of section 58(1)(1)(d) of the SANRAL Act, which provides that the Minister of Transport may make regulations "prescribing a form to be used in connection with any claim for compensation or in connection with any application, authorisation, approval, permission or exemption provided for in this Act, or prescribing the

information to be furnished and procedure to be followed in connection with any of those matters".

58.2.6 The draft Exemption Regulations refer to "the exemption granted by [SANRAL] to vehicles which provide public transport services and emergency vehicles on the [GFIP toll roads]", and provide "for information to be furnished and also the procedure to be followed by the applicant in connection with such exemption". The meaning of this is not apparent to me. It cannot mean that the draft Regulations purport to provide for the exemption itself, because the Minister of Transport has no power in law to provide for an exemption – only SANRAL has that power. If the draft Regulations purport to indicate that SANRAL has granted the exemption in a form that has not been made known to the public, then such an exemption would have no legal force because it has not been published in the Gazette in the manner required by section 27(2) of the SANRAL Act.

58.2.7 In any event, it appears that SANRAL has *not* granted any exemption. This was the very point made by SANRAL's counsel in their heads of argument in Part A, when they stated as follows (paragraph 59):

> *"In the first place, SANRAL is not required to exempt anyone from the obligation to pay tolls. In any event, it is certainly not required to exempt anyone who the Minister of Transport happens to think should be exempted. SANRAL is an independent organ of state which is required to exercise its discretion whether to grant an exemption under section 27(1)(c) of PAJA fairly and reasonably. It cannot be bound by the opinions or dictates of the Minister of Transport when exercising its powers under section 27(1)(c)."*

58.2.8 It follows that no exemptions were in place when the toll roads were declared. Even today, no exemptions have been granted.

58.3 *As regards [c]:* the record contains no evidence to suggest that SANRAL engaged in "the development of appropriate toll payment methods as well as toll payment enforcement strategies". On the contrary, the record indicates that SANRAL has taken no steps to have the necessary legislative infrastructure put in place to make e-tolling feasible. I refer to what I have stated above in this regard.

58.4 *As regards [d]*: the record contains no evidence to suggest that SANRAL engaged in measures to manage "potential diversion to the supporting network".

58.5 In any event, since the Minister gave his consent subject to specific conditions, one would expect to see in the record a document from SANRAL informing the Minister that his conditions had been satisfied, and allowing him an opportunity to consider whether they had indeed been addressed, before SANRAL declared the roads as toll roads. There is no such document.

59. Since conditions [a] to [d] had not been satisfied at the time when SANRAL purported to declare the toll roads, the Transport Minister's approval was rendered a nullity. The result of this was that the Transport Minister had not given approval for the declaration of the toll roads, in the manner required by section 27(1)(a) of the SANRAL Act, at the moment when the toll roads were declared. The declaration of the toll roads was therefore irregular, because a jurisdictional fact was absent. On this ground as well, SANRAL's decision to declare the toll roads should be reviewed and set aside in terms of section 6(2)(b) of PAJA.

60. I have submitted above that the only plausible interpretation is that the Transport Minister's approval was given subject to a suspensive condition that

SANRAL must have "achieved compliance" with [a] to [d] by the time that the toll roads were declared. If the Transport Minister in fact purported to give his approval subject to a suspensive condition SANRAL that must have "achieved compliance" with [a] to [d] at some unspecified time *after the toll roads were declared*, this would have been unlawful. It would mean that, at the time when the toll roads were declared by SANRAL, the Minister's approval would have been inchoate because it was not yet known whether the conditions in [a] to [d] would be fulfilled. Such a form of inchoate consent would have been incompetent, because section 27(1)(a) of the SANRAL Act requires the Minister's consent to exist as a jurisdictional fact at the moment when the toll roads are declared. On this ground as well, SANRAL's decision to declare the toll roads would be liable to be reviewed and set aside in terms of section 6(2)(b) of PAJA.

THE TOLL DECLARATIONS AND THE MINISTER'S APPROVALS ARE IRREGULAR BECAUSE THE PUBLIC PARTICIPATION PROCESS WAS DEFECTIVE

61. In their founding affidavit, the Applicants allege that the Minister's approvals and the toll declarations should be reviewed and set aside because of the

failure of SANRAL to comply with the obligation imposed by sections 27(1) and 27(4) of the Act read with sections 3 and 4 of PAJA.

62. This ground of review is dealt with in the founding affidavit from paragraph 194 page 187 to paragraph 205.7 page 199 of the pleadings. In summary, it is there alleged that:

62.1 SANRAL failed to give proper notice of its intent to toll Gauteng's freeways in that the content of the notice omitted material information on the expected cost of tolling;

62.2 SANRAL failed to publish the notices of intent to toll in a manner that effectively brought such notice to the attention of the public, and in particular the road users of the proposed toll road network would be materially affected by the tolling of the road;

62.3 SANRAL failed to bring the notice of intent to toll to the attention of significant individual stakeholders reasonably identifiable to SANRAL who would be materially affected by the tolling of the roads; and

62.4 SANRAL gave insufficient time to the public in which to respond to the notice of intent to toll, only allowing the statutory minimum of 30 days to the public.

63. The record buttresses this review ground, since it gives insight into one of the reasons why SANRAL failed to comply with the requirements of section 27 of the SANRAL Act read with PAJA, namely the need to upgrade Gauteng's freeways in time for the 2010 FIFA World Cup. The record also makes it evident that SANRAL:

    63.1 had no real intention of ensuring that a public participation process that was suited to the magnitude and impact of the proposed GFIP e-toll scheme was conducted;

    63.2 was not open to being dissuaded from its resolve to implement GFIP as a state implemented toll road.

64. Moreover, the record shows that the Minister of Transport failed to comply with the mandatory requirements of section 27(4) of the SANRAL Act and was also not open to refusing approval for the toll declarations.

65. I elaborate below upon the reasons for these submissions.

Early references to the 2010 World Cup

66. On 3 August 2005, SANRAL directed a letter to the Minister of Transport Radebe enclosing brief notes in preparation for the presentation to be made by SANRAL to the Minister of Transport the following day:

66.1 The letter and briefing notes are at pages 428 to 430 of the SANRAL record. They are incomplete. The final page of the briefing notes dealing with the proposed funding mechanism is one of the documents SANRAL is presently withholding.

66.2 On page 2 of the briefing notes, as part of the motivation for the proposal, the Minister was informed as follows:

"*The hosting of the 2010 FIFA Soccer World Cup in South Africa, will get a major boost from the Gauteng Freeway Project. The bid includes promises of major investments in roads, airports and transport systems. Without a fully developed freeway system in Gauteng, transport will become a nightmare when World Cup trips are added to the already congested freeway system. Furthermore, road based public transport utilizing the freeway network will operate ineffectively.*"

66.3 The presentation by SANRAL to the Minister of Transport on 4 August 2005 is contained in the SANRAL record commencing on page 431. The section of the presentation setting out the funding proposal was originally omitted from the record by SANRAL but later produced on 12 July 2012 on the Applicants' request and is attached hereto as "SA13". In the presentation which makes SANRAL's plans to toll Gauteng's freeways (to the exclusion of any other funding method) as early as August 2005 very clear, SANRAL repeats the passage on the 2010 World Cup quoted above.

67. The next relevant document in the record is the presentation by SANRAL on its business plan from 2006 to 2009 to the Minister of Transport in November 2005:

67.1 On typed page 33 of the presentation (page 540 of the SANRAL record) the following appears:

"***Project Development Status***

Toll Feasibility: Commence

Environmental Impact Assessment: Has not commenced

Economic Impact Assessment: New studies are required

Declaration of Intent: Not commenced

Way forward

We are in the process to obtain political acceptance from all spheres of government for the project. The environmental process will be a major stumbling block, if this project needs to be completed or partially completed for the FIFA 2010 Soccer World Cup. If some of the sections are not improved by then, there will be severe traffic congestion by 2010."

