**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**
**(REPUBLIC OF SOUTH AFRICA)**

Case No: 17141/12

In the matter between:

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| **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

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| **THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD** | **First Respondent** |
| **THE MINISTER, 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** |

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# APPLICANTS' HEADS OF ARGUMENT

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**INTRODUCTION**

1. The Gauteng Freeway Improvement Project ("GFIP") has involved the making of improvements to the major arterial freeway network in Gauteng ("the GFIP network").

2. In order to recover the costs of these improvements, SANRAL, supported by executive government, intends to require road users to pay e-tolls.

3. Its intention to do so has galvanised opposition from civil society in a manner that is unprecedented in the post-1994 era.

4. It is the failure of SANRAL and of government to be properly attentive to the genuine concerns of civil society about the proposed e-tolling scheme that has necessitated the bringing of this application.

5. The planned e-tolling scheme is unlawful.

6. SANRAL did not comply with the provisions of the South African National Roads Agency and National Roads Act 7 of 1998 ("the SANRAL Act") and the Constitution in the process of introducing e-tolling.

7. The Minister of Transport likewise failed to comply with the SANRAL Act and the Constitution in the process of approving SANRAL’s intention to toll.

8. The upgrades and expansion to the GFIP network have been effected pursuant to environmental authorisations that are void because the official in the Department of Water and Environmental Affairs who granted them had no authority to do so. The same environmental authorisations are, moreover, liable to be reviewed and set aside because there was no investigation or consideration given to the social, economic and environmental impact of the development of toll roads.

9. The e-tolling scheme is disproportionately and unjustifiably expensive. There was no proper assessment by the decision makers at the time of such costs, and whether such costs were in fact justified. There was also no due and proper consideration of alternative funding mechanisms.

10. What is more, on the revenue and cost figures presented by SANRAL, read with the expected traffic data recorded in SANRAL's contract with the toll operator, ETC JV, the toll scheme at present is not even economically viable.

11. Should e-tolling be implemented, road users will be forced to pay toll in terms of an invalid and unlawful scheme and so suffer an arbitrary deprivation of property.

12. Despite all of the above, SANRAL and the government have remained intransigent with respect to their intention to e-toll, and to dig into the pockets of the captive group of private road users instead of making use of public resources, or other low (or no) cost revenue collection mechanisms identified by the Legislature or endorsed in the White Paper on National Transport Policy.

13. It is in this context that the applicants approach this Court for relief in terms of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) in the form of orders:

13.1 that the seven declarations by SANRAL declaring the sections of national roads N1, N2, N3, N4, N12 and R21 making up the GFIP network (“the toll declarations”) are invalid and liable to be reviewed and set aside;[1]

13.2 that the decisions by the second respondent, the Minister of Transport, granting approval to SANRAL, in terms of section 27(1)(a) read with 27(4) of the SANRAL Act, to make the toll declarations (“the Transport Minister’s approvals”) are invalid and liable to be reviewed and set aside;[2]

13.3 that the seven environmental authorisations granted by the Department of Water and Environmental Affairs in terms of section 24 of the National Environmental Management Act 107 of 1998 ("NEMA") on the strength of which the GFIP network was upgraded and expanded with a view to tolling (“the environmental authorisations”) be declared void and of no force and effect, alternatively be reviewed and set aside;[3]

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1 Amended Notice of Motion para 1 pleadings pp 2603 - 2605

2 Amended Notice of Motion para 2 pleadings pp 2605 - 2606

3 Amended Notice of Motion para 3 pleadings pp 2606 - 2608

13.4 that the levying and collecting of e-toll pursuant to the toll declarations would constitute an unjustifiable limitation of the right to property as envisaged in section 25(1) of the Constitution and would be invalid;[4]

13.5 in the alternative, that sections 27(1)(a), 27(1)(b) and/or 27(3) of the SANRAL Act are unconstitutional and invalid;[5]

13.6 and in consequence of the above,

13.6.1 that SANRAL be interdicted and restrained from levying and collecting toll on the GFIP network pursuant to the toll declarations and any tariffs that may be published in terms of section 27(3) of the SANRAL Act;[6] and

13.6.2 that the applications for environmental authorisation (if not void) be referred back to the Minister of Water and Environmental Affairs with directions to

13.6.2.1 comply with the environmental impact assessment regulations; and

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4 Amended Notice of Motion para 4 pleadings p 2608

5 Amended Notice of Motion para 5 pleadings p 2608

6 Amended Notice of Motion para 6 pleadings pp 2608 - 2609

13.6.2.2 ensure a due and proper investigation and consideration of the geographical, physical, biological, social, economic and cultural aspects of the environment that may be affected by GFIP.[7]

14. The applicants also apply for condonation in terms of section 9(1) of PAJA for condonation and the extension of the 180-day period referred to in section 7(1) of PAJA insofar as this is necessary for the purposes of the review.[8]

**The structure of the heads of argument**

15. The structure of these heads of argument is as follows:

15.1 we identify the applicants and those on whose behalf the application is brought;

15.2 we give the history of the application and deal with the disclosure and withholding of information by the respondents;

15.3 we address the significance of policy, polycentricity and the Cabinet approval of the GFIP in August 2007 in the context of the present application;

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7 Amended Notice of Motion para 7 pleadings pp 2609 - 2610

8 Amended Notice of Motion para 8 pleadings p 2610

15.4 we then deal with the grounds for relief in the following order:

15.4.1 the defective public participation process conducted by SANRAL and its failure to comply with mandatory legislative provisions;

15.4.2 the invalidity of the Minister of Transport's approvals on account of:

15.4.2.1 the failure of the Minister of Transport to comply with mandatory legislative provisions;

15.4.2.2 the irrationality of the approval process;

15.4.2.3 the failure by the Minister of Transport to take into account relevant information and/or the basing of the approvals on materially incorrect information;

15.4.3 the infringement of section 25 of the Constitution;

15.4.4 in the alternative, the unconstitutionality of sections 27(1)(a), 27(1)(b) and/or 27(3) of the SANRAL Act;

15.4.5 the voidness of the environmental authorisations;

15.4.6 in the alternative, the invalidity of the environmental authorisations for non-compliance with NEMA;

15.5 we then deal with the application for condonation; and

15.6 we finally address the question of costs.

**THE APPLICANTS**

***OUTA***

16. The first applicant is the Opposition to Urban Tolling Alliance ("OUTA").

17. OUTA was established on 12 March 2012 for the purpose of opposing the electronic tolling of the freeways in Gauteng and providing a platform for interested individuals, companies or organisations to meet and co-ordinate their efforts in opposing e-tolling.[9]

18. OUTA is supported by 255 businesses and 11402 private individuals who have registered as supporters since the launch of OUTA's website on 15 March 2012.[10] It is also supported by various non-member associations, most notably the AA, with a membership of 2.5 million drivers.[11]

19. In bringing the application, OUTA acts:

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9 Applicants' Founding paras 30 - 34 pleadings pp 144 - 145

10 The Applicants state at Applicants' Founding paras 39 - 40 pleadings 147 that the Honourable Court will be given the updated figures at the hearing of the application. These are the updated figures.

11 Applicants' Founding para 37 pleadings p 146

19.1 in the public interest;

19.2 in the interest of a group or class of persons within the meaning of section 38(c) of the Constitution, namely, road users in Gauteng;[12] and

19.3 in order to represent those members of society who are economically or socially disenfranchised and therefore not able to oppose tolling of Gauteng's freeways in their own name.[13]

20. Included amongst the latter are the individuals whose affidavits are attached as "FA5" to "FA8" to the founding affidavit,[14] namely Hilda Maphorama, Wayne Osrin, Tshidi Leatswe and Denis Tabakin.

21. Notably, SANRAL fails to address the hardship that will be caused to such individuals (and the hundreds of thousands similarly placed to them):[15]

21.1 SANRAL's assertion that there are viable alternative routes or public transport alternatives is unsubstantiated and contradicted by the affidavits themselves;[16]

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12 Applicants' Founding para 43.2 pleadings p 149

13 Applicants' Founding para 35 pleadings p 145

14 "FA5" to "FA8" pleadings p 348 - 367

15 "FA5" to "FA8" pleadings pp 348 - 367 summarised in Founding Affidavit para 42 pleadings pp 149 - 150

16 cf. SANRAL's Answer paras 159 - 171 pleadings pp 971 - 976 and Applicants' Reply paras 424 - 475 pleadings p 22163 - 2176

21.2 SANRAL's calculation of the toll costs of Maphorama and Leatswe,[17] who commute to work from Leondale and Boksburg where they can afford to live, is demonstrably incorrect.[18] Maphorama[19] is a cashier at Spar in Norwood who commutes to work at least 24 days each month and takes her children to Ghandi Square on school days on the way so that they can take public transport from there. Leatswe[20] is a receptionist in Illovo who will be required to pay R 500 of her total disposable income of R 1000 on toll fees should e-tolling be implemented.

21.3 SANRAL fails to explain how salary earners like Leatswe and Maphorama, will benefit economically from the alleged saving of time;

21.4 SANRAL fails to acknowledge that the benefit of reduced congestion, and therefore the alleged saving of time, will be limited to a few years at most[21] and that it has already been formally admitted by the Minister of Transport on record that the original e-toll feasibility studies *"did not sufficiently weigh up international evidence suggesting that freeway expansion often does not in the medium term resolve congestion challenges, and often induces*

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17 Leatswe is a receptionist working in Illovo who will be required to spend R 550 of her total disposable income of R 1000 on toll fees whould e-tolling be implemented. "FA8" pleadings pp 365-366.

18 cf. SANRAL's Answer paras 164 - 170 pleadings pp 974 - 976 and Applicants' Reply paras 466 - 474 pleadings pp 2174 - 2176

19 Maphorama and her husband, a policeman, commute from Leondale to Norwood and Midrand. The use of public transport will be significantly more expensive and take longer. See "FA5" pleadings pp348-353.

20 "FA8" pleadings pp 365-366.

21 Transport Minister's record p 719; also at "RA17" pleadings p 3754. See in this regard Applicants' Supplementary Reply para 320 - 326 pleadings pp 3490 - 3492 and Applicants' Further Supplementary Reply paras 92 - 96 pleadings pp 3856 - 3860

*greater demand"* and that "*the projected benefits to road users may, therefore, unfortunately not be forthcoming*".[22]

***SAVRALA***

22. The second applicant is the South African Vehicle Rental and Leasing Association ("SAVRALA"). It is a voluntary association that represents 22 member companies that conduct business in the vehicle rental and leasing industry.[23]

23. SAVRALA's members collectively own approximately 160 000 motor vehicles and manage a further 390 000 motor vehicles, 220 000 of which are on the road in Gauteng.[24]

24. The members of SAVRALA will suffer material financial and administrative prejudice on account of the implementation of e-tolling, a system that attaches liability and direct enforcement against the owner of motor vehicles (i.e. the SAVRALA members) as opposed to the individual driving the motor vehicle on the toll road.[25]

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22 "RA5" pleadings pp 2267 - 2268. The Minister of Transport acknowledges further that:

"In my considered view, and in retrospect, the original feasibility study did not sufficiently weigh up international evidence suggesting that freeway expansion often does not in the medium term resolve congestion challenges, and often induces greater demand."

23 Applicants' Founding para 44 pleadings p 150

24 Applicants' Founding para 36.1 pleadings p 145

25 Applicants' Founding para 45 pleadings p 150

25. SAVRALA and its members initially co-operated with SANRAL with a view to the successful implementation of tolling and the readying of their operations on a technical and administrative level for that purpose.[26]

26. The stance of SAVRALA and its members started to change when the limitations and problems with e-tolling on a technical level became apparent to them and their concerns raised in this regard were continually left unaddressed.[27]

27. SAVRALA and its members nevertheless continued to engage with SANRAL and at the same time made representations to the Minister of Transport, the Gauteng Freeway Improvement Project Steering Committee, the Gauteng Legislature, the SANRAL Board and National Treasury between 17 February 2011 and 20 February 2012.[28]

28. It was during the course of its interactions with SANRAL and the public participation processes in 2011 that SAVRALA and its members learned more of the unworkable and unduly burdensome nature of e-tolling. These are the further reasons why the introduction of e-tolling in the case of the GFIP network is unlawful and should not be implemented.[29]

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[26] Applicants' Founding paras 385 - 395 pleadings pp 260 -263

[27] Applicants' Founding paras 397 - 399 pleadings pp 263 - 264 and "FA70" to "FA71" pleadings pp 660 - 664

[28] Applicants' Founding paras 400 - 407 pleadings pp 264 - 265 and Applicants' Answer to Treasury paras 35 - 42 pleadings pp 2402 - 2403

[29] Idem. Applicants' Founding 410 pleadings p 266 and Applicants' Reply paras 157 - 170 pleadings pp 2103 - 2108

29. SAVRALA's members will suffer material prejudice if e-tolling is implemented in the form of the substantial costs of putting in place software, systems and personnel to administer e-toll collection and interface with SANRAL. This will involve the establishment of new departments, the employment and deployment of personnel, the costs of resources in the establishment and running of the process and the huge administrative burden of collecting toll from the customers of SAVRALA's members.[30]

30. SAVRALA brings the application on behalf of its members, road users in Gauteng and in the public interest.[31]

***QASA***

31. The third applicant is the QuadPara Association of South Africa ("QASA"), an organisation that protects and promotes the rights and interests of people with disabilities and people with mobility impairment.[32]

32. QASA has approximately 6 000 active members, 2 000 of whom are based in Gauteng. 78% of QASA's members are black and less than 1% are gainfully employed.[33]

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30 Applicants' Founding paras 435 - 439 pleadings pp 272 - 273

31 Applicants' Founding para 46 pleadings p 150

32 Applicants' Founding paras 47 - 49 pleadings p 151

33 Applicants' Founding para 50 pleadings p 151

33. The sole source of income for 99% of QASA's members (and the same applies to many quadriplegics and paraplegics who are not members of QASA) is the state disability pension of R1 200 per month.[34]

34. The members of QASA and the quadriplegics and paraplegics who QASA represent are particularly vulnerable to the introduction of e-tolling on account of their dependence on the private car for transport. The pleadings set out how public transport is of no use to them: the public transport offerings are either totally inaccessible or, in the case of the Gautrain, far too expensive with its reach and/or routes being of no assistance to the vast majority of QASA's members, as attested to by the QASA CEO Ari Seirlis, who inspects public transport on behalf of persons with disability and mobility impairment.[35]

35. It is not possible to exempt QASA's members from payment of e-toll since the vast majority of them do not own a car of their own and rely on friends, relatives and third parties to transport them for which they pay out of the tiny amount given to them by the government to live on.[36]

36. Nothing has been done by SANRAL and/or the further respondents to date in order to address the hardship of the members of QASA and the constituency represented by QASA.

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[34] Applicants' Founding para 51 pleadings p 151

[35] Applicants' Founding paras 52 - 53 pleadings pp 151 - 152

[36] Idem. See also Applicants' Founding para 422 pleadings p 268 and para 445 pleadings p 274

37. In its first answering affidavit, SANRAL merely challenged the power of QASA to institute legal proceedings[37] and suggested elsewhere (apparently not having taken note of what had been said about exemption not being of assistance to QASA members) that QASA members should apply for exemption from payment of toll.[38]

38. In its second answering affidavit, SANRAL merely indicated that the prejudice to QASA's members is not sufficient reason to halt the implementation of e-tolling.

39. There is, inexcusably, no other answer or effort to address or ameliorate the position of QASA members and all persons with disability and mobility impairment.

***SANCU***

40. The fourth applicant is the South African National Consumer Union ("SANCU"), an independent consumer organisation that protects and promotes the rights of millions of consumers in South Africa.[39]

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37 Applicants' Founding para 206 pleadings p 995

38 Applicants' Founding para 218 pleadings 1002. The Transport Minister also challenged the power of QASA to institute and defend legal proceedings (Transport Minister's Supplementary Answer para 67 pleadings p 3285), but this challenge was already answered by the applicants in the Applicants' Reply at para 511 - 515 pleadings pp 2183 - 2184. As this challenge is without merit, and was not proceeded with either in argument in Part A, or before the Constitutional Court, we refrain from dealing with it in the present heads of argument.

39 Applicants' Founding para 56 pleadings p 153. As with QASA, SANRAL initially challenged the power of SANCU to institute proceedings (SANRAL's Answer para 207 pleadings p 996) which was dealt with by the applicants in the Applicants' Reply at para 511 - 520 pleadings p 2183 - 2184. The challenge was not persisted with in Part A or before the Constitutional Court and will not be dealt with further in these heads of argument.

41. The affidavit of Dr Clifton Johnston clarifies that, in bringing the application, SANCU represents its 75 000 immediate members,[40] road users in Gauteng[41] and "*all consumers who will be directly and indirectly affected by e-tolling*".[42]

42. SANCU launched proceedings with the applicants challenging the then e-toll terms and conditions[43] and the implementation of e-tolling on the GFIP network because it is SANCU's view that:

42.1 it is not in the public interest that a government agency be allowed to implement a tolling mechanism that is so inordinately expensive at the expense of road users and the general public;[44]

42.2 it is not in the public interest that consumers generally are made to bear the extra financial burden of the increase of the cost of consumer goods that will be caused by e-tolling and, in particular, the massive added cost of e-toll collection that would not have been incurred if a low or no cost collection mechanism such as the fuel levy were used;[45]

42.3 it is not in the public interest that SANRAL and the Department of Transport are allowed to introduce a tolling project of the magnitude of the proposed

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40 Johnston paras 10.1 - 10.3 pleadings pp 739 - 740

41 Johnston para 10.8 pleadings p 742

42 Johnston para 10.10.1 pleadings p 743 .

43 These have subsequently been withdrawn by SANRAL

44 Johnston para 10.10.2.2 pleadings p 744

45 Johnston para 10.10.2.3 pleadings p 744

toll road scheme and so far reaching in impact without giving the public proper notice and without duly consulting with the public at the outset.[46]

**THE HISTORY OF THE APPLICATION**

43. The present application was launched on 23 March 2012.[47]

44. The application for interim relief, that is Part A, was heard on 24 to 26 April 2012.

45. His Lordship Mr Justice Prinsloo ("Prinsloo J") granted the applicants interim relief as prayed for in terms of Part A of the notice of motion on 28 April 2012.[48]

46. Thereafter, the record of review was filed incrementally by the respondents between 16 May 2012 and 12 July 2012.[49] It was necessary for the applicants to call for the production of documents, or parts of documents, that were withheld by SANRAL.

47. Shortly after the filing of the first part of the record by SANRAL, on 21 May 2012, SANRAL and Treasury made application for leave to appeal directly to the Constitutional Court on an urgent basis against the judgment of Prinsloo J in Part A.

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46 Johnston para 10.10.2.4 pleadings p 745. SANCU set out its concerns on the lack of transparency on the inordinate costs of tolling and the lack of transparency in regard thereto to the Minister of Transport and Minister of Finance on 16 March 2012 (See "CJ1" at pleadings pp 748 - 749) and called for an independent costing of e-tolling with a view to the reconsideration of the scheme.

47 Notice of Motion pleadings p 1.

48 A copy of the judgment is attached.

49 Applicants' Supplementary Founding paras 7.1 - 7.5 pleadings pp 2445 – 2446.

48. Between 21 May 2012 and 31 July 2012, the parties exchanged affidavits in the Constitutional Court proceedings and filed their respective heads of argument.

49. The Constitutional Court application for leave to appeal was heard on 15 August 2012 and judgment was delivered on Thursday 20 September 2012.[50]

50. The Constitutional Court set aside the order granted by Prinsloo J and made an order that the costs in the Constitutional Court would be costs in the review (ie Part B).

51. In its judgment, the Constitutional Court expressly refrained from making any findings on the merits of the application.[51]

52. Meanwhile, the applicants delivered the supplementary founding affidavit in the review on 17 July 2012.[52] The supplementary founding affidavit was filed on the strength of the information contained in the consolidated record filed by the respondents between 16 May 2012 and 12 July 2012.

53. On 28 August 2012, after the repeated refusal by SANRAL to disclose its contract with the toll operator, ETC JV, (the "ETC contract") and related tender documentation, the applicants launched an application to compel disclosure of these documents

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50 A copy of the judgment is attached hereto. We will refer to this judgment as "the Constitutional Court judgment".

51 At para 52.

52 See pleadings pp 2441 - 2242

together with further documents referred to by SANRAL either in their affidavits filed of record before this Court or the Constitutional Court.[53]

54. The applicants had expressly invited SANRAL to disclose the ETC contract and true toll collection costs in their founding affidavit on 23 March 2012.[54]

55. The ETC contract together with several other documents were finally produced pursuant to a settlement of the interlocutory application to compel disclosure on Friday 14 September 2012.

56. SANRAL, the Minister of Transport, Treasury and the Minister of Water and Environmental Affairs all filed their supplementary answering affidavits in the review on Monday 17 September 2012.

57. The applicants filed their supplementary replying affidavit in two parts[55] on Monday 1 October 2012 and Saturday 6 October 2012.

58. Despite expressly reserving their right to file a supplementary founding affidavit when the ETC contract and related documentation were finally produced,[56] the applicants were able to refer to the ETC contract and related tender documentation in the

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53 cf. "SAA1" – "SAA2" pleadings p 2986 - 2988 read with Applicants' Supplementary Reply para 212 pleadings p 3466

54 Applicants' Founding para 236 pleadings p 206

55 Necessitated by the sudden illness and need for replacement of specialist counsel dealing with the environmental law review: Applicants Supplementary Reply para 6-7 p 3415

56 Applicants' Supplementary Founding para 30.3 pleadings p 2455

replying affidavit when replying to the material allegations in the supplementary answering affidavits of the respondents.[57]

59. Unfortunately, SANRAL and Treasury have continued to withhold documentation, this time documentation referred to and relied on by them in their respective supplementary answering affidavits.[58]

60. The applicants have again reserved their right to supplement their replying affidavit when such documentation is produced either voluntarily or by order of court.[59]

61. We submit that Treasury and SANRAL's unreasonable refusal to comply with the respective Rule 35(12) notices, in circumstances where they were plainly aware that such non-compliance with the rules would preclude the applicants from properly replying to allegations made by them, is inconsistent with the duties of organs of state as parties to litigation[60] and warrants

61.1 this Court disregarding allegations made on the strength of such documents; or

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57 For self-evident reasons, the information gleaned from the ETC contract and related tender documentation was not in the hands of the applicants and therefore not included in earlier affidavits filed of record through no fault of the applicants

58 Applicants' Supplementary Reply paras 413 - 419 pleadings p 3534 - 3535 and "RA22" - "RA23" pleadings p 3773 – 3780. Treasury sent a letter responding to the Rule 35(12) notice on 4 October 2012, when the Applicants' supplementary reply had already been filed.

59 Applicants' Supplementary Reply para 419 pleadings p 3535

60 See generally, Njongi v MEC, Department of Welfare Eastern Cape 2008 (4) SA 237 (CC) (and in particular para 79); Baphalane Ba Ramokoka Community v Mphela Family and Others 2011 (9) BCLR 891 (CC) at para 38; Matatiele Municipality and Others v President of the Republic of South Africa and Others 2006 (5) SA 47 (CC) at para 107; Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA) at para 15

61.2 where appropriate, the drawing of an adverse inference against SANRAL and Treasury.

**CABINET, POLICY AND POLYCENTRICITY**

62. In the leave to appeal proceedings before the Constitutional Court, SANRAL and Treasury argued, in the absence of the record of review and on partial papers, that the High Court should not have granted interim relief because the e-tolling of the GFIP network was a policy decision of executive government that was polycentric in nature.

63. The respondents beat the same drum in their answering affidavits in an attempt to ward off the review and prevent this Court from setting aside what is unlawful and interdicting what is unconstitutional.

64. In the light of the Respondents' emphasis on policy, we turn to set out the essential steps in the process leading up to the impugned toll declarations and the Minister's approvals including the Cabinet approval of August 2007. We thereafter examine the significance of such approval in the context of the present application.

65. We also clarify which grounds of review are not affected by considerations of policy.

66. We do so in order that the respondents do not succeed, as they did on partial papers before the Constitutional Court, in confounding the present application with the spectre of separation of powers and of policy.

67. The essential steps were as follows:

67.1 in August 1996, the Department of Transport published the "*White Paper on National Transport Policy*";[61]

67.2 the policy preferred for the funding of "*economic infrastructure*" was "*in the case of roads…a fuel levy, which is a surrogate user charge, and where viable or appropriate, tolling which is a direct user charge*";[62]

67.3 the White Paper also provided that in the case of social infrastructure, "*attention will be given to justifying greater appropriation from the Exchequer for transport infrastructure, and where appropriate and possible, infrastructure will be funded through user charges and/or investments by the private sector*";[63]

67.4 the White Paper also envisaged the establishment of a national roads agency and reiterated that in the case of the "*primary road network*" financing should be by means of "*a dedicated levy on fuel and toll charges*";[64]

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61 SANRAL record pp 1 - 46

62 SANRAL record p 8 and Applicants' Supplementary Reply paras 51 - 66 pleadings pp 3426 - 3430

63 SANRAL record p 12 and Applicants Supplementary Reply paras 60 - 62 p 3427

64 SANRAL record p 14 and Applicants' Supplementary Reply para 63 pleadings pp 3427 - 3430

67.5 in 1998, the Legislature endorsed the documented national policy set out in the White Paper when enacting the SANRAL Act. The SANRAL Act made provision for the establishment of SANRAL, the contemplated national roads agency. It included appropriations from the fiscus, levies on fuel and tolling amongst the funding sources for SANRAL's projects;[65]

67.6 between 1998 and 2003, the idea of tolling Gauteng's freeways was explored within the Gauteng Provincial Department of Transport and Public Works, but not pursued;[66]

67.7 on 3-4 August 2005, SANRAL made its original proposal to the Minister of Transport, Mr. Jeffrey Radebe, that Gauteng's freeways be upgraded and expanded and new roads be developed and that they be funded by means of electronic tolling;[67]

67.8 between August 2005 and June 2006, SANRAL's proposal was further developed by a joint working group set up between SANRAL, the Department of Transport, Provincial Government and certain municipalities

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65 Section 34 of the SANRAL Act and Applicants' Supplementary Reply paras 67 - 71 pleadings pp 3430 - 3431

66 Applicants Founding paras 86 - 90 pleadings pp 159 read with SANRAL's Answer para 237.1 pleadings p 1014

67 Applicants' Supplementary Founding paras 66 - 67 pleadings pp 2478 - 2480 read with SANRAL record p 428 FF and "SA13" pleadings pp 2670 - 2685

in Gauteng, the fruit of which was the document referred to in the pleadings as “the 2006 proposal”;[68]

67.9 in October 2006, the 2006 proposal was laid before Cabinet with the purpose of obtaining "*approval for scheme go-ahead by political principals*".[69] Cabinet noted the proposal and instructed SANRAL to complete outstanding feasibility studies and impact studies;[70]

67.10 on 24 May 2007, the CEO of SANRAL submitted a memorandum to the SANRAL board requesting that the board approve that SANRAL proceed with "*the proposed open road tolling strategy for tolling the national and provincial freeways of Gauteng*" and *inter alia* "*that SANRAL…embark on the legally prescribed public participation process regarding the proposed toll scheme*" and thereafter "*then approach the Minister of Transport to declare the relevant roads as toll roads*";[71]

67.11 on 29 May 2007, the SANRAL board approved the implementation of GFIP and the embarkation of SANRAL on the "*legally prescribed*" process to introduce tolling as proposed;[72]

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68 SANRAL's Answer para 62 pleadings p 856 and "NA6" pleadings pp 1278 - 1410; see also "AA1" pleadings pp 1772 - 1804 and SANRAL record p 629 FF

69 SANRAL record p 658

70 Cabinet memorandum in SANRAL record para 3.3 p 1842

71 SANRAL record pp 1402 - 1433

72 SANRAL record p 1402

67.12 thereafter, Cabinet was approached for a second time and asked to approve the implementation of GFIP by SANRAL as a toll road scheme.[73] The approval sought, and which would later be granted by Cabinet, was that:

> "*The proposed freeway improvement scheme will be implemented by South African National Roads Agency Limited (SANRAL) as a state toll scheme. Normal procedures for toll schemes will apply including the declaration of all identified roads in the scheme as national roads, execution of toll declaration process and the determination of toll tariffs.*"[74]

67.13 still in July 2007, "*Cabinet approved the implementation of the GFIP as a State implemented toll road*".[75] We pause to submit that the nature of the approval for the implementation of the scheme as "*a State toll scheme*" is a direct reference to the approval sought by SANRAL from Cabinet, and granted, namely, on the basis that "*normal procedures for toll schemes will apply*" as provided for in the SANRAL Act;[76]

67.14 on 8 October 2007, the then Minister of Transport, Jeffrey Radebe, gave a keynote address - it is not clear from the papers to whom - announcing the launch of GFIP and indicating the intention that the road be tolled;[77]

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73 SANRAL record pp 1841 - 1847

74 Cabinet memorandum in SANRAL record para 5.1 p 1845

75 SANRAL's Answer para 37 pleadings p 838. See also Applicants Founding para 93 pleadings p 160 read with SANRAL's Answer para 237.1 pleadings p 1014

76 Cabinet memorandum in SANRAL record para 5.1 p 1845

77 Applicants Founding para 94 pleadings p 160; SANRAL's Answer para 27 pleadings p 838

67.15 on 12 October 2007, SANRAL published a notice of intent to toll "*in terms of section 27(4)(a) of the [SANRAL] Act, 1998*" in the Government Gazette and initiated the toll declaration public participation procedure in respect of various sections of the N1, N2, N3, N4 and N12;[78]

67.16 on 10 January 2008, SANRAL applied to the Minister of Transport in terms of section 27 of the SANRAL Act for approval to declare the relevant sections of the GFIP network to be toll roads:

> "*The purpose of this submission is to request you, in terms of Clause 27 of the South African National Roads Agency Limited and National Roads Agency, Act no 7 of 1998, to consider, and should you concur, to give approval for the declaration of portions of the National Road network (191,5km) in Gauteng as toll roads and the proposed establishment of electronic toll points as indicated in figure 2.*" (emphasis added)[79]

67.17 on 11 February 2008, the Minister of Transport, Jeffrey Radebe, approved SANRAL's application in terms of section 27 of the SANRAL Act;[80]

67.18 on 28 March 2008, SANRAL declared certain sections of the N1, N2, N3, N4 and N12 as toll roads in terms of section 27(1) of the SANRAL Act;[81]

67.19 on 11 April 2008, the Minister of Transport declared sections 1 and 2 of the R21 as a national road;[82]

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78 Applicants Founding paras 95 - 110 pleadings pp 160 - 169 read with Answering Affidavit para 238 - 249 pleadings pp 1015 - 1020

79 Applicants Founding para 111 pleadings p 169 read with SANRAL's Answer para 250 pleadings p 1021 and Transport Minister's record p 1; see also "NA5" pleadings p 1317

80 SANRAL record p 3543 read with the attached signed approvals at pp 3545, 3547, 3549, 3551 and 3553

81 See annexures "A1" to "A6" pleadings pp 16 - 21

67.20 on 18 April 2008, SANRAL published notice of intention to toll sections 1 and 2 of the R21 "*in terms of section 27(4)(a) of the [SANRAL] Act, 1998*" and thus initiated the prescribed public participation process for the declaration of that section of road to be a toll road;[83]

67.21 on 9 July 2008, SANRAL lodged its application to the then Minister of Transport, Jeffrey Radebe, for approval for the tolling of the R21 also in terms of section 27 of the SANRAL Act.[84] Once again, the nature of the application was specified by SANRAL:

> "*The purpose of this submission is to request you, in terms of Clause 27 of the [SANRAL Act] to consider and, should you concur, to give approval for the declaration of the National Road R21…*";[85]

67.22 on 13 July 2008, three days after receipt of the July 2008 application, the Minister of Transport gave approval for the R21 to be declared a toll road;[86]

67.23 on 28 July 2008, SANRAL declared the R21 a toll road in terms of section 27(1) of the SANRAL Act.[87]

68. In the light of the above-mentioned chronology, we submit as follows:

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82 Applicants Founding para 118 pleadings p 172 read with "FA26" pleadings pp 435 - 462

83 Applicants Founding paras 119 - 125 pleadings pp 172 - 173 read with SANRAL's Answer para 252 - 254 pleadings pp 1021 - 1022

84 Applicant's Supplementary Founding paras 102 - 103 pleadings p 2493; SANRAL record p 3848 – 3851ff

85 SANRAL record p 3861

86 Applicants Supplementary Founding para 105 pleadings 2493 read with SANRAL record p 4014.1

87 "FA31" pleadings pp 470 - 472; Applicants Founding paras 127 - 128 pleadings p 174 read with SANRAL's Answer para 254 pleadings p 1022

68.1 It is vitally important to distinguish between two categories of decision:

68.1.1 the decision of Cabinet described in paragraphs 67.12 and 67.13 above; and

68.1.2 the decisions which are the subject of this review.

68.2 It is clear from the manner in which Cabinet made its decisions that it approved implementation of the GFIP as a toll scheme, but did so subject to the "*normal procedures*" envisaged by the SANRAL Act.

68.3 The Cabinet decision was self-evidently polycentric. The applicants have no quarrel with that proposition. But the Cabinet did not purport to usurp the power of the Minister, as envisaged in section 27 of the SANRAL Act, to perform the administrative acts of considering and, if appropriate, declaring the relevant roads as toll roads.

68.4 It is only the latter which are the subject of this application.

68.5 It is not competent to conflate the two categories of decision. They operate at different levels.

68.6 The Cabinet decision was a high-level policy decision or, more precisely, approval[88] of SANRAL's intention[89] to implement the GFIP as a state toll scheme.

68.7 However, as the papers in this matter reveal, there was a range of detailed considerations (not served before Cabinet) that the Minister had to take into account before exercising his administrative function in terms of section 27 of the SANRAL Act.

68.8 The Cabinet did not purport to consider those considerations. By granting approval on the basis that the normal procedures would apply, Cabinet clearly appreciated the function which the Minister would have to fulfil in terms of section 27 of the SANRAL Act.

68.9 In fact, an inappropriate conflation of the two categories of decision – and not the approach adopted by the applicants in this case – is in conflict with the separation of powers.

68.10 This is because the Legislature, when it enacted the SANRAL Act, envisaged that the Minister must exercise an independent discretion

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88 On the limited information placed before it by SANRAL who incorporated some of the findings of the social, economic and toll feasibility studies in the Cabinet memorandum at SANRAL record p. 1841. See para 3.3 at SANRAL record p 1842. It is not even clear that the studies themselves were actually placed before Cabinet since, unlike the other documents in the SANRAL record where attachments are included, no attachments were included with the Cabinet memorandum. SANRAL annexed the Cabinet memorandum to its answering affidavit in the same way.

89 SANRAL had already resolved to embark on GFIP and to e-toll in order to recover funds loaned to pay for it. Only SANRAL is empowered by law to declare a road a toll road and to garner revenues from the public by means of tolling: Section 34 read with 27 of the SANRAL Act.

whether to approve the declaration of a toll road in terms of section 27 of the SANRAL Act.

68.11 The Legislature did not empower the Cabinet to exercise that power, and the Cabinet did not purport to do so in this case.

68.12 Moreover, the Cabinet could never bind the Minister to reach a particular decision, and also did not purport to do so in this case.