67.2 The document is important as it provides evidence that the 2010 World Cup soon started to become a reason to expedite the project at the expense of legal processes.

68. As is set out in the founding affidavit, when SANRAL ultimately applied for environmental authorisation it did not inform the Minister of Environmental Affairs and the Director-General of the fact that Gauteng's freeways were being upgraded for the purposes of the establishment of a toll road scheme. This meant that the truncated Basic Assessment Report process was followed and there was no proper environmental impact assessment of *inter alia* the socio-economic impact of the activity for which authorisation was sought. There was also no comprehensive proper public participation process required for such assessment.

The 2006 Proposal

69. The theme of upgrading in time for World Cup 2010 next appears in June 2006, in the joint proposal of SANRAL and the Department of Transport (commencing on page 629 of the SANRAL record). This document has been identified in the pleadings thus far as "the 2006 proposal". I shall continue to refer to it as such.

70. In the Executive Summary (page 631 of the SANRAL record), the following is stated:

> *"The proposed scheme however faces some challenges relating to the implementation schedule that should be seriously considered and discussed to ensure that they get addressed before they become serious impediments to scheme success. These include…the FIFA World Cup 2010^{tm} deadline."*

71. In the same 2006 proposal (page 636 of the SANRAL record), the theme is taken up again:

> *"Lack of sufficient road space may also cast a shadow over South Africa's ability to successfully host the World's premier event, the FIFA World Cup, in 2010."*

72. And again later in the proposal (at page 654 of the SANRAL record) the drafters of that document emphasise the following:

> "*The timeframes of the freeway improvement scheme would also have to bear in mind that the freeways can't be a 'construction site' during the Confederation Cup in 2009 or the World Cup in 2010.*"

73. I am advised and I respectfully submit that the 2006 proposal shows that upgrading in time for the 2010 World Cup was fast changing from a theme to an imperative.

74. The 2010 World Cup imperative worked its way into the terms and conditions on which contractors for the project were engaged:

 74.1 The tender document for consulting engineer services "*for the proposed Gauteng freeway upgrading and expansion project: request for proposals for traffic modelling, toll strategy and toll feasibility studies*", dated July 2006, made prospective tenderers aware that they would be working to a World Cup deadline. In the "*Description of the Project*" (page 768 of the SANRAL record), the tender document spells out that to the prospective advisors on toll feasibility that:

"[t]he future growth of Gauteng is dependent on a road network that provides the required level of service, promotes the use of public transport and meets the immediate obligations of the 2010 FIFA Soccer World Cup." **(emphasis added)**

74.2 The tender document for the environmental assessment practitioner dated November 2006 (beginning at page 1070 of the SANRAL record) is to similar effect. In the terms of reference (beginning on page 1156 of the SANRAL record), SANRAL makes it clear that environmental practitioners submitting tenders

"should clearly set out the proposed time schedule and indicate any uncertainties associated with the process. It should be noted that for the initial upgrading of routes, only a 12 month period is available to obtain environmental approvals in order to commence with improvements timeously with the view of the 2010 FIFA world cup."

SANRAL's letter to the Minister of Transport dated 7 December 2006

75. The 2010 World Cup imperative, and the diluting effect it threatened to have on the public participation processes that SANRAL was obliged by the SANRAL

Act to undertake prior to approaching the Minister for approval in terms of section 27 of the SANRAL Act, is manifest in a letter addressed by SANRAL to the Minister of Transport at the end of 2006.

76. On 7 December 2006, SANRAL delivered a "*Progress Report*" to the Minister of Transport, in the form of the letter which is contained at pages 1175 to 1177 of the SANRAL record.

77. The dominant and pervasive nature of the 2010 World Cup imperative in Mr Alli's communication with the Minister of Transport is clear.

78. After first referring to the support of the Gauteng MEC for GFIP "*as a means to bring the project expeditiously to fruition to meet the challenges of congestion and economic growth in Gauteng*" and "*to ensure the delivery of the required road infrastructure for the operation of public transport for the FIFA 2010 World Cup*", Mr Alli goes on to inform the Minister of Transport as follows:

> "*Although it is an extremely tight programme, it is planned to complete the design process by the end of 2007, after which the contractor tender process may commence early in 2008. Technically, it is achievable to commence with the construction for the upgrading of the freeway network in time to have the critical pieces of the freeway improvements completed before the FIFA*

2010 soccer world cup. However, there are some challenges we face with respect to:

- *National road declaration of provincial routes that form part of the scheme,*
- *The toll declaration process,*
- *Legislative process, and*
- *Environmental approvals, etc.*

but we are quietly confident that given the importance of the road network to mobility and access, there won't be any undue delays.

In order for SANRAL to commence with construction of the scheme as a toll financed scheme, the network should be declared a toll network. In terms of the SANRAL Act, roads may only be declared as toll roads, if these are declared national roads. SANRAL must commence with the toll road declaration process, at latest August 2007, in order to have this public participation process completed, and the proposed scheme declared as a toll road, by the end of 2007."

79. It is clear from the aforegoing that SANRAL had begun to view the public participation process and other legislative processes as an obstacle to the progress of the Gauteng freeway improvement in time for the 2010 World Cup.

It is apparent, in particular from the last-quoted paragraph, that SANRAL had begun to let the imperatives of the infrastructure being ready for the 2010 World Cup dictate the nature of the mandatory public participation process prescribed by section 27 of the SANRAL Act read with PAJA.

80. I am advised that it should have been the reverse. Given the magnitude of the scheme and the hundreds and thousands of road users in Gauteng that would be materially impacted by the tolling of Gauteng's freeways on a daily basis long after the 2010 World Cup had come and gone, SANRAL and the Minister of Transport should have insisted that the public participation process not be rushed but be conducted as fully and comprehensively as possible.

81. Instead, the imperative of being ready on time for the 2010 World Cup meant that public participation process would be of the shortest possible duration. Time would not be allowed for the public to be properly informed and properly heard.

82. The "*tight*" schedule referred to had also been mentioned by SANRAL in its traffic cluster meeting held with various contractors on the project the previous day. The minutes of the meeting start at pages 1179 to 1180 of the SANRAL record. The schedule appears on the first page.

83. The further progress report by SANRAL to the Minister of Transport on 15 March 2007 also repeats the sentiment of the earlier progress report referred to above (page 1218 of the SANRAL record).

84. The memorandum of the CEO of SANRAL to the Board of SANRAL on 24 May 2007 motivating the request of the CEO that the Board approve that SANRAL proceed with the legal steps necessary for the implementation of tolling also makes clear that "*the obligations of the 2010 FIFA Soccer World Cup*" was a dominant consideration:

> "*The Gauteng economy cannot afford any severe impediment to traffic flow, since such impediment will stifle economic growth and the associated job creation. The future growth of Gauteng is dependent on a road network that provides the required level of service, promotes the use of public transport and meets the obligations of the 2010 FIFA Soccer World Cup.*" (page 1403 of the SANRAL record)

85. The imperative of readying the Gauteng freeways for the World Cup was mentioned in two further documents in the record in May 2007:

    85.1 the consulting engineers in their Traffic and Toll Feasibility Study report repeat the above words of Alli to the SANRAL Board verbatim (page 1443 of the SANRAL record);

85.2 a SANRAL summary report on "*feasibility, social and economic impact*" (beginning on page 1706 of the SANRAL record) states as follows in the opening paragraphs motivating for the project:

> "*the impact of additional traffic as a result of the 2010 FIFA soccer world cup may result in very poor levels of service on the Gauteng freeway network on match days*" (page1708 of the SANRAL record)

85.3 The same summary report makes mention of the time pressures on account of the 2010 FIFA Soccer World Cup later in the report (page 1718 of the SANRAL record) before stating in the same section of the report that "*SANRAL must commence with the toll road declaration process at latest in August 2007, in order to have this public participation process completed, and the proposed scheme toll declared, by end of 2007.*" (page 1719 of the SANRAL record).

The public participation processes were rushed

86. SANRAL kept to its resolve to finalise the public participation processes as quickly as possible.

87. The public participation process required by section 27 of the SANRAL Act read with PAJA in which the public were invited to comment on the notice of intent to

toll various sections of the N1, N2, N3, N4 and N12 was initiated by SANRAL in October 2007.

88. SANRAL allowed the public the statutory minimum of 30 days and public authorities the statutory minimum of 60 days in which to respond, the respective deadlines falling within November and December 2007 respectively.

The January 2008 application in respect of the N1, N2, N3, N4 and N12

89. The application seeking the Minister of Transport's approval for the declaration of the respective sections of the N1, N2, N3, N4 and N12 as toll roads was in the Minister of Transport's hands on 10 January 2008 ("the first application" or the "January 2008 application").

90. I pause to state that the January 2008 application is unfortunately contained in dislocated parts in the SANRAL record. It is, however, contained in consolidated form in the Transport Minister's record where it runs from pages 1 to 950.

91. In the section on project background that motivates the need for the upgrades, SANRAL informs the Minister of Transport:

"The impact of additional traffic as a result of 2010 FIFA World Cup may result in very poor levels of service on the Gauteng freeway network on match days, if the above integrated solutions are not implemented." (page 3414.2 of the SANRAL record)

92. In the description of the project, SANRAL continues:

"The scheme will be implemented in 3 phases, of which the initial construction works (ICW) is referred to as Phase A. Due to the significance of the 2010 FIFA World Cup, routes were identified for completion by 2010. The routes earmarked for completion by 2010 are grouped in Phase A1." (page 3414.3 of the SANRAL record)

93. In the more detailed description of Phase 1 of the project, the 2010 FIFA World Cup is referred to yet again:

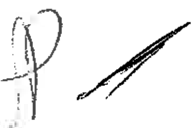
"In order to realise the social and economic benefits of an upgraded national road network as soon as possible, construction activities for most of the road sections indicated in Figure 2 will take place in two years leading to the 2010 FIFA World Cup. Since construction activities will have a negative impact on transportation activities during the 2010 FIFA World Cup event, it is essential that the proposed upgrades for Phase A1 take place before the event. This will ensure an interruption free flow to the various events. Taking the

imperatives of providing the expected improvements to the road infrastructure into account, the construction works have to be completed timeously for the 2010 FIFA World Cup. As a result, the programme for project implementation is extremely tight." (page 3414.8 of the SANRAL record)

94. It is clear that the extremely "*tight*" deadline was largely set by the need of the country to be ready to successfully host the 2010 World Cup and fulfil its promises in its 2010 World Cup bid (according to the briefing note referred to at the outset) that there would be infrastructural upgrades for that purpose.

95. The upgrading of the road may have been needed for broader economic and social reasons, but these did not dictate a rushing of the mandatory legislative requirement of an effective public participation process. It was the 2010 World Cup that did so. This much is apparent from the letter under cover of which the application to the Minister dated 10 January 2008 was sent (pages 3412 - 3414 of the SANRAL record). It stated as follows:

It would be appreciated if you could sign the endorsement and return the said document to this office for further processing. As you are aware we are working to a tight programme to get the construction works under way by late March 2008." (page 3413 of the SANRAL record, **emphasis added**)



96. SANRAL declared the relevant sections of the N1, N2, N3, N4 and N12 toll roads on 28 March 2008.

The July 2008 application in respect of the R21

97. The public participation process preceding the application by SANRAL for the Minister of Transport's approval of the toll declaration in respect of the R21 was also rushed.

98. Sections 1 and 2 of Provincial Road R21 ("the R21") was "transferred" from the Gauteng Provincial Government to SANRAL on 2 April 2008 (paragraph 115 pages 169-173 of the pleadings).

99. On 11 April 2008, nine days later, the Minister of Transport declared the R21 a national road.

100. On 18 April 2008, seven days after being declared a national road, SANRAL published notice of intent to toll the R21 in the Government Gazette and several newspapers (paragraph 119 and 120 page 172 of the pleadings).

101. The public and public authorities were allowed the statutory minimum of 30 and 60 days respectively in which to react to the notice of intent to toll. The respective deadlines were on 18 May 2008 and on 18 June 2008.

102. On 9 July 2008, SANRAL lodged its application to the Minister of Transport for approval for the tolling of the R21 ("the July 2008 application" or "the second application").

103. The covering letter enclosing the July 2008 application is at pages 3848 to 3850 of the SANRAL record and the application, excluding addenda, at pages 3851 to 3879 of the SANRAL record.

104. The July 2008 application, which is truncated in comparison to the January 2008 application, also contained reference to the 2010 World Cup and the identification of priority routes for this purpose (page 3853 of the SANRAL record).

105. On 13 July 2008, three days after the receipt of the July 2008 application, the Minister of Transport gave approval for the R21 to be declared a toll road.

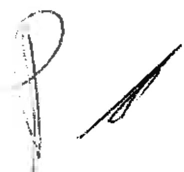
106. The copy of the letter sent by the Minister of Transport to SANRAL is at page 4014.1 of the SANRAL record.

107. SANRAL declared the R21 a toll road on 28 July 2008. A copy of the declaration is attached to the founding affidavit as "FA31".

Conclusion

108. It is apparent from what is set out above that SANRAL and the Minister of Transport allowed the imperative of being ready for the 2010 World Cup to lead to a truncation of the public participation processes prescribed by section 27 of the SANRAL Act read with PAJA, in the manner complained of by the Applicants in their founding affidavit. The time constraints imposed by the World Cup 2010 did not permit SANRAL sufficient time to do anything but pay lip service to the requirements of section 27 read with PAJA.

109. The schedule was too "*tight*" for SANRAL to attract attention by publishing the notices of intent to toll in such a manner that it came to the attention of those who would be affected by it, most especially the hundreds of thousands of road users using the proposed toll road network. SANRAL could not afford properly to bring it to the attention of such road-users in the manner required by section 27 of the SANRAL Act read with PAJA that from a certain point in time in future they would be paying "*an indicative rate of 50c per kilometre*" to make use of the roads that they had no real option but to use on a daily basis. The 2010 World Cup meant there was no room for addressing a public outcry such as the one that followed the publication of the tariffs in February 2011 which simultaneously made known to the public the fact that Gauteng's freeways would be tolled. The public was therefore not given proper notice in particular of the costs until much later, when it was too late.



110. The following submission by SANRAL in the July 2008 application under the heading "*Conclusions and recommendations*" therefore had a decidedly hollow ring:

"*This report clearly indicates that Interested and Affected Parties were afforded sufficient opportunity to comment and/or submit written representations regarding the proposed declaration and the positioning of the toll points for the national road R21...All written representations and comments received were thoroughly evaluated and the issues raised have been addressed, either as a direct response to a particular issue, or a combined response to a group of comments with a common theme.*" (p.3878 of the SANRAL record)

111. The fact of the matter is that there had been only two responses from the public.

112. The equivalent passage is in the January 2008 application at pages 57 to 58 of the record of the Minister of Transport, where there had been only 30 responses from the public.