68.13 While the Transport Minister would obviously take account of the approval of Cabinet, the Minister had to exercise his administrative function lawfully, reasonably and procedurally fairly, and could not be fettered by the approval of Cabinet.[90]

68.14 As the Constitutional Court has said:

> "The principle of the separation of powers emanates from the wording and structure of the Constitution. The Constitution delineates between the legislature, the executive and the judiciary. This court recognised a fundamental premise of the new constitutional text as being 'a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness'."[91]

68.15 And further:

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[90] Hofmeyr v Minister of Justice 1992 (3) SA 108 (C) at 123C and at 124-5; Tantoush v Refugee Appeal Board 2008 (1) SA 232 (T) at para 81; See, generally, the majority decision in Walele v City of Cape Town 2008 (6) SA 129 (CC).

[91] Justice Alliance of South Africa v President of the Republic of South Africa and Others 2011 (5) SA 388 (CC) at para 32

> "The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'."[92]

68.16 These extracts make clear that the doctrine of separation of powers does not only concern deference which must be shown by the courts to the other branches of government. It also entails appropriate respect being shown between the Executive and the Legislature.

68.17 Where, as in this case, the Legislature has determined that a particular functionary must make a particular decision, that determination must be respected and applied.

69. We respectfully submit that in any event the grounds for relief that are unaffected by considerations of policy, polycentricity and/or separation of powers include:

69.1 the failure by SANRAL to conduct a proper public participation process in terms of section 27 of the SANRAL Act;

69.2 the failure by the Transport Minister to comply with mandatory provisions of the SANRAL Act;

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[92] Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC) at para 37; Glenister v President of the Republic of South Africa and Others 2009 (1) SA 287 (CC) at para 34

69.3 the review on the grounds that the toll declarations and/or the Transport Minister's approvals were irrational;[93]

69.4 the review of the environmental authorisations.

70. Finally, the applicants accept that the decisions of the Transport Minister warrant due deference by this Court where relief is sought by the applicants on the grounds of reasonableness. However, as will be submitted in the section on the substantive grounds of review below, this is not an obstacle to the proper application of PAJA to the decisions.

**DEFECTIVE PUBLIC PARTICIPATION**

71. We submit that the Transport Minister's approvals and the toll declarations made by SANRAL in terms of section 27(1) of the SANRAL Act on the strength of such approvals are invalid because the public participation process conducted by SANRAL was defective.[94]

72. Section 27 of the SANRAL Act prescribes that a mandatory public participation procedure be conducted before SANRAL may declare a toll road.

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93 Democratic Alliance v President of the Republic of South Africa and Others (Unreported judgment dated 5 October 2012 in CC Case No. 122/11) ( hereafter referred to as "Simelane") para 44: "The separation of powers has nothing to do with whether a decision is rational…. Either a decision is rational or it is not."

94 This ground is traversed in Applicants Founding paras 194 - 205 pleadings pp 187 - 199; SANRAL's Answer para 285 - 291 pleadings pp 1033 - 1034; Transport Minister's Supplementary Answer paras 74 - 81 pleadings pp 3289 - 3293; Applicants Supplementary Founding para 61 to 118 pleadings pp 2475 - 2498 and SANRAL Supplementary Answer para 184 - 192 pleadings pp 2898 - 2901; Applicants Replying paras 239 - 249 pleadings pp 2123 - 2127

73. Section 27(1) of the SANRAL Act provides that SANRAL may declare a specified portion of national road a toll road "with the Minister's approval".[95]

74. Section 27(4) of the SANRAL Act provides that:

> "(4) The Minister will not give approval for the declaration of a toll road under subsection (1) (a), unless-
>
> (a) the Agency, in the prescribed manner, has given notice, generally, of the proposed declaration, and in the notice-
>
> (i) has given an indication of the approximate position of the toll plaza contemplated for the proposed toll road;
>
> (ii) has invited interested persons to comment and make representations on the proposed declaration and the position of the toll plaza, and has directed them to furnish their written comments and representations to the Agency not later than the date mentioned in the notice. However, a period of at least 30 days must be allowed for that purpose;
>
> (b) the Agency in writing-
>
> (i) has requested the Premier in whose province the road proposed as a toll road is situated, to comment on the proposed declaration and any other matter with regard to the toll road (and particularly, as to the position of the toll plaza) within a specified period (which may not be shorter than 60 days); and
>
> (ii) has given every municipality in whose area of jurisdiction that road is situated the same opportunity to so comment;
>
> (c) the Agency, in applying for the Minister's approval for the declaration, has forwarded its proposals in that regard to the Minister together with a report on the comments and representations that have

[95] Section 27(1)(a) of the SANRAL Act

> been received (if any). In that report the Agency must indicate the extent to which any of the matters raised in those comments and representations have been accommodated in those proposals; and
>
> (d) the Minister is satisfied that the Agency has considered those comments and representations.
>
> Where the Agency has failed to comply with paragraph (a), (b) or (c), or if the Minister is not satisfied as required by paragraph (d), the Minister must refer the Agency's application and proposals back to it and order its proper compliance with the relevant paragraph or (as the case may be) its proper consideration of the comments and representations, before the application and the Agency's proposals will be considered for approval." (emphasis added)

75. We submit that as legislative provisions designed to safeguard the rights of the public in general, and road users who will be affected by the tolling of a road in particular, sections 27(1) and 27(4) must be interpreted in a manner that is informed by the right to procedurally fair administrative action guaranteed by section 33 of the Constitution.[96]

76. In this regard, the Constitutional Court has held that, as it is legislation that gives effect to section 33 of the Constitution, all administrators must comply with PAJA unless the statutes (or by-laws) that govern them are inconsistent with PAJA:

> "PAJA was enacted pursuant to the provisions of s 33, which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a

[96] Section 39(2) of the Constitution provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." See Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others 2001 (1) SA 545 (CC) at paras 21-25

> proper construction, the provisions of the statutes in question are inconsistent with PAJA."[97] (emphasis added)

77. And in the earlier case of *Minister of Home Affairs v Eisenberg and Associates: In re Eisenberg and Associates v Minister of Home Affairs and others*, the same Court held that:

> "In each case it is a question of construction whether a statute making provision for administrative action requires special procedures to be followed before the action is taken. In addition, whether or not such provisions are made, the administrative action must ordinarily be carried out consistently with PAJA."[98] (emphasis added)

78. We therefore submit that sections 27(1) and 27(4) of the SANRAL Act should be read in a manner that is consistent with and informed by sections 3 and 4 of PAJA and the regulations pertaining to fair public participation.[99]

79. We submit that what the above implies is that the mandatory public participation procedure prescribed by sections 27(1) and 27(4) of the SANRAL Act must be carried out in a manner that is meaningful and effective since, as was recently held by the Constitutional Court,

> "[p]rocedural fairness … is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is

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97 Zondi v MEC for Traditional & Local Govt Affairs 2005 (3) SA 589 (CC) at para 101 (emphasis added).

98 2003 (5) SA 281 (CC) at para 59

99 Regulations on Fair Administrative Procedures published in GN R1022 in GG 23674 of 31 July 2002 (as amended)

> also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy." [100]

80. We emphasise that the right to procedural fairness is no recent phenomenon, and that the courts have consistently laid down stringent requirements of procedural fairness:

80.1 In *Administrator, Transvaal and others v Traub & Others*,[101] Corbett CJ considered whether the *audi* principle is confined to cases where the decision affects the liberty, property or existing rights of the individual concerned or whether the impact of the principle is wider. After analysing the evolution of the doctrine of "legitimate expectations" particularly in English law, he concluded that there was a similar need in South Africa to expand the ambit of the *audi* principle:

> "There are many cases where one can visualise in this sphere ... where an adherence to the formula of 'liberty, property and existing rights' would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected."[102]

80.2 The extension of the *audi* principle has since been repeatedly affirmed.[103]

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100 Joseph and others v City of Johannesburg 2010 (3) BCLR 212 (CC) at para 42.

101 1989 (4) SA 731 (A)

102 At 761E.

103 See: Administrator, Tvl & Others v Zenzile & Others 1991 (1) SA 21 (A); South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A); Administrator, Natal & another v Sibiya & another 1992 (4) SA 532 (A); Administrator Cape & another v Ikapa Town Council 1990 (2) SA 882 (A).

80.3 It is clear that where there is a right to be heard, the failure to afford a hearing vitiates the decision entirely.[104]

80.4 We submit that the case-law reveals that a reasonable opportunity to make representations requires the following:

80.4.1 that the affected party is properly apprised of the information and reasons that underlie the impending decision;[105]

80.4.2 that the affected party is given an opportunity to present and dispute information and arguments;[106] and

80.4.3 that the decision-maker keeps an open mind in hearing the representations.[107]

81. Ironically, SANRAL and the Department of Transport showed themselves in the 2006 proposal to appreciate the above when unequivocally acknowledging the fundamental importance of public participation in the context of GFIP. In the 2006 proposal, which

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104 Momoniat v Minister of Law & Order 1986 (2) SA 264 (T) at 274 D; Nkwinti v Commissioner of Police 1986 (2) SA 421 (E) at 439F; Attorney-General, Eastern Cape v Blom 1988 (4) SA 645 (A) at 669 J and 658 H – I; Administrator, Transvaal & Others v Zenzile & Others 1991 (1) SA 21 (A) at 28 H - I, 37 C - F and 40 A – B; Administrator, Natal & another v Sibiya & another 1992 (4) SA 532 (A) at 536 H – I; Crook and another v Minister of Home Affairs 2000 (2) SA 385 (T) at 398-399; Logbro Properties CC v Bedderson NO and others 2003 (2) SA 460 (SCA) at paras 24-25.

105 Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism 2005 (3) SA 156 (C) at paras 52-69; Yuen v Minister of Home Affairs 1998 (1) SA 958 (C); Mhlambi v Mtjhaberg Municipality 2003 (5) SA 89 (O)

106 Sokhela v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) 2010(5) SA 574 (KZP), para 52; Du Bois v Stompdrift-Kamanassie Besproeiingsraad 2002 (5) SA 186 (C) at 198H-199A

107 Janse van Rensburg NO v Minister of Trade and Industry NO 2001 (1) SA 29 (CC), para 24; Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others 2006 (4) SA 73 (W), para 143; Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others 2000 (4) SA 621 (C), para 69.

was a joint publication *inter alia* by SANRAL and the Department of Transport, it is spelled out in the concluding section dealing with the "***WAY FORWARD***" for proposed tolling scheme that:

> "*Consultation at all levels will be an important cross-cutting element in all of the above processes, both within and outside Government. The most critical will be public consultation, which will be particularly necessary in the following areas:*
>
> - *the principle of tolling;*
> - *the planned Initial Construction Works;*
> - *the nature and price of the planned toll scheme*."[108]

82. This is not what happened in practice.

83. We submit that the public participation procedure conducted by SANRAL woefully failed the requirements of sections 27(1) and 27(4) of the SANRAL Act in the case of GFIP.

**SANRAL failed to publish notice generally**

84. First, SANRAL failed to comply with section 27 in that it failed to publish notice of intent to toll in a manner that was effective to bring to the attention of the public

[108] SANRAL record p 658

generally, and the hundreds of thousands of road users using the GFIP network in particular, that Gauteng's freeways would be tolled.

85. In the case of both the notices of intent to toll for the various sections of the N1 and the R21, SANRAL only published notice of intent to toll in the Government Gazette and in a single edition of newspapers such as the Sunday Times, Beeld, The Star, Mail and Guardian and Pretoria News.[109]

86. All of the notices were situated well within the inner pages of such newspapers,[110] and none of the newspapers signalled on the front page that it contained such notice.[111]

87. There was no television or radio broadcast informing the public of SANRAL's notice of intent to toll and of the deadline for making representations.[112] SANRAL did not even put up roadside signboards alongside affected routes to alert road users using such routes of the intention to toll, despite that it easily could have done so.[113]

88. As much was said to SANRAL by a member of the public at the time:

> "*For a venture aimed at extracting huge amounts of money from the public, SANRAL should put up boards at the intended toll spots, indicating an*

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109 Applicants Founding para 99 pleadings pp 164 - 165 and para 120 pleadings p 172. The Notice of Intent to toll in respect of the R21 was only published in the Pretoria News, the Beeld and the Star.

110 Applicants Founding para 99 pleadings pp 164 - 165 and para 120 pleadings p 172

111 FA19-FA24 pleadings p 420-424 and FA28-FA30 pleadings p 467-469

112 Transport Minister's record p 20-25 and Transport Minister's supplementary record p 15-20.

113 Applicants' Founding para 203.9 pleadings p 195

> *approximate proposed fee for that toll point and the distance covered by this fee. A telephone number for public enquiries should also be shown. This way the public can see exactly how the tolling will affect them financially and give them a chance to explore ways of using other roads to avoid toll stretches.*"[114]

89. As a consequence, SANRAL received only thirty[115] responses in respect of the notice of intent to toll for the N1, N2, N3, N4 and N12 and two[116] responses in respect of the R21.[117]

90. In other words, knowing that SANRAL intended to undertake the largest urban toll road scheme ever in South African history that would affect hundreds of thousands of urban motorists every day,[118] SANRAL made no effort to ensure that such persons knew of its intent to toll.

91. Inconsistent with the Constitution and with PAJA, SANRAL adopted a minimalist and inflexible approach to its duty to publish notice "*generally*" that amounted to the paying of mere lip service to the section.

92. The regulations under PAJA on fair administrative procedures, and in particular Regulation 18(6), were ignored:

> "In order to ensure that a proposed administrative action is brought to the attention of the public, an administrator may, in addition, publicise the

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114 Comment of Mr I van Rooyen quoted in Applicants Founding para 202.8 pleadings p 192 and "FA47" pleadings p 526

115 SANRAL count 82 because one of the representations was a private petition by a company in Woodmead: Applicants' Supplementary Founding para 112-113 pleadings p 2495. The petition is at Transport Minister's record p 197-200 and is referred to as the response of Ms J Engelbrecht.

116 Applicants' Supplementary Founding para 112-114 pleadings pp 2495-6

117 Applicants' Founding para 125 pleadings p 173

118 Nazir Alli says "approximately 1 million vehicles … each day" SANRAL Answer para 153 pleadings p 968

> information … by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets."

93. We submit that SANRAL and the Transport Minister's inflexible interpretation is inconsistent with the approach to procedural fairness laid down by the Constitutional Court.

94. In *Joseph* (supra), the Constitutional Court pointed out that it has "consistently held that fairness needs to be determined in the light of the circumstances of a particular case."[119]

95. This approach means that "[t]here is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts."[120]

96. The Constitutional Court held in the *Kyalami Ridge Environmental Association* case, "procedural fairness depends in each case upon the balancing of various relevant

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[119] Joseph (supra) at para 56; See also Premier, Mpumalanga and another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC) at para 39; President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC) at para 219 and Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) at para 114

[120] Chairman, Board on Tariffs and Trade and others v Brenco Inc 2001 (4) SA 511 (SCA) at para 14

factors including the nature of the decision, the 'rights' affected by it, the circumstances in which it is made, and the consequences resulting from it."[121]

**The time given to respond was inadequate**

97. Secondly, the public participation process was made defective by the shortness of the period in which the public was given to respond.

98. The amount of time in which the public was allowed was the statutory minimum of 30 days. We submit that this was hopelessly insufficient and inappropriate in view of the magnitude of the scheme and the number of persons it would impact.[122]

99. In this regard it has been held[123] precisely in the context of consultation procedures conducted with a view to tolling that two essential prerequisites to the initiation of proper consultation[124] are that there must be

99.1 sufficient information provided in notices initiating consultation; and

99.2 sufficient time given in which to respond.[125]

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121 Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukhwevho Intervening) 2001 (3) SA 1151 (CC) at para 101

122 Applicants Founding para 205.1 - 205.7 pleadings pp 198 - 199. See also SANRAL Answer para 294 pleadings pp 1039 - 1042

123 S v Smit 2008 (1) SA 135 (T)

124 We submit the same is valid for the proper initiation of a valid notice and comment procedures.

125 S v Smit supra at 153B-J and 173A

100. We submit that the following dictum by the SCA in *Democratic Alliance v Ethekwini Municipality*[126] – where that court was concerned with the question whether the respondent municipality had complied adequately with its duty to facilitate public participation in the decision whether to rename various roads – also underscores the importance of the sufficiency of the time given to respond:

> "The first public notice of this decision came in February 2007. This notice identified the nine streets under consideration and their proposed new names. It did not invite any suggestions for alternative names. It only informed the public that these were the new names the council would consider at the end of that month. More significantly, it afforded members of the public only seven days to submit written comment. The appellant's objection was that the time period was inadequate in that it provided insufficient time for the receipt and compilation of objections; research into the background of the old and new names, and so forth. The validity of this objection, it seems to me, is dictated by common sense."[127]

**The content of the notice was inadequate**

101. Thirdly, SANRAL did not only fail to publish notice as broadly and effectively as the magnitude of the scheme and the number of people that would be affected warranted, SANRAL failed to give proper notice in terms of section 27(4) of the SANRAL Act at all.[128]

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126 2012 (2) SA 151 (SCA)

127 Democratic Alliance v Ethekwini Municipality (supra) at para 27. Although the case concerned the duties of a legislative body, it is useful for present purpose. Like in the present case, there was no detail provided in the legislative scheme under consideration by the court about the precise nature of the requirements of public participation. The Supreme Court of Appeal read the legislative framework in the light of the requirements of the Constitution and PAJA. The same must be done here. Another striking similarity between the two cases is that, in the Democratic Alliance v Ethekwini Municipality case (supra), there was no reasonable explanation for the short notice period (of seven days in that case) to the public, given that there was no urgency.[127] The long period of time between the publication of the notice and the introduction of e-tolls in this case, shows that there was in actual fact similarly no urgency here.

128 Applicants Founding paras 201 - 202 pleadings p 190 - 193

102. The notice published by SANRAL gave no indication to the public, who were expected to react to it, of the indicative cost of tolling.

103. As a result, the most important effect of the administrative action (of declaring Gauteng's freeways to be toll roads) – that in future the road users would have to pay for the use of the road – was not spelled out to the very road users who would be affected.

104. We submit that the most important component of fairness[129] is that the subject of the administrative act must be given a proper indication of the way in which he, she or they will be affected by the decision. Proper engagement is otherwise impossible.

105. SANRAL and the Transport Minister's only answer to the absence of information on the indicative costs of tolling is that, within the scheme of section 27, it is not obliged to inform the public what the cost of using the toll roads in future will be as considerations of cost only come into play with the publishing of tariffs by the Transport Minister in section 27(3).[130]

106. We submit that this could never be right because:

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[129] If an administrator follows a procedure in terms of an empowering provision other than section 4 of PAJA, the procedure which he or she follows must nevertheless be fair. That much is clear from section 4(1)(d) of PAJA.

[130] SANRAL Answer para 285 pleadings pp 1033 - 1034 and Transport Minister's Supplementary Answer para 75 pleadings pp 3289 - 3290

106.1 individuals would be deprived of knowing what impact the tolling of the road would have on them until it was "too late", as happened in the case of GFIP;

106.2 implied in the declaration of a road as a toll road, is the fact that motorists will have to pay tolls for the use of such road. The exacting of a toll for use of the road is what makes a toll road a toll road;

106.3 the declaring of a road as a toll road in terms of section 27(1) and the declaration of tariffs in terms of 27(3) are two powers which are inextricably linked. It is precisely the declaration of a road as a toll road that enables the publication of tariffs and exaction of tolls; and

106.4 regardless whether there is a separate, self-standing obligation to invite comment when proposed tariffs are announced, there can be no doubt that the real bite of a tolling scheme is the tolls themselves. It would be nonsensical and lead to absurdity if the entire infrastructure of the scheme could be rolled out *before* any comment is invited on the most material manner in which tolling would affect people, namely compel them to pay money for the use of the road.[131]

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[131] We caution that to the extent that SANRAL seeks to rely on para 51 of the Constitutional Court judgment to say the contrary, that the interrelationship between section 27(1) & (4) and 27(3) was not addressed in written or oral argument in the leave to appeal. We submit furthermore that such finding was obiter given that the Constitutional Court expressly refrained from pronouncing on the merits of the review.

107. We submit that the decision of *Public Carriers Association and others v Toll Road Concessionaries (Pty) Ltd and others*[132] offers some useful guidance on the importance of the notice of intent to toll having adequate content. The case was also concerned with the declaration of certain roads as toll roads. The Appellate Division, seized with the question whether there had been proper compliance with the notice and comment provisions of the regulations made under the previous National Roads Act 54 of 1971, said the following:

> "The notion that the Minister must set specific amounts of toll and not merely parameters within which tolls are to be charged is reinforced by the requirement of publication of the amounts of toll to be charged in the Gazette (s 9(4)(c) ). The purpose thereof is obviously to inform the public. Although the Act is silent on the point, the reason why, in terms of s 9(4)(d), at least 60 days is to elapse between the date of publication and the date on which the amount of toll becomes payable is presumably to allow for representations to be made to the Minister in regard to the proposed amounts. <u>This purpose would be stultified, if not defeated, if all that is made public is the upper limit of the tolls and not the actual amount thereof. How can representations be made, or be adequately made, when it is not known what actual amount they should address?</u>"[133](emphasis added)

108. It is submitted that this reasoning applies with equal force to the public participation that is envisaged under the SANRAL Act as read with PAJA.

109. We submit that the failure of SANRAL to give in its notice of intent to toll an indication of what the cost of tolling would be vitiated the notice and caused SANRAL to fail to comply with the mandatory provision to publish notice of intent to toll.[134]

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132 1990 (1) SA 925 (A)

133 Public Carriers Association (supra) at 950D-F

134 S v Smit supra at 153B-J and 173A

**SANRAL failed to inform reasonably identifiable individual stakeholders**

110. Fourthly, we submit that SANRAL also conducted a defective public participation process because it failed to give notice to significant and reasonably identifiable juristic persons such as SAVRALA that ply their trade on Gauteng's freeways and would be particularly affected by the declaring of the roads to be toll roads.[135]

111. The application of sections 3 and 4 of PAJA are not mutually exclusive. Where administrative action affects the rights both of individual persons and the general public, the provisions of both section 3 and 4 of PAJA will be applicable.[136]

112. SANRAL made contact with and met with significant stakeholders, including SAVRALA, after the toll declaration process had been completed.[137] There is no reason why they could not have ensured that the same stakeholders were informed of the notice of intent to toll before.

**The rushing of public participation**

113. The consolidated record of review showed at least one of the reasons why SANRAL did no more than pay mere lip service to section 27(4) of the SANRAL Act.[138]

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135 Applicants Founding para 204.1 - 204.6 pleadings pp 196 - 197. Cf SANRAL Answer paras 293 - 293.5 pleadings pp 1038 - 1039

136 Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and another 2005 (3) SA 156 (C) at para 48

137 For instance, the stakeholder meeting held at Irene Country Lodge in July 2008: NA9 pleadings pp 1421-1423

138 Applicants Supplementary Founding paras 61 - 118 - pleadings pp 2475 - 2498

114. SANRAL clearly watered down and expedited the toll declaration process in a rush to get construction under way on time to meet South Africa's promises in the World Cup bid and to make a success of South Africa's hosting of the FIFA 2010 World Cup.[139]

115. SANRAL even imposed the 2010 World Cup deadlines as a condition of tender in relation to the traffic and toll feasibility and environmental consultant tenders.[140]

116. The answers of SANRAL,[141] the Transport Minister[142] and Treasury[143] all essentially amount to a bald denial that SANRAL rushed the process, although tellingly Treasury tried to explain (and therefore implicitly conceded):

> "*Were it to be thought that somehow the public participation process was in some aspects influenced by the reality of the looming World Cup, then the enormous benefits associated with hosting the event entire eclipse any nominal effect on the public participation process.*"[144]

117. We respectfully disagree. Section 33 of the Constitution, and sections 3, 4 and section 6(2)(c) of PAJA guarantee the right to administrative action that is procedurally fair.

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139 Idem. See in particular Applicants Supplementary Founding para 66.2 pleadings p 2478, para 67 pleadings pp 2479 - 2480, paras 73 - 74 pleadings p 2482 - 2483 and paras 75 - 79 pleadings p 2483 - 2486

140 Applicants Supplementary Founding paras 74.1 - 74.2 pleadings pp 2482 - 2483

141 SANRAL's Supplementary Answer paras 184 - 192 pleadings pp 2988 -2901

142 Transport Minister's Supplementary Answer paras 102 - 102.6 pleadings pp 3312 - 3315

143 Treasury Supplementary Answer para 116 pleadings p 3379

144 Treasury Supplementary Answer para 116 pleadings p 3379

118. SANRAL's desire to prepare on time for the 2010 World Cup should have given way to the constitutionally entrenched rights of the public in general, and of road users in particular, to procedurally fair administrative action:

> "*Given the magnitude of the scheme and the hundreds of 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*."[145]

119. We submit that SANRAL and the Transport Minister's allegations that the public participation process duly complied with section 27(4), properly interpreted, are shown to be incorrect and insupportable by:

119.1 the virtual non-response of the public in the context of a scheme which would affect hundreds of thousands of urban road users materially every day;[146]

119.2 the stark contrast between the massive public outcry when tolling as well as the cost of tolling became generally known in February 2011 and the unprecedentedly broad scale of participation in the consultation processes that followed, on the one hand, and the reaction received initially, on the other;[147]

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145 Applicants Supplementary Founding para 80 pleadings p 2486

146 Applicants Supplementary Reply para 107 - 119 pleadings pp 3440 - 342

147 Applicants Supplementary Reply paras 94 - 106 pleadings pp 3437 - 3440

119.3 the acknowledgment by the Minister of Transport that consultation had been insufficient;[148] and

119.4 the widespread and continued public anger at SANRAL and the Government's intransigence on tolling. It is clear that the public feel taken by surprise and betrayed.[149]

120. It is also respectfully submitted that it is evident that, notwithstanding intermittent publication about the planned GFIP in 2007 and 2008, SANRAL's intention to toll as well as the indicative rate of 50 cents were not known to the public.[150] Such intermittent media attention did not, in any event, constitute due compliance by SANRAL of its duty properly and adequately to publish notice of intent to toll and invite comment in terms of section 27(1) read with 27(4) of the SANRAL Act.

121. We submit that it is not necessary for this Court to decide whether section 27 of the SANRAL Act ousts sections 3 and 4 of PAJA – an issue which is addressed in the papers to an extent. As explained above, the concept of procedural fairness is inherently flexible. The wording of section 27(4) of the SANRAL Act is sufficiently open to accommodate the flexibility which procedural fairness requires.

122. The components of procedural fairness which the applicants say were necessary in this case – proper advertising of the intended administrative action, a proper

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148 Applicants Supplementary Reply paras 123 - 127 pleadings pp 3443 - 3444 and "RA3" pleadings p 3591

149 Applicants Supplementary Answer paras 120 - 122 pleadings p 3443

150 Applicants Supplementary Reply paras 128 - 137 pleadings p 3443 and Applicants Reply paras 239 - 249 pleadings pp 2123 - 2127

opportunity to respond to the notice and proper detail in the notice of the true implications of the administrative action – are easily accommodated within the text of section 27(4). It is submitted, in any event, that PAJA is clearly applicable, for the reasons given above.

**Procedural unfairness cannot be justified by appealing to the substance of the decision**

123. Finally, we submit that there is no room for the respondents to argue that a hearing would have made no difference. In *Zenzile's* case (supra) it was held there is no longer any room for such doctrine. In this regard, Hoexter JA observed:[151]

> "It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the enquiry whether he is entitled to a prior hearing. Wade *Administrative Law* 6th ed puts the matter thus at 533-4:
>
> 'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be pre-judged unfairly.'"
>
> The learned judge went on to cite the well-known dictum of Megarry J in *John v Rees* [1970] Ch 345 at 402:
>
> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

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151 At 37C-F.

124. Flowing from the fundamental nature of procedural fairness is the principle that our courts have consistently emphasised: that the issue of procedural fairness and the merits are to be kept separate.

125. According to Baxter *Administrative Law*, 1984 at 540:

> "The principles of natural justice are considered to be so important that they are enforced by the Courts as a matter of policy, irrespective of the merits of the particular case in question. Being fundamental principles of good administration the enforcement serves as a lesson for future administrative action. But more than that, and whatever the merits of any particular case, it is a denial of justice in itself for natural justice to be ignored. The policy of the Courts was crisply stated by Lord Wright in 1943:
>
> 'If the principles of natural justice are violated, in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."
>
> …
>
> The Courts have therefore nearly always taken care to distinguish between the merits of a decision and the process by which it is reached. The former cannot justify a breach in the standards of the latter. The isolated decisions which have overlooked this have seldom received subsequent judicial endorsement."[152]

126. Emphasis should be placed on the point that Baxter captures: this Court must take care "to distinguish between the merits of a decision and the process by which it is reached. The former cannot justify a breach in the standards of the latter". As Friedman J explained in *Yates* (supra at 836A):

> "I respectfully agree with what the learned author has stated. Inherent in the aforegoing is the principle of procedural justice and it is imperative that a

[152] Affirmed and quoted by Friedman J in Yates v University of Bophuthatswana and others 1994 (3) SA 815 (BG) at 835G.

> distinction be drawn between the merits of a decision and the process of reaching it. Even if the merits are unassailable, they cannot justify an infraction of the rules of procedure in which the principles of natural justice have been ignored or subverted. The merits and the procedure must not be blurred. Basically it is a quest for justice. As has been said, justice is but truth in action."

**Conclusion**

127. In the premises, we respectfully submit that the toll declarations are liable to be reviewed and set aside because:

127.1 SANRAL failed to comply with a mandatory legislative process that was a prerequisite to the valid making of the toll declarations;[153] and

127.2 the making of the toll declarations was in the circumstances procedurally unfair.[154]

## SUBSTANTIVE GROUNDS OF REVIEW – LEGAL PRINCIPLES

128. We turn to deal with the substantive grounds of review.[155]

129. We begin by setting out a brief discussion of the legal principles and then proceed to apply those principles to each of the grounds of review disclosed by the facts.

130. The substantive grounds of review relied on by the applicants are:

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153 Section 6(2)(b) of PAJA

154 Within the meaning of section 6(2)(c) of PAJA

155 We draw this distinction for the sake of convenience. SANRAL's failure to comply with the mandatory provisions of section 27(4) in relation to the public participation process, involving legality, falls also under the rubric of substantive grounds.

130.1 non-compliance with a mandatory and material procedure or condition prescribed by an empowering provision, within the meaning of section 6(2)(b) of PAJA;

130.2 failure to consider relevant considerations, within the meaning of section 6(2)(e)(iii) of PAJA;

130.3 irrationality in the light of the purpose of the administrative decision, within the meaning of section 6(2)(f)(ii)(aa) of PAJA;

130.4 irrationality in the light of the information before the administrator, within the meaning of section 6(2)(f)(ii)(cc) of PAJA;

130.5 arbitrariness, within the meaning of section 6(2)(e)(vi) of PAJA; and

130.6 unreasonableness, within the meaning of section 6(2)(h) of PAJA.

**Non-compliance with an empowering provision**

131. We submit that this ground of review is identical to the principle of legality in terms of which all public power must be lawfully exercised.[156]

132. The Legislature and the Executive, in each sphere of government, "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law".[157]

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[156] See Hoexter Administrative Law in South Africa (2012) 2nd Ed at 254-5

133. By illustration, if the Transport Minister failed to comply with the requirements of section 27 of the SANRAL Act when making the tolling declarations, his conduct would be invalid in law. Both in terms of section 6(2)(b) of PAJA and in terms of the doctrine of legality, his decisions would therefore fall to be reviewed and set aside.

134. The same applies to the Chief Director of the Department of Water and Environmental Affairs, in the case of the environmental authorisations.

**Consideration of irrelevant considerations and failure to consider relevant considerations**

135. This is an established ground of review recognised prior to the advent of PAJA.[158]

136. Although our courts are reluctant to prescribe the weight to be accorded to different relevant considerations, it is well-recognised that a decision will be reviewable under PAJA if relevant considerations were not considered or irrelevant considerations were.[159]

**Irrationality**

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157 Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others 1999 (1) SA 374 (CC) at para 58; Pharmaceutical Manufacturers Association of SA and another: In re ex parte President of the Republic of South Africa and others 2000 (2) SA 674 (CC) at para 17; President of the Republic of South Africa and others v South African Rugby Football Union and others 2000 (1) SA 1 (CC) at para 148; AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and another 2007 (1) SA 343 (CC) at para 29

158 See, for example, Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 (A) at 152-154

159 South African Jewish Board of Deputies v Sutherland 2004 (4) SA 368 (W) at paras 29-30; Visser v Minister of Justice and Constitutional Affairs 2004 (5) SA 183 (T) at 188-9; Ulde v Minister of Home Affairs 2009 (4) SA 522 (SCA) at para 11; Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd 2009 (4) SA 628 (SCA) at para 6

137. Sections 6(2)(f)(ii) and 6(2)(e)(iv) focus, in essence, on the question whether a particular decision is rational and not arbitrary.

138. The test has been described as focusing on the question "is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?"[160]

139. For example, a tender award has been set aside in circumstances where the decision to appoint a particular tenderer "was not rationally connected to the information that was before the adjudication committee or the municipal manager. The information on price, company profile, preference and reference sites simply did not justify the award of the highest number of points to [the successful tenderer]. For these reasons the decision must be set aside. Objectively speaking there was no rational connection between the outcome of the decision and the facts upon which the decision was based."[161]

140. The respondents have repeatedly referred to the separation of powers and the need for deference as a basis for this Court dismissing the review.

141. In this regard, rationality review has until recently been understood as "relatively deferential" because it calls for "rationality and justification rather than the substitution

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[160] Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA) at para 21

[161] Total Computer Services (Pty) Ltd v Municipal Manager, Potchefstroom Local Municipality and others 2008 (4) SA 346 (T) at para 55

of the court's opinion for that of the tribunal on the basis that it finds the decision . . . substantively incorrect."[162]

142. The Constitutional Court has recently clarified in *Simelane*,[163] however, that if the decision is found to be irrational, the identity of the decision maker and the separation of powers[164] are of no import.

> "It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not." (emphasis added)

143. Significantly, the Constitutional Court in *Simelane* also pronounced on rationality review in the context of the failure to take into account relevant considerations. It held that the failure of a decision-maker to take into account facts relevant to the purpose of the power to be exercised renders such decision irrational:

> "If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the

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[162] Nieuwoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission 2002 (3) SA 143 (C) at 155G-H and 164G-H; See Hoexter Administrative Law in South Africa 2 ed (2012) 342

[163] Democratic Alliance v President of the Republic of South Africa and Others (Unreported judgment dated 5 October 2012 in CC Case No. 122/11): "The separation of powers has nothing to do with whether a decision is rational…. Either a decision is rational or it is not."

[164] In that case the decision challenged was that of the President to appoint the National director of Public Prosecutions.

> rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole."[165]

144. The Court continued:

> "There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational."

145. We submit that the above dictum from *Simelane* is of particular relevance to the present application.

**Reasonableness review under section 6(2)(h) of PAJA**

146. The leading case on reasonableness review is *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others*.[166]

147. In *Bato Star*, the Constitutional Court said the following about reasonableness review having referred to certain dicta of Lord Cooke in *R v Chief Constable of Sussex, Ex Parte International Trader's Ferry Ltd*:[167]

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[165] Idem para 40.

[166] 2004 (4) SA 490 (CC).