113. I pause to state that because one response was a domestic petition of a company in Woodmead signed by 53 people, the number of responses to the N1, N2, N3, N4 and N12 notices of intent to toll has been counted as 82.

114. The aforesaid submission in the January 2008 application also had a decidedly hollow ring, given that the tolling of Gauteng's freeways would have a material impact on hundreds of thousands of road users in Gauteng every day.

115. I am advised and I respectfully submit that the Minister of Transport should, when it came to his attention that there had only been a limited publication of the notice of intent to toll and that this had drawn so negligible a response from the public in each instance, have refused to give approval or at least have referred SANRAL's application and proposals back to it and ordered SANRAL's proper compliance with section 27 (as envisaged by section 27(4)). It is clear, however, that in the circumstances, the Minister of Transport could and would not do so. He was pressed by the very same imperative of keeping to the "*tight*" schedule in order that Gauteng's freeways would be ready for the 2010 World Cup. The Minister of Transport was also constrained by his own prior determination that Gauteng's freeways would be tolled. In his Keynote Address at the Gauteng Freeway Scheme Launch (page 1310-1315 of the pleadings), the Minister of Transport had told the guests at that occasion that Gauteng's freeways would be tolled and that the "tolling of the road system will begin in 2010/2011".

116. In the case of the July 2008 application, the Minister of Transport was not open to declining or remitting the application to SANRAL for a further reason. The Minister of Transport had, in granting approvals for the N1, N2, N3, N4 and N12

pursuant to the January 2008 application, made it a condition of his own approval that provincial roads, and in particular the R21, be incorporated into the toll road network.

117. I am advised and I respectfully submit that the above, in conjunction with what is contained in the affidavits already filed of record, demonstrates that the toll declarations and the approvals of the Minister are liable to be reviewed and set aside:

117.1 because of the failure of SANRAL to comply with the public participation requirements of section 27(1) and (4) of the SANRAL Act read with PAJA; and/or

117.2 because of the failure of the Minister of Transport to comply with mandatory provisions of section 27(4) of the SANRAL Act; and/or

117.3 because SANRAL and/or the Minister of Transport had an unwarranted fixed adherence to the idea of tolling Gauteng's freeways and had closed their minds to any outcome to the January 2008 and July 2008 applications other than that approval would be given and the proposed toll road network would be declared toll roads.

118. I am advised further that the imposition of a tolling system following a process which is unfair or fails to comply with mandatory provisions and procedures as prescribed by legislation constitutes an arbitrary deprivation of property as envisaged by section 25(1) of the Constitution. The toll declarations and approvals therefore constitute an unjustifiable limitation to the right to property for this additional reason. Further legal argument to this effect will be advanced at the hearing of this matter.

THE TOLL DECLARATIONS AND THE MINISTER'S APPROVALS ARE IRREGULAR BECAUSE OF THE COSTS OF E-TOLL COLLECTION

119. One of the factors that is necessarily relevant to a decision about whether to collect revenue from a particular source, is the costs involved in collecting that revenue. With e-tolling, the costs involve first setting up, and then maintaining an infrastructure to collect e-tolls. These costs are huge. In the case of other funding mechanisms (such as an increase in the fuel levy) the costs of implementation are minimal. As SANRAL's CEO readily accepts, "*the economic benefits would have been even higher if they were to be funded in part or wholly from the National Treasury*" because "*tolling reduces user benefits by the cost of the tolling infrastructure*" (pleadings page 1327). Of

course the benefits are dramatically reduced even further by the costs of toll collection as well.

120. In their founding affidavit (paragraph 206 page 199 to paragraph 249 page 209 of the pleadings), the Applicants referred to the costs involved in the collection of e-tolls. In those paragraphs, they alleged:

120.1 that the cost of e-tolling the toll-road network is so disproportionately high that no reasonable administrator could have taken the decision to approve the declaration of the toll roads or to declare the toll roads (within the meaning of section 6(2)(h) of PAJA);

120.2 that the Transport Minister's approvals and the toll declarations were irrational and arbitrary within the meaning of section 6(2)(f)(ii) of PAJA and 6(2)(e)(vi) of PAJA because

120.2.1 e-tolling implies that the road user would be paying more for toll collection than the upgrades of the roads themselves;

120.2.2 the Minister of Transport approved the toll declarations in ignorance of material information on the disproportionate cost of tolling;

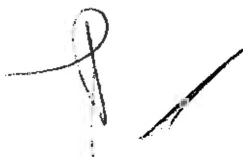
120.2.3 the Minister of Transport was misled in that it was represented to him in the January 2008 application that what was in actual fact the capital cost of tolling would be the cost of toll collection.

121. For the reasons that follow, I submit that the record buttresses these review grounds.

The costs are disproportionately high

122. The Applicants dealt with the costs involved in collecting e-tolls in paragraph 206 to 249 page 199-209 of their founding affidavit. The figures used by the Applicants were ETC JV'S tender figures given by the GFIP Steering Committee in its Report. The Applicants had to rely on the figures given in the Report as estimates because SANRAL refused to produce any documents which revealed the actual costs of e-toll collection. As it turns out, the estimates given by the Applicants materially understated the costs of e-tolling, which are shown to be far higher by information described below which came to light after the founding affidavit was deposed to.

123. I begin by drawing attention to the written reply by the Minister of Transport on 23 April 2012 to the National Council of Provinces which I attach as "SA14" hereto. The toll costs referred to include the costs of toll operations, which the



Minister qualifies to mean "*collection*" costs. The written reply makes it clear that, according to the Minister:

123.1 the toll costs for 2013 are R1.1221 billion while the projected revenue to be collected in the same period will only be R1.084 billion;

123.2 the projected toll costs for 2014 are R1.421 billion while the projected toll revenue to be collected will be R2.4945 billion;

123.3 the toll costs will increase and not decrease over time;

123.4 the toll costs are therefore either fixed, or if variable, will increase as the toll collection increases.

124. In May 2012 one of the joint venture partners in ETC JV, Kapsch Trafficcom, attached part of the ETC Contract to an affidavit filed in the South Gauteng High Court in interlocutory proceedings before that Court:

124.1 The matter was called in open court and I am advised that the document is therefore a public document.

124.2 I attach a copy of the part of the ETC contract hereto as "SA15".

125. The ETC contract reveals that the true cost of e-tolling is much higher than the estimated figure (of R 20,562b) given in the founding affidavit and admitted by SANRAL in its answering affidavit in Part A to be "*correct*", but based on a 60% non-compliance rate. (See paragraph 305 page 1048 of the pleadings).

126. According to the ETC Contract signed on 18 September 2009, the cost of toll collection, including the transaction clearing house and violations processing, will be R8.3507 billion over five years, and therefore R1.67 billion per year. Taken over 20 years, it means that the cost of toll collection will be R33.4 billion – more than one-and-a-half times the cost of the road upgrades and approximately R13 billion more than the Applicants' calculation in the founding affidavit which SANRAL said was correct in its answering affidavit. In other words, road-users in Gauteng will be expected to pay 162% of the capital costs of the upgrades for toll collection only.

127. As I have explained above, SANRAL is presently withholding the balance of the ETC contract as well as the related tender documents. Since these documents are clearly relevant to the issue of the costs of toll collection, I am advised and I respectfully submit that the only reasonable inference to be drawn is that the documents evidence the excessive cost of toll collection and SANRAL wishes to withhold them because they are adverse to its case. Such inference is justified further by the fact that the Applicants called for the ETC contract prior to launching this application, and in their founding affidavit contended that

SANRAL was deliberately withholding the contract and invited SANRAL to produce it during the application proceedings. SANRAL refused to do so and has still not done so.