[167] [1999] 1 All ER 129 (HL) at 157

> "In determining the proper meaning of s 6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act 'reasonably', the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of s 6(2)(h), if taken literally, might set a standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s 33 which requires administrative action to be 'reasonable'. Section 6(2)(h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."[168] (emphasis added)

148. O'Regan J continued to explain the content of this ground of review:

> "What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."[169]

149. The Constitutional Court then considered the role that deference must play in a case involving reasonableness review. It concluded its discussion of that topic with the following succinct statement of the interaction between deference and reasonableness review:

> "In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should

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168 Bato Star (supra) at para 44

169 Bato Star (supra) at para 46

> thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."[170] (emphasis added)

150. *Bato Star* remains the leading case on reasonableness review and it has been affirmed repeatedly by the Constitutional Court.[171]

151. In *Ehrlich v Minister of Correctional Services and another* 2009 (2) SA 373 (E), Plasket J made the following remarks about the proper interpretation of the cluster of provisions in PAJA requiring reasonableness and rationality in decision-making:

> "Professor Jowell classes unreasonable administrative actions under three broad heads, namely those that suffer from an 'extreme defect in the decision-making process' (such as decisions taken in bad faith or irrational decisions); those that are 'taken in violation of common-law principles governing the exercise of official power' (and in South Africa, corresponding constitutional imperatives), such as equality and legal certainty; and those that are oppressive in the sense that they 'have an unnecessarily onerous impact on affected persons or where the means employed (albeit for lawful ends) are excessive or disproportionate in their result'. These grounds of unreasonableness are found in PAJA, either in specific

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170 Bato Star (supra) at para 48 (emphasis added)

171 See Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others 2006 (2) 311 (CC) at para 95n80; Nyathi v MEC for Department of Health and another 2008 (5) SA 94 (CC) at para 88n63; Koyabe and others v Minister of Home Affairs and others 2010 (4) SA 327 (CC) at para 36n31

provisions (such as s 6(2)(e)(v) - bad faith - for instance) or embedded in s 6(2)(h) (such as proportionality or equality)."[172] (emphasis added)

152. It is important to emphasise, when considering Plasket J's remarks, that he considered all three components of unreasonable administrative action described in the above-mentioned extract to form part of reasonableness review under section 6(2)(h) of PAJA.[173]

153. In the light of the above-mentioned legal principles, it is now possible to consider the individual grounds of review.

**THE FAILURE OF THE TRANSPORT MINISTER TO COMPLY WITH THE SANRAL ACT**

154. Section 27(4) of the SANRAL Act places an imperative obligation upon the Minister to refer an application back to SANRAL in a case of a failure to comply with the mandatory public participation provisions.[174]

155. In the supplementary founding affidavit, the applicants allege that the Transport Minister "*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*

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172 Ehrlich (supra) at para 42

173 Cora Hoexter in Administrative Law in South Africa (2012) 2nd Ed. p 343-346 discusses proportionality in reasonableness review referring to the factors identified in Bato Star, namely "competing interests" and "the impact of the decision on the lives and well-being of those affected".

174 Section 27(4) of the SANRAL Act: "…Where the Agency has failed to comply with paragraph (a) [due publication of notice of intent to toll], (b) or (c) [due consideration of comments and representations received], or if the Minister is not satisfied as required by paragraph (d) [due consideration of comments received], the Minister must refer the Agency's application and proposals back to it and order its proper compliance with the relevant paragraph…" (emphasis added)

*have referred SANRAL's application and proposals back to it and ordered SANRAL's proper compliance with section 27*".[175]

156. It is clear that the Transport Minister knew of the magnitude of the scheme and of the hundreds of thousands of road users who would be affected by it.[176]

157. He knew already in 2004 that various sections of Gauteng's freeways carried between 86 000 to 156 000 road users per day, increasing annually between 4% and 6% and also that the Ben Schoeman Highway carried up to 180 000 vehicles per day.[177]

158. We submit that in view of this knowledge, the Transport Minister could not ever have reasonably drawn the conclusion that a proper public participation procedure commensurate with the magnitude and impact of the scheme had been conducted when faced by a miniscule thirty and two responses in the January and July 2008 applications respectively.

159. The Transport Minister apparently allowed himself to be pressed by the imperative of keeping to the 2010 World Cup deadline, his own prior determination that Gauteng's freeways would be tolled,[178] or the prior approval of Cabinet.

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175 Applicants Supplementary Founding para 115 pleadings p 2496

176 Applicants Supplementary Reply para 110 pleadings p 3440 referring to SANRAL record p 2327 and SANRAL record p 436

177 Ibid.

178 Applicants Supplementary Founding para 115 p 2496

160. We submit that the Transport Minister's failure to apply his mind to whether a proper public participation procedure had been conducted in terms of section 27 is further evidenced by the fact that the Transport Minister did not even indicate on any one of the seven approval forms signed off by him whether SANRAL had "*complied/not complied*" with section 27(4) of the SANRAL Act.[179]

161. In the premises, we respectfully submit that the Transport Minister's approvals as well as the toll declarations made on the strength of such approvals are liable to be reviewed and set aside because of the failure to follow a mandatory procedure required by the legislation.[180]

**The Minister's approvals were irrational in view of the power he exercised**

162. We submit further that the failure of the Transport Minister duly to apply his mind to whether the public participation procedure had been effective rendered his decision to grant approval irrational in view of the purpose of the power which he exercised.[181]

163. The power of granting approval for SANRAL to declare a toll road opens the way, legally, to compelling road users to pay a compulsory charge for the use of that road.

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179 SANRAL record pp 3545, 3547, 3549, 3551, 3553, 3555 and 4014.1

180 Section 6(2)(b) of PAJA

181 Simelane supra para 40-41

164. We submit that that power in its very essence carries the responsibility of ensuring that the persons who will suffer such compulsion, have been given proper notice and been afforded a right to participate in the decision that will affect them.

165. We submit that the clear neglect of that responsibility rendered the Transport Minister's decision to approve the making of the toll declarations by SANRAL irrational.

166. We submit that for this further reason, the Transport Minister's approvals, and the toll declarations by SANRAL consequent upon such approvals, should be reviewed and set aside.

**TRANSPORT MINISTER'S APPROVALS ARE INVALID BECAUSE HE FAILED TO CONSIDER THE COSTS OF TOLL COLLECTION**

167. One of the factors that will necessarily be relevant to a decision to collect revenue from a particular source is the costs involved in collecting that revenue.

168. In the case of e-tolling, those costs involve setting up and operating an infrastructure to collect tolls.

169. This added cost represents a fundamental difference between tolling as a funding mechanism and other funding mechanisms available to SANRAL, including direct funding from the fiscus, from the fuel levy, licence fees or a hybrid of these (and/or other mechanisms).

170. We submit that the Transport Minister's approval is liable to be reviewed and set aside because he failed to consider the (massive) cost of toll collection. As a result, the Transport Minister's decision was:

170.1 made in ignorance or made without taking relevant considerations into account;[182]

170.2 arbitrary;[183]

170.3 irrational;[184] and/or

170.4 so unreasonable that no reasonable administrator could have made such decision.[185]

171. In the founding affidavit, the applicants pertinently alleged that the Transport Minister did not have the costs of collection before him when SANRAL made application for his approval in terms of section 27(1) of the SANRAL Act.[186]

172. The applicants alleged further that the January 2008 application and the economic feasibility report referred only to the capital cost of setting up tolling infrastructure. What is more, that the economic report was misleading in that it created the

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182 Section 6(2)(e)(iii) of PAJA

183 Section 6(2)(e)(vi) of PAJA

184 Within the meaning of section 6(2)(f)(ii) of PAJA or within the meaning given by the Constitutional Court in Simelane supra idem

185 Section 6(2)(h) of PAJA read with Bato Star (supra)

186 Applicants Founding paras 218 - 221 pleadings pp 2902 - 203

impression that the toll infrastructure cost was the only cost difference between tolling and direct funding.[187]

173. These allegations were repeated in the applicants' supplementary founding affidavit.[188]

174. The applicants added further that SANRAL had materially omitted to place the costs of toll operations before the Minister in the January 2008 application by specifically drawing the Minister of Transport's attention to the capital and other costs, while leaving out the critical toll collection cost information.[189]

175. SANRAL initially sought to answer these allegations by alleging generally that the Transport Minister was not "*placed under any incorrect apprehension concerning the costs of toll collection*".[190] Later, in its supplementary answering affidavit, SANRAL pointed out that the costs of toll collection were before the Minister in the form of page 62 of the Traffic and Toll Feasibility Report at Addendum D to the July 2008 application.[191]

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187 Ibid

188 Applicants Supplementary Founding paras 151 - 153 pleadings pp 2512 - 2513

189 Applicants Supplementary Founding paras 154 - 154.4 pleadings p 2514

190 SANRAL's Answer para 302.3 pleadings p 1046

191 SANRAL Supplementary Answer para 215.8 pleadings pp 2936 - 2937. We submit that the Honourable Court should take a dim view of SANRAL's version in regard to what was before the Minister given its continually changing version (summarised at Applicants Supplementary Reply para 180 - 184 pleadings pp 3458 - 3459) and given that initially SANRAL admitted that the costs before the Transport Minister were the capital costs of collection and that this was not a "startling omission" (SANRAL's Answer para 303.2 pleadings p 1047).

176. But the Transport Minister does not deal pertinently with these allegations at all, either in the Transport Minister's answering affidavit or in the Transport Minister's supplementary answering affidavit.[192]

177. Worse than that, there is in fact no answer at all from the Transport Minister himself. This is because the deponent on behalf of the Transport Minister in both instances is the Director-General of Transport, Mr George Mahlalela, (who was apparently not employed by the Department of Transport at the time)[193] and there is no confirmatory affidavit from the relevant Transport Minister.[194]

178. Since the true facts lie exclusively within the Transport Minister's knowledge, we respectfully submit that in the circumstances his failure directly and unambiguously to address the allegations made by the applicant in this regard justifies the drawing of an inference analogous to that referred to in *Wightman* in the context of final relief:

> "A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the facts said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied…There is a serious duty imposed upon a legal advisor who settles an

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192 See Applicants Supplementary Reply paras 185 - 194 and references to the pleadings contained therein

193 Applicants Supplementary Reply paras 189 - 190 pleadings p 3461

194 Applicants Supplementary Reply paras 189 - 191

> answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."[195] (emphasis added)

179. We respectfully submit that on the affidavits of record, there is no dispute that the Transport Minister failed to consider the highly relevant consideration of the costs of toll collection. In the premises, the Transport Minister's approvals are clearly liable to be set aside as this material omission vitiated his decision.

**THE ESTIMATED COSTS ON PAGE 62 WERE PATENTLY WRONG IN ANY EVENT**

180. The applicants submit that, in the alternative, even if the Transport Minister had read through to page 62 of the Toll Feasibility Report and considered the projected cost of toll collection, (which he did not do) the Transport Minister's decision would still be invalid because the projected cost of collection was patently wrong.[196]

181. The Transport Minister would, if he had regard to page 62 of the Toll Feasibility Report and the information placed before him in the July 2008 application, drawn the conclusion that the public would be paying between 28.5% and 36% of the capital cost for the collection.[197]

182. The actual picture is entirely different.

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[195] Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) para 13

[196] Supplementary Founding Affidavit paras 159 - 163 - pleadings pp 2516 - 2519

[197] Applicants Supplementary Founding para 159 - pleadings pp 2516 - 2517

183. The public will in actual fact be expected to pay at least one and a half times (140%) more for the cost of toll collection relative to the capital cost.[198] (On SANRAL's own version, the public will pay almost as much for toll operations (89%[199]) of the capital cost.)

184. In the premises, we respectfully submit that the information that would have been before the Transport Minister had he considered it (which is denied) is materially wrong and therefore irrelevant.

185. Accordingly, we submit that to the extent that the Transport Minister relied on such information in granting the approvals, these and the toll declarations consequent on such approvals, are liable to be reviewed and set aside.

**SANRAL'S VERSION ON THE COSTS OF E-TOLLING IS UNRELIABLE AND MUST BE REJECTED**

186. It is necessary that we directly address the question of the costs of toll collection as it is relevant both to the review and to the constitutional challenge on the basis of an arbitrary deprivation of the property of road users in Gauteng (dealt with below).

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198 Applicants Supplementary Reply paras 201 - 205 pleadings p 3464 read with paras 259 - 291 pleadings pp 3475 - 3484 (costs calculation off ETC contract). The applicants deny the ratio in 2008 is comparable to present day as per SANRAL's Supplementary Answer para 210.1 pleadings p 2927. This conclusion for which the reference given is the Traffic and Toll Feasibility Report as a whole, is not borne out by such report. It is significant too that SANRAL does not directly and pertinently address the applicants' allegations in this regard.

199 Calculated by dividing the operations costs by the capital cost: SAA4 pleadings p 2991

187. This Court will, in its determination of the application, be called upon to weigh the version of the applicants regarding the costs of toll collection against that of SANRAL. SANRAL's version, its fourth and hopefully final version, is set out in its supplementary answering affidavit and summarised in "SAA4".[200]

188. The applicants, by contrast, have calculated the toll collection costs conservatively with reference to the express terms of SANRAL's contract with the toll operator and have determined that the added cost of toll collection will be approximately R28.2 billion over 24 years.[201]

189. We emphasise that the applicants' calculation of the toll operation costs of R28.2 billion is conservative, given that:

189.1 toll operation costs will in fact be relatively stable in a steady state of 10% and will not decrease over the years of operation;[202]

189.2 these stable costs can only be expected to rise over time due to normal inflation;

189.3 future violations processing (“VPC”) and transaction clearing house (“TCH”) costs (from year six to 24) <u>will be subject to tender</u> by a new toll operator,[203]

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200 SANRAL Supplementary Answer para 208.3 pleadings p 2923

201 Applicants Supplementary Reply paras 258 - 291 pleadings pp 3474 - 3484

202 Applicants Supplementary Reply para 263 - 264 pleadings p 3476 read with "RA9" and "RA10" pleadings pp 3597 - 3601

203 Applicants Supplementary Reply para 262 - pleadings 3475

> the toll operator only being allowed an extension in respect of the service period of a maximum of 12 months before a new contract following the usual tender process must be concluded.[204]

190. We respectfully submit that the fact that the toll operation costs are undefined and may well be more than R28.2 billion and are subject to the uncertainty of future tender processes is a further factor to be taken into account when considering the arbitrary nature of the deprivation of property of road users who will be compelled to pay for this expensive scheme.

191. The applicants' calculation of R 28.2 billion is approximately R10 billion more than SANRAL's, i.e. R28.2 billion versus R18.36 billion.

192. As regards the overall cost of e-tolling to road users of the freeway network, because of the lack of disclosure of full information by SANRAL, such costs will not be known to this Court.

193. SANRAL's version in its supplementary answering affidavit is that the revenue to be garnered from the public will be R71.39574 billion.[205]

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204 "RA16" pleadings 3470

205 "SAA4" quoted in SANRAL Supplementary Answer para 208.3 pleadings p 2923

194. For the reasons set out below, the applicants suggest this figure is unreliable and should be rejected. It certainly, according to the calculations of the expert Bernal Floor, yields an unviable toll scheme.[206]

195. OUTA has attempted a calculation of the overall revenues to be garnered from the public which is recorded at "RA9" and is R102.7548 billion[207] over a period of 20 years.[208] We submit that the taking of such an amount of revenue from Gauteng's road users will be grossly disproportionate - indeed extortionate – in view of the fact that capital and maintenance costs over24 years will be approximately R 30 billion.

196. We submit that the applicants' version of the toll collection costs of R 28.2 billion should be accepted for the reasons we now set out.

**SANRAL's version on costs is ever changing**

197. Firstly, SANRAL's version is inherently unreliable and must be rejected because it has constantly changed.

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[206] Applicants Further Supplementary Reply paras 82 - 91 pleadings pp 3852 - 3856

[207] This calculation is not exaggerated when regard is had to the figures communicated to OUTA by Treasury recorded at "RA4" pleadings p 3593.

[208] "RA9" pleadings pp 2275

198. SANRAL's first version was that the cost of tolling determined by the applicants from the GFIP Steering Committee Report to be R20.562 billion over 20 years "*was correct*" but based on 60% non-compliance.[209]

199. SANRAL's second version appeared in the Constitutional Court proceedings and was to the effect that the scheme would yield a revenue over 24 years of R89.721 billion and that the cost of collection would be R18 billion with an average of 8.9% non-compliance over 20 years.[210]

200. SANRAL's third version involved a drop in interest on account of an alleged R17.2 billion mistake in the calculation of interest.[211]

201. The total cost of the project was said to be R71.39574 billion.[212]

202. SANRAL's fourth version is contained in its supplementary answering affidavit and summarised in "SAA4".

203. This fourth version involved an alarming drop in projected revenue over 24 years from R89.72117 billion to R71.395074 billion.[213]

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209 SANRAL Answer para 305.1 pleadings p 1048 read with Applicants Founding paras 237 - 241 pleadings pp 206 - 207

210 Applicants Supplementary Reply paras 219 - 229 pleadings p 3468 - 3469 and "RA6" pleadings p 3594

211 Applicants Supplementary Answer paras 231 - 237 pleadings pp 3470 - 3471 and "RA7" pleadings p 3595

212 Ibid

213 Applicants Supplementary Reply paras 238 - 242 pleadings pp 3471 - 3472

204. We respectfully submit that the arbitrary change in figures and the presentation of later versions which contradict earlier versions reveal that SANRAL cannot be relied upon to give the true cost.

**SANRAL has consistently refused to be transparent**

205. Secondly, we respectfully submit that SANRAL's version on the costs of e-tolling is unreliable and must be rejected because of its lack of transparency concerning the ETC contract and the cost figures contained in it.

206. The applicants invited SANRAL as far back as 23 March 2012 in their founding affidavit[214] to "*take the Honourable Court and the public into its confidence and disclose its contract with ETCJV and the actual amount that it will cost to operate the open road toll system over the next five years*".