128. I pause to state that on 13 July 2012 SANRAL filed an irregular affidavit in the leave to appeal in the Constitutional Court in which it sought to challenge the Applicants' calculations based on the ETC contract. Quite apart from the fact that several of SANRAL's assertions were incorrect on the face of it, SANRAL did so without disclosing the balance of the ETC contract. SANRAL has also put forward on affidavit and in talks with the Applicants several scheduled summaries of what it now claims to be the costs of tolling, but without disclosing the full toll financial model with all of its underlying data and assumptions. SANRAL is invited to disclose the full ETC contract (again) and to disclose the full toll financial model together with all underlying data and assumptions to the Honourable Court in order that these may be scrutinized. The Applicants will seek that an adverse inference be drawn should SANRAL fail to provide the ETC contract and all of the above information.

129. I respectfully submit that what is set out above confirms and strengthens the Applicants' case that the toll declarations and the Minister's approval of such declarations should be reviewed and set aside in terms of sections 6(2)(e)(vi), (f)(ii) and (h) of PAJA.

130. I also submit that what is set out above demonstrates that the declaration and approval of toll roads in the circumstances of this case gives rise to an unjustifiable violation of the Applicants' right to property (and, by parity of reasoning, the right to property of any potential user of the toll roads). The approval and declarations of the toll roads give rise to a situation in which users of the toll roads will be forced to pay tolls which have been imposed in terms of an arbitrary, irrational and unreasonable system. This is an unjustifiable violation of section 25(1) of the Constitution.

The costs were not adequately calculated or considered

131. The Applicants have submitted above and in the founding affidavit that the Minister's approvals and the tolls declarations were unreasonable because the costs of collecting e-tolls are disproportionately high. In addition, however, the SANRAL record shows that SANRAL gave woefully inadequate attention to the likely costs of collecting revenue through e-tolling. This had the effect of vitiating the Transport Minister's decision to approve the declaration of toll roads, and SANRAL's decision to declare the toll roads. I make this submission for the reasons that follow.

132. The record shows that SANRAL made at least some attempt to estimate the costs of setting up the infrastructure required to operate an e-toll system. However, there are also enormous operating costs involved in running an e-toll

system in order to collect tolls. As I shall indicate below, the record shows that SANRAL gave no meaningful consideration to the operating costs (as opposed to the capital costs) of the e-toll system and consequently paid no attention to a relevant consideration.

The 2006 Proposal

133. The disproportionate cost argument was a central tenet in the Applicants' argument before the High Court in Part A of the application. The SANRAL record runs to more than 5000 pages. However, in its application for leave to appeal to the Constitutional Court (as had been the case in argument before Prinsloo J) SANRAL was able to point only to a single sentence in those 5000 pages indicating that an estimate had been made of the operating costs of e-tolling. That sentence occurs on page 862 of SANRAL record, where the following is recorded in the 2006 proposal:

> *"The yearly estimated operations and maintenance costs amounts [sic] to R200 million (Excl VAT, 2006 Rand)."*

134. By its own admission, the figure of R200m is no more than an "estimate". Not to put too fine a point on it, it is a thumbsuck because there is no indication whatsoever as to how that figure of R200 million had been calculated. These is also no indication what part of the R200 million includes the cost of toll

operations and what part maintenance. Moreover, the document goes on to record on the very same page that the figure of R200 million (along with other figures) "still needs to be confirmed by means of specialist studies, which will commence after the principles of a freeway improvement scheme have been agreed upon" (page 862 of SANRAL record). As I shall indicate below, the record contains no evidence to show that the figure of R200 million was in fact "*confirmed by means of specialist studies*". On the contrary, the record shows a remarkable absence of any investigation into the quantum of the operating costs, despite the importance of establishing this figure before an informed decision could be made about whether to adopt e-tolling.

135. In any event, the 2006 proposal was not before the Minister of Transport when he approved the toll declarations. Since the 2006 proposal does not form part of the Transport Minister's record, the Transport Minister could not have had regard to it when he gave approval for the declaration of the toll roads.

The Toll Feasibility Report (May 2007)

136. In May 2007, a draft Traffic and Toll Feasibility Study Report was prepared for SANRAL ("the Toll Feasibility Report"). It commences on page 1436 of the SANRAL record.

137. Page 62 of the Toll Feasibility Report (page 1503 of the SANRAL record) contains tables 11.6 and 11.7, in which the consulting engineers set out their estimates of the "*toll-related operating and maintenance costs*".

138. Since page 1503 in the record is almost illegible, I attach a legible copy hereto as "SA16".

139. The Honourable Court will note that the estimate given in table 11.6 is that the "*ORT System Operations*" for the comprehensive open system (the one chosen by SANRAL for the proposed toll road network) is R390 million per year "*(March 2007 Rand)*".

140. Table 11.7 repeats the above figure of R390 million and also provides a figure of R57 million per year for "*toll systems maintenance*".

141. Significantly, the toll feasibility report contains nothing further regarding the costs of the operating of the toll system. There is, for instance, no indication as to how the figures contained in the above schedules were calculated. No basis for the figures is set out. Moreover, these estimates did not include other relevant components of operating costs (such as the costs of recovering tolls from defaulters).

The April 2007 PowerPoint

142. In April 2007, SANRAL prepared a PowerPoint presentation entitled "Gauteng Freeway Improvement Project: Feedback and Progress" (SANRAL record page 1280ff).

143. In this document, SANRAL estimated the capital costs of the road upgrading to be R11.7 billion (SANRAL record page 1333) – in other words, almost double the estimate of R6.3 billion in the 2006 proposal (SANRAL record page 860). SANRAL provided a breakdown of the "Toll System Capex Costing", with reference to the capital costs of "tags", "gantries", "enforcement" and "other" (SANRAL record page 1334).

144. This document also provided an "Operations Cost Overview", containing estimates of "resource requirements" (SANRAL record page 1336) and "O&M [I.e. Operations and Maintenance] Costs" (SANRAL record page 1337). These estimates appear to come from the Toll Feasibility Report. Although the estimates of "O&M Costs" included "Operator's Head Office" and "Central Ops Centre", there is nothing in the record to indicate how these estimates were calculated. Moreover, the estimates for "O&M Costs" did not include other relevant components (such as the costs of recovering tolls from defaulters).

145. The total "O&M costs" on page 1337 were then carried through to the line item "ORT [i.e. Open Road Tolling] System Operations" in the table headed "Recurring Annual Costs" (SANRAL record page 1338). For the reasons already given, the figures in this line item are unsubstantiated by any analysis and excluded relevant items of recurring costs (such as the costs of recovering tolls from defaulters).

<u>The memorandum to the SANRAL Board (May 2007)</u>

146. On 24 May 2007, Mr Alli prepared a memorandum for the SANRAL board seeking approval for the proposed open-road tolling strategy for the GFIP (SANRAL record page 1402ff). It bears emphasis that this was the memorandum which was approved by the SANRAL Board as the basis upon which to approach the Transport Minister to have the GFIP declared as toll roads.

147. The following aspects of the memorandum are noteworthy:

147.1 The memorandum recorded that there is "generally a low percentage of recovery of traffic fines in South Africa", and that it was important to ensure that this culture of non-payment was not carried over to e-tolling (SANRAL record page 1421). For this reason, it was "vital that careful planning of enforcement of payment takes place" (SANRAL record page

1421). The memorandum then stated that "initial planning and costing of enforcement actions in respect of the Gauteng ORT scheme ... focussed upon systems to assist in the identification of non-toll payers and to be able to physically apprehend persistent non-payers" (SANRAL record page 1421). (**emphasis added**).