207. SANRAL not only withheld the contract and failed to disclose it when filing its initial answering affidavit, it continued to withhold the ETC contract after it had been expressly requested in June 2012 in writing to disclose it by the applicants , who fully motivated its relevance to the application.[215]

208. SANRAL's lack of good faith in continuing to withhold the ETC contract (which it later referred to and relied on at length in its supplementary answering affidavit) is revealed

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214 Applicants Founding para 236 pleadings p 206

215 Applicants Supplementary Founding paras 20 - 23 pleadings 2451 - 2452 read with "SA2" - "SA4" pleadings p 2615 - 2622

in the letter from its attorney dated 29 June 2012 in which it tersely denied the relevance of the ETC contract to the application.[216]

209. SANRAL shamelessly still continued to withhold the ETC contract after the applicants delivered a notice in terms of Rule 35(12) in August 2012 which necessitated the bringing of an application to compel by the applicants.[217]

210. The ETC contract and related tender documentation were finally delivered to the applicants in terms of a settlement of the application to compel on 14 September 2012, two days before the delivery of the respondents' supplementary answering affidavits and 10 days before the applicants were due to file their replying affidavit in this expedited review.

211. Had the applicants not brought an application to compel, the ETC contract and related tender documentation would no doubt still not have been disclosed to this Court.

212. We respectfully submit that it is plain that SANRAL failed to disclose the ETC contract and related tender documentation (until being compelled to do so) because it wanted to keep the true costs of e-tolling hidden from the court and the public.

**SANRAL persists in not disclosing the full toll model, despite express invitation**

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216 See Applicants Supplementary Founding para 24 and "SA5" pleadings p 2623

217 Referred to in “SAA1” pleadings p 2986

213. The third reason why the version of SANRAL regarding the costs is unreliable and must be rejected is because SANRAL has still failed to make frank disclosure of the full financial toll model with all underlying data and assumptions.

214. In the supplementary founding affidavit, the applicants called for such disclosure:

> "*SANRAL has also put forward on affidavit and in talks with the applicants several scheduled summaries of what it now claims to be the cost of tolling, but without disclosing the full 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 scrutinised.*"[218]

215. In its answering affidavit, as with previous affidavits filed in this court and the Constitutional Court, SANRAL failed to make such full and frank disclosure:

215.1 no proper toll model is provided. "SAA4" is not a toll model but merely a table of what SANRAL says e-tolling will cost;

215.2 the precise loans, the terms thereof, including interest rates and periods of repayment, are not disclosed;

215.3 the starting figures for traffic volumes and assumed rate of increase in traffic volumes are not disclosed;

215.4 the impact of payment of incentives to the toll operator for higher than standard performance on the cost of collection is not disclosed;

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[218] Applicants Supplementary Founding para 128 pleadings p 2503

215.5 the number of vehicles in the base year for each road section and the percentage of heavy vehicles versus percentage of light vehicles are not disclosed;

215.6 the rate of inflation applied by SANRAL to the model is not disclosed.

216. In short, SANRAL have made it impossible for the applicants, the Honourable Court or the public to calculate the true cost of tolling that will be borne by the public and by corollary the true amount of revenues that will be garnered by SANRAL in the scheme.

**SANRAL and the Director General of Transport fail to explain their lack of candour**

217. The fourth reason why we submit that the Honourable Court should take a dim view of SANRAL's version on costs is the studious avoidance of frank disclosure of the costs by SANRAL's CEO, Nazir Alli, and the Director-General for Transport, George Mahlalela, as recorded in the applicants' founding affidavit at paras 233 - 235 pleadings p 206.

218. We direct the attention of this Court to the fact that Alli responded to this allegation by alleging that he had "*no knowledge of the contents of these paragraphs*" and deferred to the affidavits of the Transport Minister.

219. The Director-General, George Mahlalela, failed to respond to these allegations in both affidavits deposed to on behalf of the Transport Minister.

220. The fifth and possibly most compelling reason why SANRAL's version as regards the costs of toll collection and the costs of tolling should be rejected is because of the numerous key ways in which SANRAL's version is contradictory to and is contradicted by the ETC contract:

220.1 SANRAL first contradicted itself by alleging on oath that a cost of R20 billion over 20 years was "*correct*" but based on a non-compliance percentage of 60%. However, in subsequent versions, including SANRAL's fourth version in the supplementary answering affidavit, SANRAL alleges that the cost over 24 years is R18.364 billion after an initial ramp up of one year and then "*settling*" into a steady state with a violation rate of "*only 7 to 10%*";[219]

220.2 secondly, before the Constitutional Court and again in SANRAL's supplementary answer, SANRAL alleges that the initial upfront CAPEX cost of R1.16 billion should, "*at a minimum…[be] subtracted from the total figure of R8.3 billion*" before the remainder is divided over the five and eight year periods.[220] But this is demonstrably false since in the signed letter of

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[219] cf SANRAL Answer para 305.1 pleadings p 1048 compared with SANRAL Supplementary Answer para 204.3 pleadings p 2906 and para 208.3 pleadings p 2923

[220] SANRAL's Supplementary Answer paras 204.1 - 204.2 pleadings pp 2905 - 2906

acceptance reflecting the agreement as to price, the CAPEX cost for the design/build of the works is a separate line item to the operation price;[221]

220.3 thirdly, before the Constitutional Court,[222] SANRAL alleges (either expressly or by implication) that the operations cost will be reduced because of savings in banking services commissions, procurement of e-tags and the like. But these provisions are not borne out by the toll contractor's estimated contract expenditure;[223]

220.4 fourthly, SANRAL alleged before the Constitutional Court[224] that collection costs would be more than halved in the third year of collection from being "*R1421.0 million*"[225] to R591.79 million.[226] This is also starkly contradicted by the toll operator's estimated contract expenditure[227] that shows a marginal decrease from the second to the third year and increasing again to the fifth year of collection. We pause to draw it to the attention of this Court that the affidavit filed by SANRAL before the Constitutional Court was filed at a stage when the applicants did not have the ETC contract and could not possibly obtain it before the hearing before that court;

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221 "SA15" pleadings p 6488

222 Applicants Further Supplementary Reply paras 75 - 78 pleadings p 3850 read with "SRA3" pleadings p 3869 - 3874 and again in a different guise in SANRAL's Supplementary Answering Affidavit. See eg SANRAL's Supplementary Answer para 207.2.3.3 pleadings pp 2918 - 1919

223 "RA9" in pleadings p 597 and "RA10" in pleadings p 3599

224 "SRA3" pleadings pp 3869 - 3874

225 "SA14" pleadings p 2686

226 "SA3" pleadings p 3873

227 "RA9" pleadings p 3597

220.5 fifthly, on a related note, SANRAL's version represents a dramatic decrease in the operating costs (VPC and ORT) from the first to the second year of operations.[228] But this is also contradicted by the operator's assessment of his estimated contract expenditure upon which the final contract figure is based;[229]

220.6 sixthly, SANRAL has presented a version to this Court that toll operationcosts will dramatically decrease from the first year of collection (and in the Constitutional Court two years) moving from a "*ramp up*" period of high cost lasting one year (or in the Constitutional Court, two years) to steady state whereafter the operation costs will allegedly reduce greatly and not be anywhere near the tendered amount.[230] But this is likewise apparently contradicted in a number of respects by the ETC contract and related tender documentation:[231]

220.6.1 first, the ramp up period envisaged by the contract and upon which the toll operator's tender and contract amount was based was <u>three months</u> and not one (or two) years;[232]

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228 SANRAL's Supplementary Answer para 208.5 pleadings p 2924.2925

229 "RA9" to "RA10" pleadings pp 3597 - 3601 read with "SA15" pleadings pp 2688 - 2694

230 SANRAL's Supplementary Answer para 207.1 - 207.2.1.4 pleadings pp 2913 - 2916 and para 208 - 208.6 pleadings pp 2922 - 2925

231 See generally Applicants Supplementary Reply para 258 - 294 pleadings pp 3474 - 3485

232 Applicants Supplementary Reply paras 266 - 267.1 pleadings p 3477 read with "RA11" and "RA12" pleadings pp 3602 - 3606

220.6.2 second, the estimated violation rate during the ramp up would be 60% and not 30%;[233]

220.6.3 third, steady state would commence after the ramp up period of three months and the estimated violation rate in steady state is presumed to be 10% (not 7%);[234]

220.6.4 fourth, the toll operator's tender and final contract amount clearly would not reduce dramatically given that the 10% violation rate for the steady state life of the contract was presumed from the outset.[235]

221. We respectfully submit that it is clear that SANRAL, at every turn, has either hidden the costs of toll collection or has sought to present to this Court that the costs of toll collection are far less than what they actually will be.

222. We respectfully submit that this Court simply cannot rely on what SANRAL says the cost of tolling will be and should accept the version of the applicants who have conservatively calculated such cost with reference to the terms of the ETC contract and the signed toll operators' costs estimates and summary schedules of payments.

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233 Applicants Supplementary Reply para 267.2 pleadings p 3477 read with "RA11" and "RA12" pleadings pp 3602 - 3606

234 Applicants Supplementary Reply paras 267.3 - 268 pleadings pp 3477 - 3478 read with "RA11" and "RA12" pleadings pp 3602 - 3606

235 Applicants Supplementary Reply paras 263 - 272 pleadings pp 3476 - 3479 read with "RA11" and "RA12: pleadings pp 3602 - 3606 and "SA15" pleadings pp 2688 - 2694

**SANRAL AND THE MINISTER OF TRANSPORT FAILED TO CONSIDER ALTERNATIVES**

223. We submit that the record of review makes plain that the Minister of Transport failed to duly and properly consider alternative funding methods to e-tolling with the result that the Minister's approvals are invalid:

223.1 the Transport Minister failed to take into account relevant considerations;[236]

223.2 the granting of approval was therefore arbitrary;[237] and

223.3 the process followed in granting the approval was irrational in view of the power the Minister was exercising.[238]

224. In the founding affidavit on the basis of an analysis of the January 2008 application, the applicants alleged that the Transport Minister was deprived of the relevant information concerning alternative funding mechanisms material to his decision and was unable "*to apply his mind to the real advantages and disadvantages of tolling versus various other funding models which were available*".[239]

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236 Section 6(2)(e)(iii) of PAJA

237 Section 6(2)(e)(vi) of PAJA

238 Section 6(2)(f)(ii) of PAJA within the meaning given in Simelane supra idem

239 Applicants Founding para 278.12 pleadings p 218. See further Applicants Founding paras 278 - 278.14 pleadings pp 216 - 218

225. The applicants case in this regard was reaffirmed in the supplementary founding affidavit:[240]

> *"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.*
>
> *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 implications of alternative methods, were not disclosed to him.*"[241]

226. The respective affidavits filed on behalf of the Transport Minister (not confirmed by the Transport Minister), pointed to the list of five alternative funding mechanisms in the 2006 proposal as evidence for a consideration of alternatives.[242]

227. However, quite apart from the fact that the 2006 proposal was not part of the Transport Minister's record of review, the information concerning alternative methods in the 2006 proposal was clearly preliminary in nature, in "*outline*" and in terms envisaged further exploration.[243]

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240 Applicants Supplementary Founding paras 167 - 180 pleadings pp 2521 - 2525

241 Applicants Supplementary Founding paras 173 - 174 pleadings pp 2523

242 Transport Minister's Answer para 7.6 pleadings p 1744; Transport Minister's Supplementary Answer paras 44 - 45 pleadings p 3276

243 Applicants Reply paras 753 - 765 pleadings p 2234 and Applicants Supplementary Founding paras 175 - 176 pleadings pp 2523 - 2524

228. We submit that the voluminous annexure "SAA5" containing slavish repetition of superficial references to alternatives is of no assistance to the respondents' case in this regard because it does not amplify the information that was before the Minister.[244]

229. The Transport Minister was not only thwarted in his duty duly and properly to consider alternative funding mechanisms by what was not in the application served before him, he evidently only could have been misled by what was before him.[245]

230. This is because the only information before him that resembled an exercise in considering the real difference between tolling and other direct funding mechanisms misleadingly created the impression that the cost of toll infrastructure alone was the difference between tolling and a direct method (in that case the fuel levy).[246]

231. As we have dealt with above, there is no answer from the Transport Minister as to whether he was misled regarding costs. There is in fact no proper indication from the Transport Minister on affidavit that he in fact considered the costs of tolling at all.

232. In the premises, we submit that the Transport Minister's approvals were vitiated by failure to take into account relevant considerations.

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244 Applicants Supplementary Reply paras 162 - 177 pleadings pp 3453 - 3457

245 Applicants Founding para 278.7 - 278.11 pleadings pp 217 - 218/ Applicants Supplementary Reply paras 169 - 176 pleadings pp 3455 - 3456

246 Transport Minister's record p 677 para 4 quoted in Applicants Supplementary Reply paras 172 pleadings pp 3455 - 3456

233. We submit further that the failure by the Transport Minister to give due and proper consideration of funding alternatives rendered the process of his decision-making irrational in view of the power which he exercised.[247]

234. Here the material economic consequences of tolling and the concomitant supervisory power granted by the Legislature to approve the declaration of a toll road is at the fore.[248]

235. We submit that before the Transport Minister approves the collection of a compulsory road charge from the public, he must at least have duly and properly considered whether there were not any other reasonable alternatives that might not be as expensive and might show the proposed tolling to not be justifiable.

236. It follows that the toll declarations issued by SANRAL on the strength of the Minister's approvals also fall to be set aside.

**SANRAL'S FAILURE TO CONSIDER ALTERNATIVES**

237. It was not only the Minister of Transport who failed duly and properly to consider alternatives.

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[247] Here the material economic consequences of the power granted by the Legislature to approve the declaration of a toll road comes is at the fore. Before the Transport Minister approves the collection of a compulsory road charge from the public, he must at least have considered whether there were not any other reasonable alternatives that might not be as expensive and might show the proposed tolling to not be justifiable.

[248] Public Carriers Association supra at 959J: “the Legislature intended the determination of the amount of a toll ultimately to be a matter of ministerial responsibility. The reason for this probably lies in the fact that a toll is a form of tax and that therefore the Minister, and not some lesser official, should be the final arbiter of the amount thereof.”

238. We submit that the record reveals that SANRAL itself was not open to and did not consider alternative methods of funding.

239. It is clear that from the outset that, when SANRAL approached the Minister of Transport on 3-4 August 2005, SANRAL had a single agenda – to launch a toll project on the GFIP network.[249]

240. SANRAL sought to hide the fact that it had this agenda at such an early stage from the Applicants when originally filing the record of review. When filing the record of review initially, SANRAL omitted not only the part of the briefing notes attached to the letter dated 3 August 2005 referring to the proposed funding mechanism but also the pages of the presentation delivered to the Transport Minister, containing the toll proposal.[250]

241. The 2006 proposal which is alleged by SANRAL and the Minister of Transport to provide evidence that alternative funding methods were considered, is only evidence to the contrary because of the preliminary and superficial nature of the references to alternatives.[251]

242. Not only this, SANRAL regarded and used the 2006 proposal not as a working document to invite exploration into alternative funding mechanisms, but as a tool for

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249 SANRAL record p 428 – 443 read with Applicants' Supplementary Founding para 66.3 pleadings p 2479 and "SA13" pleadings p 2670 - 2686

250 Applicants Supplementary Founding para 20 read with "SA2" Applicants Supplementary Founding paras 66 - 66.3 pleadings pp 2748 - 2479 read with "SA13" pleadings pp 2670 - 2685

251 See inter alia Applicants Reply paras 753 - 765 pleadings p 2234

the promotion of the toll project. As much is clear from SANRAL's CEO's description of the 2006 proposal to the SANRAL Board:

> "*The purpose of this memorandum is to provide for the Board's information, the Gauteng Freeway Improvement Scheme (GFIS) document which is currently under circulation for political support for the process*." (emphasis added)[252]

243. It is evident from the consolidated record that there was no investigation into alternatives between the time that the 2006 proposal was produced and in June 2006,[253] (or September 2006 according to SANRAL),[254] and when the proposal was laid before Cabinet for the first time in October 2006.[255]

244. After laying the 2006 proposal before Cabinet, SANRAL commenced feasibility studies for tolling, still without any proper consideration for alternative mechanisms. Further, the SANRAL board approved the implementation by SANRAL of tolling in terms of the legislation on 29 May 2007[256] without detailed consideration of alternatives. The Board did not even consider the costs of toll operations as these figures were omitted from the memorandum.

245. As we have already traversed above, SANRAL then went back to Cabinet for approval in July 2007, and thereafter initiated the toll declaration processes not laying

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252 SANRAL record p 786

253 SANRAL record p 629

254 SANRAL Answer para 62 pleadings p 856

255 Cabinet memorandum in SANRAL record para 3.3 p 1842

256 SANRAL record p 1402

any detailed and proper information before the Minister of Transport concerning alternatives, and apparently not duly and properly considering such alternatives itself.

246. It is, with respect, telling that practically the whole of SANRAL's answer to the applicants' case on the consideration of alternative funding mechanisms in its supplementary answering affidavit[257] is motivated on the basis of present day information[258] and not with reference to the situation that obtained in 2007/2008. The only material drawn from the latter period is that containing "SAA5" the superficial and repetitive nature of which shows no due and proper consideration to funding alternatives.[259]

247. We submit, with respect, that SANRAL's answer in the supplementary answering affidavit to this ground is palpably an impermissible *ex post facto* justification.[260] It also does not bridge the failure of SANRAL's duty duly and properly to consider alternative funding mechanisms prior to declaring the roads to be toll roads and/or approaching the Minister for approval for that purpose.

**The alleged exclusion of the fuel levy because of Treasury policy: a red herring**

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257 SANRAL's Supplementary Answer paras 216 - 238 pleadings pp 2938 - 2957

258 The Roelof Botha study referred to at SANRAL Supplementary Answer para 234 pleadings pp 2946 - 2951 is a 2012 study. The records of the dry run referred to in SANRAL Supplementary Answer para 236 pleadings pp 2954 - 2956 is a June 2012 study. The general information given concerning SANRAL's portfolio and funding position at SANRAL Supplementary Answer paras 216 - 231 is all present day information. The other information is not reflected in the record as what was duly and properly considered by SANRAL at the time, save superficially in several aspects.