147.2 Astonishingly, however, the memorandum made no further mention of the costs involved in operating the e-toll system.

147.3 Paragraph 9 of the memorandum was headed "Project Capital and Operating Costs" (SANRAL record page 1421, **emphasis added**). However, this heading was entirely misleading because the body of paragraph 9 made no reference to "operating costs" as opposed to "capital costs". It dealt with "road-related capital costs" (para 9.1), "initial toll-related capital costs" (para 9.2) and "initial capital costs for public transport infrastructure and for overload facilities" (para 9.3). These sub-items were incorporated into a "summary of initial capital costs" (para 9.4).

148. What this means is that the SANRAL board approved the decision to proceed with e-tolling in circumstances where it was not furnished with any estimate whatsoever of the likely costs involved in operating the e-toll system. It beggars belief that SANRAL could have decided to proceed with e-tolling

without applying its mind to the question of how much it would cost to collect a rand of revenue.

The feasibility report (May 2007)

149. In May 2007, SANRAL prepared a document entitled "Gauteng Freeway Improvement [and] Expansion Scheme: Feasibility, Social and Economic Impact: Summary Report" (SANRAL record page 1706ff). Paragraph 8 of that document dealt with "toll feasibility". Its conclusions were summarised in Table 4, which set out the initial capital costs of the road works and the "toll system' (SANRAL record page 1717). Remarkably, the document made no reference at all to the operational costs involved in running the e-toll system.

150. It follows that there is simply no basis for Mr Alli's statement in his answering affidavit in Part A that "whilst the actual costs of open road tolling were not known as at the time that the network was to be declared as a toll road, the feasibility studies that were conducted and required by section 27 were estimated and included in the toll financial model" (para 302.1 page 1045 of the pleadings).

The January 2008 application to the Minister

151. On 10 January 2008, SANRAL requested the Transport Minister to approve the declaration of the toll roads (SANRAL record page 3412ff). Although the documents placed before the Transport Minister were voluminous, there was no analysis of the costs involved in collecting e-tolls such as to enable the Minister to apply his mind to this immensely important consideration.

152. Paragraph 7 of SANRAL's memorandum dealt with "toll feasibility". Its conclusions were summarised in Table 2, which set out the initial capital costs of the road works and the "toll system' (SANRAL record page 3414.18). Remarkably, the memorandum made no reference at all to the operational costs involved in running the e-toll system.

153. Addendum D was the Interim Economic Impact Report prepared by the University of Cape Town's Graduate School of Business. It dealt with toll collection costs in seven lines as follows (second and fourth respondents' record page 619):

> *"6.2.1 Toll collection costs*
>
> *Paying for roads through taxes or a dedicated fuel fund is simply cheaper than imposing tolls on a road even if this is through an ORT system. The cost of collection is far lower because it does not incur the cost of toll collection system.*

It has been calculated that the actual cost of the toll infrastructure adds, on average 3.7 cents per vehicle kilometre for the upgrade option and 4.4 cents per vehicle kilometre for the expansion option. This is the cost that would have to be paid for improved equity."

This "calculation" is meaningless because there is nothing in addendum D (or anywhere else in the record, for that matter) to indicate how the figures of 3.7 cents and 4.4 cents had been arrived at. It is simply bereft of any empirical foundation. In any event it is clear that the figures refer to capital costs and not the operating costs.

154. The Toll Feasibility Report was included as an addendum to the January 2008 application (commencing at page 697 of the Transport Minister's record). I make the following submissions in this regard:

154.1 SANRAL saw fit to draw selectively from the Toll Feasibility Report and place before the Minister of Transport the information on the capital costs on page 61, a copy of which is attached hereto as "SA17". It placed this squarely before the Minister of Transport in the text of the January 2008 application (page 3414.18 of the SANRAL record).

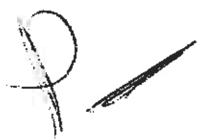
154.2 SANRAL also saw fit to draw the debt cover ratios on page 71 from the toll feasibility report, a copy of which is attached hereto as "SA18", and

place this squarely before the Minister of Transport in the text of the January 2008 application (page 3414.19 of the SANRAL record).

154.3 However, no information regarding the costs of operating the toll system was drawn to the attention of the Minister of Transport. I am advised and I respectively submit that this was a material omission that caused the Minister of Transport to make his decision to grant the approvals in ignorance of material facts. The Minister of Transport would necessarily have given attention to the text of the January 2008 application, that is, the information specifically drawn to his attention by SANRAL, and in that document nothing is said about toll collection costs.

154.4 I am advised and I respectfully submit that the Minister of Transport's approval and the toll declarations based on such approval are accordingly liable to be reviewed and set aside on the basis that the Minister's decision to grant approval was made in ignorance of material facts.

155. The record therefore makes it plain that, when SANRAL sought approval from the Transport Minister for the declaration of the toll roads, no adequate disclosure was made of the likely costs involved in the collecting and enforcing of e-tolls. In other words, the Minister was not given any proper indication of



the costs that would be incurred in collecting the e-tolls. This vitiated his decision to approve the declaration of the toll roads.

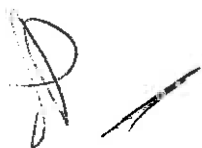
The July 2008 application

156. The supplementary record filed by the Minister of Transport (also contained at pages 3851 and following of the SANRAL record) is the record that served before the Minister of Transport when he made the decision to approve the toll declaration in respect of the R21.

157. What is set out above regarding the failure of the January 2008 application to make mention of the operating costs of e-tolling, applies equally to the July 2008 application. I pray that those allegations be read as if incorporated herein.

Summation

158. For the reasons set out above, the record makes it plain that SANRAL made no meaningful attempt to calculate the operational costs involved in running the e-toll system or to place such calculations before the Minister. This had two consequences:



158.1 *First*: the Minister's decision to approve the declaration of the toll roads was vitiated because he did not apply his mind to a highly relevant consideration, viz. the operational costs. The Minister's decision should therefore be reviewed and set aside in terms of section 6(2)(f)(ii) and section 6(2)(h) of PAJA.

158.2 *Second*: SANRAL's decision to declare the toll roads was vitiated because it did not properly apply its mind to a highly relevant consideration, viz. the operational costs. SANRAL's decision should therefore be reviewed and set aside in terms of section 6(2)(f)(ii) and section 6(2)(h) of PAJA.

The estimated costs in 2007 were patently wrong in any event

159. In any event, if the Minister had regard to page 62 of the Toll Feasibility Report and if he considered the projected cost of toll collection in light of the capital costs, the Minister would have drawn the conclusion that the cost of recovering the debt over the projected repayment periods of 11 or 14 years (see page 3414.19 of the SANRAL record) was R4.29 billion or R5.6 billion respectively. Given that the capital cost of the project was estimated to be R15.038 billion (see page 3414.18 of the SANRAL record), this would have implied toll collection costs of

159.1 28.5% of the capital cost over 11 years; or

159.2 36% of the capital cost over 14 years.

160. The true position, however, is that open road tolling (if implemented) will cost road users in Gauteng much more than this:

160.1 On the figures alleged by the Applicants in the founding affidavit, the cost of toll collection over the period of 20 years (at that stage the projection of SANRAL) was 104% of the capital costs. In other words, the road users would be paying more for the collection of toll than they were for the capital cost of the upgrades.

160.2 The Applicants did not have the updated final contract figures when they deposed to their founding affidavit, and requested that SANRAL take the Court into its confidence and disclose the true cost over five years for toll collection.