259 Applicants Supplementary Reply para 162 - 177 pleadings pp 3453 - 3458

260 See National Lotteries Board and others v SA Education and Environment Project and another [2012] 1 All SA 451 (SCA) at para 27

248. We submit that the Honourable Court should not entertain the respondents' false allegation that the Transport Minister and SANRAL could not consider the fuel levy as an alternative funding mechanism in 2007/2008.

249. In the founding affidavit, the applicants specifically challenge the superficial reasons for rejecting the fuel levy related to:

249.1 the alleged policy by Treasury against ring-fencing of the fuel levy;

249.2 the alleged inequity of funding GFIP by means of a general revenue raising mechanism.[261]

250. In SANRAL's answering affidavit, in answer to the direct challenge, SANRAL justified the exclusion of the fuel levy on the spurious basis that a raise in the fuel levy would have "*dire effects on the economy*" and that it was not feasible to use the fuel levy "*for every public infrastructure project that needs to be funded*".[262] SANRAL did not deny the availability of the fuel levy.

251. SANRAL's position in its supplementary answering affidavit represents a sea change. SANRAL there alleges that by virtue of government policy it is unable to raise funding directly through a dedicated fuel levy[263] and elsewhere falsely states that it is "*not*

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261 Founding Affidavit para 245 pleadings p 208

262 SANRAL Answer para 306.4 pleadings p 1050

263 SANRAL Supplementary Answer para 31.1 pleadings p 2774

*challenged by the applicants…that National Treasury's funding policy removed a ring-fenced fuel levy from the table*".[264]

252. We respectfully submit that the new position taken by SANRAL, in which it is supported by Treasury, is disingenuous and opportunistic.

253. It is also demonstrably false.

254. The applicants show in the supplementary replying affidavit that the use of a dedicated fuel levy is documented national policy and also is a form of the user-pay principle.[265]

255. The applicants demonstrate further that the Legislature has expressly endorsed the use of the fuel levy by its enactment of section 34 of the SANRAL Act and its inclusion of the fuel levy there as a funding source. This express inclusion would have been redundant if the Legislature meant that the revenues of the fuel levy should first be pooled in the general fiscus from where budget appropriations could be made to SANRAL.[266]

256. It is furthermore repeated in the supplementary replying affidavit, as was set out in the applicants' founding affidavit,[267] that Treasury, both historically and presently, ring-

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264 SANRAL Supplementary Answer para 219 pleadings p 2939

265 Applicants Supplementary Reply paras 47 - 66 pleadings pp 3425 - 3430

266 Applicants Supplementary Reply paras 67 - 72 pleadings pp 3430 - 3431

267 Applicants Founding para 245.1 pleadings p 208

fences revenues on the fuel levy in the form of the Road Accident Fund and Transnet multi-purpose pipeline.[268]

257. The applicants point out further, and we submit fatally for the respondents, that the fuel levy - according to the Minister of Finance - remains a revenue mechanism within the contemplation of government for the funding of GFIP.[269]

258. We accordingly respectfully submit that the use of the dedicated fuel levy alone or in combination with other funding sources was one of the alternatives that SANRAL and the Minister of Transport could and should duly have given proper consideration to.

259. But the failure of SANRAL and the Transport Minister went further than that. No alternative mechanisms whether from the fiscus, the fuel levy, licence fees or a hybrid of these and/or others, were duly and properly considered.

260. The Transport Minister evidently had no appreciation of the true disparity in costs and risks inherent in the alternatives that might have brought a reconsideration or refusal of approval for tolling.

261. We submit that as a consequence, the Transport Minister's approvals, and the toll declarations issued on the strength of such approvals, are liable to be reviewed and set aside.

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[268] Idem. Respondents Supplementary Reply para 73 - 79 pleadings p 3431 - 3432

[269] Applicants Supplementary Reply paras 84 - 85 pleadings p 3433 read with "RA1" pleadings p 3588

**E-TOLL SCHEME IS PRACTICALLY BURDENSOME AND UNWORKABLE**

262. We submit that the decision to e-tolling should be reviewed and set aside on the basis that it is arbitrary, irrational and unreasonable because it is practically grossly burdensome and unworkable.[270]

263. The founding affidavit alleged that the decision to declare the GFIP network as a toll road was unreasonable (within the meaning of section 6(2)(h) of PAJA) because enforcement of the system would be virtually impossible.[271] Detailed reasons were offered for this allegation.

264. In Part A, the Transport Minister elected not to deal with these allegations at all in Part A.[272] Although SANRAL dealt with the allegations, it did so in a manner that was entirely evasive.[273] SANRAL conspicuously offered no explanation at all for how the system would be implemented in relation to road-users who did not pay voluntarily.

265. SANRAL's answering affidavit states that there will be "approximately one million vehicles who utilise the proposed toll road network each day".[274] The applicants put this figure together with the statement by Mr Alli in his letter to Business Unity South Africa that non-compliance "will stabilise in the order of 7",[275], and argued that as a matter of simple arithmetic – on SANRAL's own version -- within seven days of the

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270 Applicants' Founding paras 250 to 275 pleadings pp 210ff; Applicants' Supplementary Answer para 41-52 pleadings pp 2459 - 2466

271 Applicants' Founding idem

272 Transport Minister's Answer para 70.1 pleadings p 1767

273 SANRAL's Answer para 309 pleadings p 1051

274 SANRAL's Answer para 153 pleadings p 968

275 Pleadings p 486

implementation of e-tolling there will be 70 000 non-compliant defaulters from whom toll collection will have to be made each day or 2.1 million per month using whatever procedures are available in terms of the Criminal Procedure Act and the rules of the Magistrate's Court.[276] The Applicants submitted that that this would be practically impossible.

266. The focus of the Applicants' case in the supplementary founding affidavit was that e-tolling is legally unworkable, in view of the failure (which failure still persists) of SANRAL and the Department of Transport to put into place the required legal framework for tolling.[277]

267. In SANRAL's supplementary answering affidavit, SANRAL answered this challenge by, in essence, saying that the legal framework will be put in place, and that the fact that it was not in place at the time the decision was made does not render such decision unreasonable or irrational.[278]

268. While it is conceded that the legal framework for e-tolling could be put in place making e-tolling legally workable (although this has not yet been done), the applicants' fundamental challenge to e-tolling on this ground still remains: E-tolling is unworkable and impossible to properly implement <u>because of the sheer volumes of traffic on the GFIP network</u>.[279]

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276 Applicants' Reply para 35 pleadings p 2079

277 Applicants' Supplementary Answer para 41-52 pleadings pp 2459 – 2466.

278 SANRAL supplementary answer para 151-168 pleadings pp 169.

279 Applicants' Supplementary Reply para 295-307 pleadings pp 3485-3487 and 311-312 pleadings pp 3488

269. We submit that SANRAL's scheduled approach to enforcing compliance will not solve this problem.[280]

270. Because according to SANRAL's own numbers once again[281] the Applicants' demonstrate that e-tolling is irrational because it is practically unworkable or at least unreasonable within the meaning of section 6(2)(h) of PAJA:

> "*2.3 to 2.5 million users per month at a non-compliance rate of 7% implies that 161 000 users will default each month. (The more likely default rate would be 10% or higher, that is 230 000 to 250 000 defaulters).*
>
> *The massive waste of time, cost and resources – according to SANRAL's table: invoices, sms's, emails, telephone calls, further invoices, services of notices, summons, civil and criminal processes - that will be suffered by society and by the Courts, with the bill ending up at the door of the Gauteng road user, that collection from 161 000 users per month (or even per year) is grossly unreasonable*.
>
> *When all of that could be avoided, with the time, money and resources being put back into the economy simply by using a direct funding mechanism, one can only conclude that e-tolling Gauteng's freeways was so unreasonable that it was not viably an option open to SANRAL to choose, or the Transport Minister to approve, as a funding mechanism for GFIP*."[282]

271. We submit that had the Transport Minister and SANRAL applied their minds to the actual figures, as opposed to the general notion that enforcement mechanisms would have to be put in place, they would have come to the only reasonable conclusion open to them, that e-tolling was either impossible to implement, or so unduly

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280 SANRAL Supplementary Answer para 169.8 at pleadings pp 2883

281 SANRAL Supplementary Answer para 169.7 at pleadings pp 2882

282 Applicants' Supplementary Reply para 310-311 pleadings p 3488

burdensome and expensive to enforce on society that it was not open to them to choose it.

**REVIEW GROUNDS PLEADED BUT NOT DEALT WITH HERE**

272. The applicants stand by the further grounds in the affidavits filed of record not dealt with in these heads of argument. They will, if necessary, address this Court in oral argument at the hearing of the application in relation to these.

**THE PROPERTY CHALLENGE**

273. Section 25(1) of the Constitution provides that:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

274. The following legal principles are relevant to a proper analysis of this provision:

274.1 The leading case on the right to property is the decision of the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another*.[283] It established the following principles:

274.1.1 The court explained the concept of deprivation of property, as envisaged by section 25(1) of the Constitution as follows: "any

[283] 2002 (4) SA 768 (CC).

interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."[284]

274.1.2 In some cases, there will be controversy about whether a particular instance of interference with property is sufficiently significant to be described as a "deprivation" for the purposes of the property clause. In the present case, the controversy is avoided – a toll scheme, especially when there are no viable alternative routes, necessarily involves the compulsory deprivation of the users' money.

274.1.3 The court summarised the test which is applicable to determine whether a deprivation is arbitrary as follows:

> "In its context 'arbitrary', as used in s 25, is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of s 36. This is so because the standard set in s 36 is 'reasonableness' and 'justifiability', whilst the standard set in s 25 is 'arbitrariness'. This distinction must be kept in mind when interpreting and applying the two sections."[285]

274.1.4 The court also gave guidance on when the less demanding test would be applicable and when the more exacting test would be applicable:

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[284] Wesbank (supra) at para 57

[285] Wesbank (supra) at para 65

> "It is important in every case in which s 25(1) is in issue to have regard to the legislative context to which the prohibition against 'arbitrary' deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary."[286]

274.1.5 The court also made it clear that "[t]he protection against unfair procedure has particular relevance to administrative action - which protection is provided for under s 33 of the Constitution - but it could also apply to legislation and be relevant to determining whether, in the light of any procedure prescribed, the deprivation is arbitrary."[287]

274.1.6 The Court said the following about the proper approach to arbitrariness under our Constitution:

> "[T]here must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination. Moreover, the requirement of such an appropriate relationship between means and ends is viewed as methodologically sound, respectful of the separation of powers between Judiciary and Legislature (in the case of the United Kingdom between Judiciary and Executive) and suitably flexible to cover all situations. It matters not whether one labels such an approach an 'extended rationality' test or a 'restricted proportionality' test. Nor does it matter that the relationship between means and ends is labelled 'a reasonably proportional' consequence, or 'roughly proportional', or 'appropriate and adapted' or whether the consequence is called 'reasonable' or 'a fair

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286 Wesbank (supra) at para 66

287 Wesbank (supra) at para 67

balance between the public interest served and the property interest affected'."[288]

274.1.7 Although somewhat lengthy, it is worth repeating verbatim the Court's summary of the proper approach to determining whether there has been a violation of section 25(1) of the Constitution. The Court explained that "it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

274.1.7.1 It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.

274.1.7.2 A complexity of relationships has to be considered.

274.1.7.3 In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

274.1.7.4 In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

[288] Wesbank (supra) at para 98

274.1.7.5 Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive.

274.1.7.6 Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

274.1.7.7 Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

274.1.7.8 Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is

concerned with 'arbitrary' in relation to the deprivation of property under s 25."[289]

274.2 Since the decision in *Wesbank* (supra) it has been reiterated that, in addition to showing an appropriate relationship between means and ends, a law permitting a deprivation of property must be procedurally fair to survive constitutional scrutiny. Procedural fairness is a flexible concept and the requirements which must be satisfied in order to render an action or law procedurally fair depends on the circumstances of the case.[290]

275. In the light of the above mentioned principles, we submit as follows:

275.1 The e-tolling of the GFIP has not been implemented in terms of section 27 of the SANRAL Act. Mandatory provisions of the Act were not complied with. There was no procedural fairness in the toll declaration process. The Minister failed to comply with section 27(4). The levying and collection of toll will accordingly not be lawful and the exaction of toll from road users will amount to an arbitrary deprivation of property.

275.2 There was no consideration of the disproportionate costs that would be laid on the public, neither on their own nor in the context of a due and proper

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289 Wesbank (supra) at para 100; see also Armbruster and another v Minister of Finance and others 2007 (6) SA 550 (CC) at para 70, where these requirements were confirmed. See also Mkontwana v Nelson Mandela Metropolitan Municpality 2005 (1) SA 530 (CC) at paras 34-35, where the requirements established by the Wesbank case were succinctly summarised.

290 Mkontwana (supra) at para 65

weighing up of alternative mechanisms in order to ascertain whether placing the burden on the road user was in fact justified. In this further sense, the deprivation will be arbitrary and irrational.

275.3 The papers show that the users of the GFIP are a captive market – there are no viable alternative roads to the GFIP network and public transport alternatives are limited and expensive, eg the Gautrain, which is too expensive for the majority of current users of the Pretoria-Johannesburg road and in any event has limited reach.

275.4 The papers also show that the extent of the deprivation of property is severe – many users of the GFIP will be compelled to pay a significant percentage of their monthly income to use the toll roads.

275.5 On the *Wesbank* test set out above, more than a mere correlation between ends and means is required in this case. The extent of the deprivation warrants a heightened level of scrutiny.

275.6 Even on a less onerous ends-means analysis, the implementation of the GFIP will amount to an arbitrary deprivation of property. This is because:

275.6.1 The main reason advanced by the respondents in this Court and in the Constitutional Court for the need for the tolling scheme was the need to pay for the GFIP. However, the discussion of the substantive grounds of review above reveals that alternative funding

mechanisms were and are available, but were not properly considered. The process of choosing e-tolling was therefore not rational.

275.6.2 E-tolling is disproportionately expensive. SANRAL and the authorities could, and can make use of a low, or indeed no cost alternative mechanism for garnering the revenues needed to repay SANRAL's GFIP debt and maintain the GFIP network. There was and is no need to load en extra burden of paying for a disproportionately expensive toll collection mechanism, between R 18 billion on SANRAL's version and in excess of R 28.2 billion if regard is had to the ETC contract, on the private citizen.

275.6.3 E-tolling is disproportionately expensive in view of the limited ancillary benefits that SANRAL, the Transport Minister and Treasury claim tolling will yield. The effect of tolling to reduce congestion and change behaviour will, in the case of the GFIP, be limited to a few years at most. The Transport Minister has acknowledged on record that it is unlikely that the projected benefits will be forthcoming.

275.6.4 A subsidiary benefit advanced by the respondents for the scheme is the reduction of vehicles on the road and the changing of driver behaviour (to less dependence on cars). However, the record shows that this benefit is likely to be illusory, especially without

viable public transport alternatives. Tolling will not effectively reduce congestion or reduce urban sprawl.[291] The record also shows that the manner in which tolling will be implemented will be to attract users onto the network.[292] Once again, there is no rational connection between the reasons advanced for the measure and the measure. The disproportionate costs are not justified.

275.6.5 E-tolling is not viable (ie overly expensive) on SANRAL's own parameters.[293] It has been shown by the expert Bernal Floor using SANRAL's own figures and the ETC contract, that e-tolling is not economically viable in its current form.[294] Even on SANRAL's own version, and leaving aside the expert evidence, the scheme will be prohibitively expensive. Its implementation will therefore be irrational, if not unduly burdensome on private road users. We submit that it matters not that the public will have to pay toll in small amounts. It is no defence to say depriving the public arbitrarily of property is justifiable because they will be deprived in small increments over a long period of time (especially where the facts show, as in this case, that even small amounts will be very hard for many to bear).

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291 Applicants' Supplementary Answer para 316 – 332 pleadings pp 3489-3493 and "RA17"-"RA18" pleadings pp 3754-6. Applicants' Further Supplementary Answer para 92 – 96 pleadings pp 3856 – 3860.

292 Ibid.

293 Applicants' Supplementary Reply para 258 – 294 pleadings pp 3474-3485.

294 Applicants' Further Supplementary Answer para 83 – 91 pleadings pp 3852 – 3856 and "SRA4" - "SRA5"

275.6.6 The papers and record show that there were far less onerous, and more effective, means available to SANRAL and the Minister to pay for the GFIP than the open-tolling scheme. Examples include use of a fuel levy and direct funding by the fiscus. We therefore submit that whether under a proportionality analysis in terms of section 25(1) or under section 36(1) of the Constitution,[295] the scheme is unlawful and unconstitutional.

276. It is therefore submitted that, were the open-tolling scheme to be introduced tomorrow (and, on the respondents' version in the Constitutional Court, it could happen any day), it would give rise to an unjustifiable limitation of the right to property of the users of the road.

**THE MONEY BILL CHALLENGE**

277. Section 77 of the Constitution reads as follows:

> "77 Money Bills
>
> (1) A Bill is a money Bill if it-
>
> (a) appropriates money;

[295] The respondents argue that, if the scheme is found to limit the right to property under s 25(1), such limitation is reasonable and justifiable in terms of section 36(1) of the Constitution. The Constitutional Court in Wesbank (supra) left open the question whether an arbitrary deprivation of property could ever be justifiable in terms of section 36(1) of the Constitution. We submit that, as a matter of logic and principle, it could not.

(b) imposes national taxes, levies, duties or surcharges;

(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or

(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except-

(a) a subordinate matter incidental to the appropriation of money;

(b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;

(c) the granting of exemption from national taxes, levies, duties or surcharges; or

(d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament.

278. The proper interpretation of the phrase – national taxes, levies, duties or surcharges – is vital to the applicants' argument 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.