160.3 In its answering affidavit, SANRAL failed to disclose the true costs, despite saying that these had become known once the tender processes were concluded. SANRAL also did not put up the contract between SANRAL and ETC JV as it had been invited to do. Rather, SANRAL alleged that the figures quoted by the Applicants were correct,

namely approximately R 5 billion for 5 years or R 20 billion for 20 years, but were "*based on a public non-compliance in excess of 60%*". (paragraph 305 page 1048 of the pleadings)

160.4 The Applicants demonstrated in their replying affidavit that the tender figures in the GFIP Steering Committee Report were not qualified or based on 60% non-compliance and asked that an adverse inference be drawn from SANRAL's deliberate failure to disclose the true cost and the contract with ETC JV.

160.5 According to the ETC Contract signed on 18 September 2009, the cost of toll collection, including the transaction clearing house and violations processing, will be R8.3507 billion for five years, or R1.67 billion per year. Taken over 20 years, this means that the cost of toll collection will be R33.4 billion – that is, more than one-and-a-half times the costs of the road upgrades themselves. (The Honourable Court will note also that nowhere in the parts of the contract in the possession of the Applicants is it indicated that this contract cost is in any way qualified by compliance rates.) Reverting to the comparison with the figures that were on page 62 of the Toll Feasibility Report, as opposed to 28.5% or 36%, it is now clear that road users in Gauteng will be expected to pay 162% of the capital costs of the upgrades for toll collection only.

161. The toll collection cost estimates in the Toll Feasibility Report, besides being inadequately substantiated, were therefore patently wrong. The approval of the Minister of Transport, if based on this information, was based on materially incorrect information.

162. In addition, if the Transport Minister approved tolling on the basis that road users would be required to pay between 28.5% and 36% of the capital cost for it, the approval no longer holds because such basis does not exist.

163. The Transport Minister had no opportunity to consider whether he would approve a scheme in which road users would be required to pay more than one and a half times as much for toll collection as they would for the upgrades and improvement of the roads. The public also had no opportunity to object thereto or comment thereon.

164. I am advised and I submit that in the circumstances:

164.1 the Transport Minister's approval would remain liable to be reviewed and set aside on account of being based on materially incorrect information, arbitrary and unreasonable within the meaning of the sections of PAJA referred to above; and/or

164.2 the implementation of e-tolling on the strength of the Transport Minister's approvals and corresponding toll declarations that presumed that the public would have to pay a fraction of what they will in fact have to pay constitutes an arbitrary deprivation of the right to property in contravention of section 25 of the Constitution.

165. I am advised and I respectfully submit that imposing a toll system on the Applicants and road users where the costs of collection are disproportionately high (or in fact unknown) relative to the costs of the upgrades and improvements of the road in question in itself constitutes an arbitrary deprivation of the right to property, in particular when other mechanisms or revenue sources involving minimal cost are available.

166. The Applicants' counsel will address the Honourable Court more fully on the manner in which the Applicants' (and other road user's rights) in terms of section 25(1) of the Constitution have been violated in written and oral legal argument on the basis of the facts contained in this affidavit and the affidavits filed of record.

THE TOLL DECLARATIONS AND THE MINISTER'S APPROVALS ARE IRREGULAR BECAUSE OF A FAILURE TO CONSIDER ALTERNATIVE FUNDING METHODS

167. The failure of SANRAL and the Minister of Transport to be open to and to properly consider methods of funding other than tolling, is raised in the founding affidavit as a further ground on which the Minister's approval and the toll declaration should be reviewed and set aside. The principal allegations in this regard are contained at paragraph 278 of the founding affidavit on pages 216 to 219 of the pleadings.

168. The allegations there are based on what is identified in the founding affidavit as the HMKL record. The record filed by the Minister of Transport confirms that the HMKL record is in fact the record that was before the Minister when he made the decision to approve the toll declarations in respect of N1, N2, N3, N4 and N12.

169. The supplementary record filed by the Minister of Transport (also contained at pages 3851 and following of the SANRAL record) is the record before the Minister of Transport when he made the decision to approve the toll declaration in respect of the R21.

170. This was not in the possession of the Applicants prior to the application for the relief sought in Part A. The Applicants could at that stage not make any submissions in relation to whether alternative methods of funding were considered in respect of the approval granted by the Minister in that case.

171. A reading of the July 2008 application makes it clear that the allegations contained in the founding affidavit concerning the absence of any proper consideration of alternative methods of funding apply equally to the approval of the R21.

172. The ground of review advanced by the Applicants I now deal with is linked to the failure of SANRAL to draw material information regarding the cost of tolling to the attention of the Minister of Transport. It is linked because by failing to set before the Minister of Transport accurate information on what the true costs of toll collection on the proposed toll road network was likely to be, or even the estimates that were buried away on page 62 of the toll feasibility report, SANRAL deprived the Minister of the ability to properly compare the funding mechanism he was called upon to approve with alternative mechanisms. The Minister of Transport was therefore given no appreciation of the true advantages and disadvantages of the proposed funding mechanism versus other methods open to SANRAL.

173. The January and July 2008 applications only dealt superficially with alternatives, if they mentioned them at all. Proper and detailed information on the alternative methods was not provided to the Minister of Transport.

174. Relevant considerations such as the relative costs of the alternative methods, the implications for what the road user would be required to pay, the length of time it would take to repay the debt incurred by SANRAL in each case, and the economic implications of alternative methods, were not disclosed to him.

175. In the pleadings and in argument at the hearing of Part A, SANRAL and the Minister of Transport referred to the 2006 proposal and the discussion of the alternative methods of funding there as evidence for the submission that alternative methods of funding were properly considered. I am advised and respectfully submit that this reliance is misplaced:

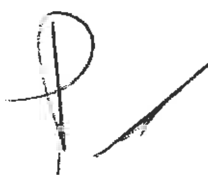
175.1 The 2006 proposal was not placed before the Transport Minister at the time that he made his decision to approve the toll declarations. The Transport Minister's record makes this clear.

175.2 In any event, the 2006 proposal expressly mentioned other methods of funding only in "*overview*" and under the heading "*Motivation for a state funded toll scheme to improve the Gauteng freeway system*". Four alternative methods are superficially described and conclusions are

drawn that they are either inappropriate or require further investigation or lobbying with National Treasury. After the passing mention of four alternative methods, tolling is then dealt with and generously motivated. The remainder of the document then goes on to deal with tolling to the exclusion of any of the other methods. There is no true comparison or proper weighing of the costs of toll collection in comparison to other methods. There indeed could not have been, given that the estimate of R200 million per annum for "*toll collection and maintenance*", even in 2006 Rand terms, was so out of proportion to the true cost that the figure was meaningless.

176. There is nothing in the record to evidence a detailed weighing-up of the alternative methods of funding available to SANRAL.

177. It is apparent from what <u>is not contained</u> in the record, therefore, that SANRAL and the Minister of Transport did not properly consider alternative methods of funding. I am advised that SANRAL and the Minister of Transport should have, particularly given the material impact that tolling would have on hundreds of thousands of captive road users, who would be required to pay toll every day. The failure to properly consider alternative methods of financing GFIP meant that the Minister of Transport's approvals were granted in ignorance of relevant considerations and were arbitrary and unreasonable.



178. I am advised and I respectfully submit that to the extent that the Transport Minister's approvals and SANRAL's toll declarations were unreasonable and/or irrational for reasons related to the disproportionate cost of toll collection, the failure to consider alternative funding mechanisms, and enforceability, they similarly give rise to a threatened violation of right of road users not to be arbitrarily deprived of their property.

179. I am advised that the toll approvals and declarations also constitute an unjustifiable limitation of section 25(1) of the Constitution, for the reasons given above. To impose on the users of the GFIP roads an obligation to pay tolls pursuant to an irrational, arbitrary and unreasonable system (in which the vitally important issues of alternatives of funding methods and the disproportionate costs of tolling were not even considered) is plainly an unjustifiable limitation of the right not to be deprived arbitrarily of property.

180. Counsel for the Applicants will address the Honourable Court in this regard in argument on the basis of the facts set out in the pleadings and further papers filed of record.

PRAYER 4 OF THE AMENDED NOTICE OF MOTION

181. The Applicants have amended their notice of motion to introduce a prayer for declaratory relief based on section 25(1) of the Constitution. In this regard:

181.1 It has already been explained above the extent to which various aspects of the impugned decisions render them invalid since they facilitate an unjustifiable limitation of the right to property.

181.2 The prayer for declaratory relief introduced as prayer 4 in the amended notice of motion addresses also the following – regardless whether the decisions were valid at the time when they were made (which is, of course, denied), the facts set out in this affidavit (and in the founding affidavit) demonstrate that the implementation of e-tolling would constitute an unjustifiable limitation of the right to property enshrined in section 25(1) of the Constitution.

181.3 In particular, were the system of e-tolling to be implemented in the present circumstances, it would be a system implemented despite the fact that:

181.3.1 It arbitrarily imposes the liability to pay on the driver of the vehicle but is equipped only to enforcement against the owner;

181.3.2 Its introduction was procedurally unfair;

181.3.3 The collection costs are disproportionately high (rendering the whole system irrational); and

181.3.4 Alternative funding methods were irrationally not considered.

181.4 These facts demonstrate that, if implemented now, the system would violate section 25(1) of the Constitution. It is submitted that it would be just and equitable for this Court to grant declaratory relief to this effect coupled with the interdict sought in prayer 4 of the amended notice of motion. Further legal argument to this effect will be advanced at the hearing of this matter.

PRAYER 5 OF THE AMENDED NOTICE OF MOTION

182. The Applicants have amended their notice of motion to introduce prayer 5 in which declaratory relief is sought in relation to the unconstitutionality of section 27(1)(a), section 27(1)(b) and/or section 27(3) of the SANRAL Act. This relief is sought in the alternative to prayers 1, 2 and 4. I set out below the basis for the relief sought in prayer 5.

183. In their founding affidavit seeking leave to appeal to the Constitutional Court against the judgment of Prinsloo J in Part A, the respondents aver that the toll declarations and the Minister's approvals should not be susceptible to judicial review because these are governmental decisions regarding fiscal policy. I cite some examples of these averments below:

183.1 In paragraph 29.2 of his founding affidavit seeking leave to the Constitutional Court, Mr Gordhan states that "*it is for Government, not OUTA or with respect the courts, to decide* ***on appropriate financing mechanisms for infrastructure investments such as the GFIP***" (my emphasis).

183.2 In paragraph 29.5.3 of his founding affidavit seeking leave to appeal to the Constitutional Court, Mr Gordhan states that "*it is for policy-makers,*

elected by and accountable to those they represent, to choose between various forms of revenue collection". In the same paragraph, Mr Gordhan refers to "*collecting revenue*" and "*intervention in public finance*".

183.3 In paragraph 37 of his founding affidavit seeking leave to appeal to the Constitutional Court, Mr Gordhan states that "*Government is obliged to adopt an appropriate financing arrangement to give effect to this [i.e. the need to pay for the GFIP]*".

183.4 In paragraph 72 of his founding affidavit seeking leave to appeal to the Constitutional Court, Mr Gordhan states that the effect of the judgment of Prinsloo J in Part A is that "*the High Court is de facto and on an interim basis administering a crucial aspect of government <u>in the form of revenue procurement</u> and allocation*" (my emphasis).

183.5 In paragraph 95 of his founding affidavit seeking leave to appeal to the Constitutional Court, Mr Gordhan refers to the relevant decisions as being located in "*the executive domain*".

183.6 In paragraph 12.4 of his founding affidavit seeking leave to appeal to the Constitutional Court, Mr Alli states that "*the decision on the part of SANRAL [i.e. the toll declaration] – taken in conjunction with the*

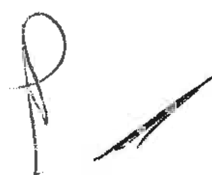
Minister of Transport and with the knowledge and approval of Cabinet in 2007 – was therefore a decision as to how the GFIP should be funded and the outcome was that would be funded through tolling".

183.7 In paragraph 18 of his founding affidavit seeking leave to appeal to the Constitutional Court, Mr Alli states that "*the decisions brought under review and the interdict sought bear upon the fiscal policies and decisions of the state and its agencies*" (my emphasis).

184. I anticipate that the Respondents will adopt a similar stance to that quoted above, when they file their answering affidavits in Part B.

185. I must make it clear that the Applicants deny the correctness of the statements quoted in paragraph 183 above. The Applicants contend that the decisions that form the subject matter of prayers B1 and B2 of the notice of motion do not involve governmental decisions regarding fiscal policy, for reasons that have been fully set out in the answering affidavit filed in the Constitutional Court. However, in the event that this Honourable Court were to take different view of the matter, I respectfully submit that it would render the relevant provisions of the SANRAL Act unconstitutional for one of two reasons:

185.1 *First*: if the Respondents are correct in their stance as quoted above, it would mean that sections 27(1)(a), 27(1)(b) and/or 27(3) of the



SANRAL Act impose national taxes, levies, duties or surcharges within the meaning of section 77(1)(b) of the Constitution. However, this would be fatal to the validity of those sections:

185.1.1 I am advised that the SANRAL Act was not enacted in accordance with the requirements of section 77(2) of the Constitution since it deals with matters other than those listed in sections 77(2)(a) to (d) of the Constitution. On this ground alone, sections 27(1)(a), 27(1)(b) and/or 27(3) of the SANRAL Act would be invalid (in terms of section 44(4) of the Constitution read with section 2).

185.1.2 I do not know whether the SANRAL Act was enacted in accordance with the procedure established by section 75 of the Constitution, as required by section 77(3) of the Constitution. I call upon the Respondents to clarify this matter when they file their answering affidavits. If this procedure was not followed, then sections 27(1)(a), 27(1)(b) and/or 27(3) of the SANRAL Act would be invalid on this ground as well.

185.1.3 Section 73(2) of the Constitution provides that only the Cabinet member responsible for national financial matters may introduce a money bill into the National Assembly. To

the best of my knowledge, this did not occur when the SANRAL Bill was introduced into the National Assembly. On this ground as well, sections 27(1)(a), 27(1)(b) and/or 27(3) of the SANRAL Act are invalid.

185.2 *Second*: if this Honourable Court were to find that sections 27(1)(a), 27(1)(b) and/or 27(3) of the SANRAL Act do not of themselves impose national taxes, levies, duties or surcharges within the meaning of section 77(1)(b) of the Constitution but authorise the First Respondent and/or the Second Respondent to do so, this would amount to an unconstitutional delegation of power:

185.2.1 I am advised that Parliament's ability to delegate its power to an administrative body is circumscribed by law. In particular, Parliament may not delegate to an administrative body the power to impose taxes. If the stance of the respondents as quoted above is correct, it would mean that when Parliament enacted sections 27(1)(a), 27(1)(b) and/or 27(3) of the SANRAL Act it purported to delegate to the First and/or Second Respondent the power to impose taxes. This would be unconstitutional.