279. In *Public Carriers Association and others v Toll Road Concessionaries (Pty) Ltd and others*,[296] the Appellate Division considered a review of a toll declaration under section 9 of the previous National Roads Act 54 of 1971. The Court said the following, which is of importance for present purposes:

> "It is clear from the provisions of s 9(4)(a) that the Legislature intended the determination of the amount of a toll ultimately to be a matter of ministerial responsibility. *The reason for this probably lies in the fact that a toll is a form of tax* and that therefore the Minister, and not some lesser official, should be the final arbiter of the amount thereof."[297]

280. It is submitted that, in the light of this dictum, a toll is quite clearly a form of tax.

281. According to *The Chambers Twentieth Century Dictionary*, a "levy" is "a contribution called for from members of an association; *a tax*; the amount collected."[298] According to the same dictionary, the term "duty" means "a tax on goods, etc".[299]

282. It is submitted, therefore, that tolls clearly constitute a tax and/or levy and/or duty:

282.1 The dictionary definitions and the *Public Carriers Association* case support this construction.

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296 1990 (1) SA 925 (A)

297 Public Carriers (supra) at 949H-I. Emphasis added.

298 At p 757

299 At p 403

282.2 The respondents seek to argue that the tolls in this case are not “national taxes” because they are charged at specific places and not throughout the country.

282.3 However,

282.3.1 On that logic, no tax is a national tax, because each taxpayer pays tax at the place where he is located, not throughout the country.

282.3.2 The proper enquiry should be – is the toll road national? If the answer is yes, then the toll charged on that road will constitute a national tax.

282.3.3 In this regard, it is important to emphasise that it is irrelevant whether the toll *in this particular case* is a national tax. The question is whether section 27 authorises, in principle, the raising of a national tax. If so, then the provision violates section 77(2) of the Constitution. Since section 27 of the SANRAL Act is wide enough to allow the imposition of national tolls (and therefore national taxes), it constitutes a money bill as envisaged in section 77 of the Constitution.

282.4 Even if the applicants are wrong in this regard, the tolls of relevance in this case constitute “levies” and “duties”. Those terms, unlike the term “tax”, are not qualified by the word “national”. Therefore, since section 27 of the

SANRAL Act facilitates the imposition of levies and duties, it is in conflict with section 77(2) of the Constitution and invalid.

**THE ENVIRONMENTAL LAW CHALLENGE**

283. We now proceed to set out the environmental law challenge of the applicants.

**Overview of the applicants' submissions**

284. Before dealing with the submissions of SANRAL and the environmental respondents(the fourth and fifth respondents) it is instructive briefly to set out the applicants' contentions in regard to the environmental authorisations granted in respect of the Gauteng Freeway Improvement Project ("GFIP").

285. These authorisations form the subject of the relief sought by the applicants in prayers 3 and 7 of the amended notice of motion which seek, amongst other things, that the decisions to grant environmental authorisation to SANRAL for the upgrading of the freeways comprising the GFIP be declared void and of no force and effect, alternatively, that they be reviewed and corrected or set aside and referred back to the Environment Minister (or her delegate) for reconsideration.[300]

[300] "SA1" pleadings pp2590 - 2593.

286. In support of their contention that the environmental authorisations are void and of no force and effect, the applicants contend that the Chief Director: Environmental Impact Evaluation of the Department of Water and Environmental Affairs ("Chief Director") did not have authority to grant the requisite environmental authorisations to SANRAL.[301] (It is common cause that the decisions to grant the aforesaid authorisations were made by the Chief Director.)[302]

287. The basis for the applicants' contention in this regard is that the delegation by the acting Director General to the Chief Director of the power to grant the environmental authorisations required by SANRAL preceded the delegation of the requisite powers from the Environment Minister to the Director General. More particularly, when the acting Director General delegated the power to the Chief Director on 27 July 2006 she had no authority to do so as the Environment Minister only delegated the requisite powers to the Director General on 28 September 2006. Accordingly, the Chief Director's decisions to grant the environmental authorisation to SANRAL, taken between July 2007 and February 2008, were taken without authority.[303]

288. The basis for the applicants alternative contention that the environmental authorisations granted by the Chief Director fall to be reviewed and corrected or set aside is –

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301 Applicants' Supplementary Founding paras 229 - 232, pleadings p2559.

302 Environmental Minister's Answer paras 55 – 61, pleadings pp 3135 – 3137.

303 Applicants' Supplementary Founding paras 229 - 232, pleadings p 2559.

288.1 Firstly, that SANRAL's application for environmental authorisation for the GFIP did not disclose the funding mechanism proposed for the GFIP and consequently the basic assessment reports ("BARs") compiled in support of its application did not consider the social, economic and environmental impacts of the GFIP(which include the proposed funding mechanism) as it was statutorily required to do. The failure of SANRAL and its environmental consultants to address the social, economic and environmental impacts of the GFIP also tainted the public participation process that was followed in the compilation of the BARs. As a result interested and affected parties were not properly advised and thus could not provide meaningful input in regard to the impacts of the GFIP.[304]

288.2 Secondly, that as a consequence of the aforesaid substantive and procedural inadequacies of the BARs, the Chief Director was not provided with all the relevant information concerning the social, economic and environmental impacts of the GFIP in order for an informed decision to be made on whether to grant environmental authorisation. As a result the Chief Director failed to take all relevant considerations into account in granting environmental authorisation to SANRAL.[305]

**Overview of SANRAL and the environmental respondents' submissions**

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[304] Applicants' Founding paras 289 – 304, pleadings pp 228 – 235.

[305] Applicants' Founding paras 305 – 311, pleadings pp 235 – 239.

289. In essence, SANRAL and the environmental respondents oppose the relief sought by the applicants on the following five grounds:

289.1 Firstly, in response to the applicants' contention that the Chief Director did not have the requisite authority to grant the environmental authorisations to SANRAL, the environmental respondents submit that a proper delegation from the former Environment Minister to the Director General took place on 30 June 2006 notwithstanding the fact that the instrument of delegation was only signed by the former Environment Minister on 28 September 2008.[306]

289.2 Secondly, both SANRAL and the environmental respondents dispute that it was required of the environmental consultant responsible for compiling the BARs or the Chief Director in deciding whether or not to grant environmental authorisation to consider the proposed funding mechanism for the GFIP. SANRAL and the environmental respondents base this submission on the fact that the activity of tolling – the proposed funding mechanism for the GFIP – is not a listed activity as contemplated in the National Environmental Management Act, 1998 ("NEMA") and there is accordingly no requirement in NEMA that tolling be considered for the purposes of granting environmental authorisation.[307]

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306 Environmental Minister's Answer paras 55 – 61, pleadings pp 3135 – 3137.

307 SANRAL's Supplementary Answer para 22.5, pleadings p 2748; Environmental Minister's Answer paras 10.4.2; 32 - 34 pleadings pp 3116, 3127.

289.3 Thirdly, both SANRAL and the environmental respondents deny that the applicants are entitled to approach this Court for judicial review as the applicants did not exhaust the internal appeal remedies provided in section 43 of NEMA.[308]

289.4 Fourthly, both SANRAL and the environmental respondents allege that the applicants have delayed unreasonably in instituting the present review proceedings and no basis exists for condoning the delay.[309]

289.5 Fifthly, both SANRAL and the environmental respondents dispute that any practical purpose would be served in declaring the environmental authorisations void and of no force and effect or in referring the decisions back to the Environment Minister for reconsideration as construction of the infrastructure associated with the GFIP is complete.[310]

**The Chief Director was not authorised to grant the environmental authorisations to SANRAL**

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308 SANRAL's Answer para 12.9, pleadings p 824; SANRAL's Supplementary Answer para 22.10, pleadings p2750; Environmental Minister's Answer paras 16 – 26, pleadings pp 3123 - 3125.

309 SANRAL's Supplementary Answer para 22.9, pleadings p 2750; Environmental Minister's Answer paras 12 – 15, pleadings pp 3117 - 3123.

310 SANRAL's Supplementary Answer para 22.7, pleadings p2490; Environmental Minister's Answer paras 10.4.3; 110, pleadings pp 3117; 3148.

290. Attached to the answering affidavit filed on behalf of the environmental respondents are two delegation letters, each containing a recommendation in support of the delegation. These letters are attached to the affidavit as annexures EM3 and EM4.[311]

291. Annexure EM3 is a letter addressed to the acting Director General from the Deputy Director General: Environmental Quality and Protection. This letter recommends that the acting Director General delegate certain powers delegated to her by the Environment Minister to, amongst others, the Chief Director. The powers the acting Director General was requested to delegate were those contemplated in sections 24C(2) and 24C(3)(b) of NEMA which include the authority to grant the environmental authorisations required by SANRAL for the GFIP. The acting Director General approved the recommendation on 27 July 2006 and signed the necessary delegation letter on that day in accordance with section 42(3) of NEMA giving effect to the recommendation.[312]

292. Annexures EM4 and EM5[313] to the environmental respondents' affidavit deal with the delegation of powers from the Environment Minister to the Director General. Annexure EM4 is a recommendation addressed to the Minister from the Director General recommending that the Minister delegate the powers conferred on the Minister in terms of sections 24C(2) and 24C(3)(b) of NEMA to the Director General. The recommendation letter is dated 30 June 2006 and contains certain initials, which

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311 "EM3", pleadings p 3239; "EM4", pleadings p 3245.

312 "EM3", pleadings p 3244.

313 "EM5", pleadings p 3248.

the environmental respondents allege are those of the former Environment Minister.[314]

293. It is evident from annexure EM5 (being the "Instrument of Delegation of Powers") that the former Environment Minister only effected the delegation of powers on 28 September 2006. The environmental respondents explain this anomaly as being the product of an administrative oversight.[315] The environmental respondents state that the former Environment Minister's intention in signing the recommendation letter "*would have been to delegate the necessary powers to the Director General when he signed his approval on 30 June 2006*". On this basis the environmental respondents conclude that a proper delegation to the Director General took place on 30 June 2006.[316]

294. That a proper delegation did not take place on 30 June 2006 is plainly evident from the fact that the former Environment Minister deemed it necessary to correct the administrative oversight and sign annexure EM5 on 28 September 2006.[317]

295. In the alternative, the environmental respondents contend that should the recommendation letter not constitute a valid delegation of powers from the Environment Minister to the Director General, this Court should exercise its discretion not to review and set aside the decision taken by the Chief Director in 2007 and 2008

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314 Environmental Minister's Answer para 57, pleadings p 3136.

315 Environmental Minister's Answer para 58, pleadings p 3136.

316 Environmental Minister's Answer para 61.1, pleadings p 3137.

317 "EM5", pleadings p 3250.

on the basis that by that stage any possible technical deficiency in the primary delegation from the Minister to the Director General had been cured by the Minister's signature of the delegation instrument in September 2006.[318]

296. There is no merit in this submission.

297. If the Chief Director did not have the necessary power to grant the environmental authorisations to SANRAL, the authorisations are unlawful and null and void.[319]

298. This being the case there is in law no decision which can be reviewed and confirmed or set aside.

299. In the premises the applicants are entitled to the declaratory order sought in prayer3 of the amended notice of motion.[320]

**The requirement to consider the proposed funding mechanism for the GFIP**

300. SANRAL and the environmental respondents draw a distinction between the decision to authorise the construction of the GFIP on the one hand and the decision to authorise the proposed funding mechanism for the GFIP on the other.[321]

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318 Environmental Minister's Answer para 61.2, pleadings p 3137.

319 Rangani v Superintendent-General, Department of Health and Welfare, Northern Province 1999 (4) SA 385 (T) at 395.

320 "SA1" pleadings p 2590.

301. On the basis of this distinction they allege that since it is only the construction of the GFIP that constitutes a listed activity in terms of NEMA, it is only the impacts associated with the construction of the GFIP that must be assessed in the environmental assessment process and it is only those impacts that must be considered by the Chief Director in deciding whether or not to grant environmental authorisation.[322]

302. This distinction also forms the basis for SANRAL and the environmental respondents' contention that since tolling - the proposed funding mechanism for the GFIP – is not a listed activity, there is no need for the impacts associated with tolling to be considered in the environmental assessment process or by the Chief Director in deciding whether or not to grant environmental authorisation.[323]

303. Not only is this distinction artificial, since the manner in which a listed activity is funded is capable of producing impacts that are no less significant than the impacts that may result from the physical construction of a listed activity, but it is also not a distinction drawn in the relevant legislation. On the contrary, the relevant legislation requires *"that the social, economic and environmental impact of a proposed*

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321 SANRAL's Supplementary Answer paras 244; 256, pleadings p2959; 2959; Environmental Minister's Answer para 73, pleadings p 3139.

322 SANRAL's Supplementary Answer paras 22.5; 259, pleadings p 2748; 2972; Environmental Minister's Answer paras 10.4.2; 32 - 34 pleadings pp 3116; 3127.

323 Ibid.

*development be 'considered, assessed and evaluated' and that any decision made 'must be appropriate in the light of such consideration and assessment'"*.[324]

304. The environmental authorisations granted to SANRAL, were granted in terms of Chapter 5 of NEMA read with the environmental impact assessment regulations made in terms of sections 24(5), 24D and 44 of NEMA ("the EIA Regulations").[325]The EIA Regulations set out the procedures and criteria for the submission, processing, consideration and decision of applications for environmental authorisation of listed activities.

305. Having regard to the provisions of Chapter 5 of NEMA read together with the environmental management principles contained in section 2 of NEMA and the EIA Regulations themselves it is the applicants' submission that the assessment of the impacts associated with the proposed tolling of the GFIP, in addition to the construction of the GFIP itself, was required in the environmental assessment process and was required to have been considered by the Chief Director in granting the environmental authorisations to SANRAL.

306. This is manifest when one has regard to the broader framework of integrated environmental management as provided for in Chapter 5 of NEMA within which environmental assessments take place.

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[324] Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Environment, Mpumalanga Province 2007 6 SA 4 (CC) para 60, p 27.

[325] The EIA regulations were published in GN R 385, 386 and 387 in GG28753 of 21 April 2006.

307. Section 23(2)(b) of NEMA provides that the general objective of integrated environmental management is to "*identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2*".

308. This is consistent with the national environmental management principles contained in section 2(4)(i) of NEMA which require that the *"social, economic and environmental impacts of activities including disadvantages and benefits, must be considered, assessed and evaluated and decisions must be appropriate in the light of such consideration and assessment"*.

309. Consequently, regulation 23 of the EIA Regulations, which prescribes the content of basic assessment reports (being the form of environmental assessment undertaken for the GFIP) requires a basic assessment report to contain "*a description of the environment that may be affected by the proposed activity and the manner in which the geographical, physical, biological, social, economic andcultural aspects of the environment may be affected by the proposed activity*".

310. It is thus apparent that in assessing the impact of an activity, an environmental assessment must consider not only the impacts of the activity on the natural environment but also its impact on broader socio-economic conditions and cultural heritage.

311. The ambit of the obligations under NEMA was definitively analysed by the Constitutional Court in the *Fuel Retailers* case.[326] Ngcobo J held that "*NEMA makes it abundantly clear that the obligation of the environmental authorities includes the consideration of socio-economic factors as an integral part of its environmental responsibility*".[327] He explained this as follows:[328]

> *"Construed in the light of section 24 of the Constitution, NEMA therefore requires the integration of environmental protection and economic and social development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development which may have a significant impact on the environment is planned, it envisages that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplates that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of sustainable development.*
>
> *To sum up therefore NEMA makes it abundantly clear that the obligation of the environmental authorities includes the consideration of socio-economic factors as an integral part of its environmental responsibility."*

312. In the *Fuel Retailers* case, the Constitutional Court set aside the decision of the provincial environmental authority because it had taken the view that it was not required to have regard to socio-economic factors.

313. It is submitted that the same irregularity vitiated the decision in the present case. Since the environmental consultant responsible for compiling the basic assessment

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326 Supra footnote 324.

327 Para 62.

328 Paras 61 and 62.

reports and the decision maker responsible for granting environmental authorisation is required to consider the social, economic and environmental impacts of listed activities, it is clear that any such impacts that result from the funding mechanism proposed for the listed activity must be considered and assessed and decisions must be appropriate in the light of such consideration and assessment.

314. If the environmental assessments undertaken for the GFIP had assessed the impacts of the proposed funding mechanism, namely tolling, the identification and evaluation of the socio-economic and environmental impacts of the GFIP would have been substantially different. For example, the introduction of a toll is likely to result in some motorists avoiding the upgraded freeways and using the secondary road network in order to avoid the tolls. Not only will this have exactly the opposite impact on congestion and degradation as predicted in the basic assessment reports but it will result in a host of other negative impacts that have not been investigated at all in the basic assessment reports.[329]

315. The identification and assessment of new impacts associated with the GFIP would also have necessitated the imposition of new and different conditions in the environmental authorisations to mitigate these impacts.

[329] Applicants' Founding para 303, pleadings p 234.

316. SANRAL and the environmental respondents contend that the appropriate forum for the consideration of the impacts of tolling is the toll declaration process conducted in terms of the SANRAL Act.[330]

317. This issue arose in the Fuel Retailers case where the provincial environmental authority contended that it was not necessary for it to consider the social and economic impacts of an activity because the issues were addressed by the local authority in respect of the same activity. In response to this contention, Ngcobo J stated as follows:[331]

> *"There is a fundamental flaw in this approach. Need and desirability are factors that must be considered by the local authority in terms of the Ordinance. The local authority considers need and desirability from the perspective of town-planning and an environmental authority considers whether a town-planning scheme is environmentally justifiable. A proposed development may satisfy the need and desirability criteria from a town-planning perspective and yet fail from an environmental perspective. The local authority is not required to consider the social, economic and environmental impact of a proposed development as the environmental authorities are required to do by the provisions of NEMA. Nor is it required to identify the actual and potential impact of a proposed development on socio-economic conditions as NEMA requires the environmental authorities to do."*

318. Accordingly, while it is correct that a consideration of the impacts of tolling is required during the toll declaration process, this does not obviate the requirement for such impacts to be considered in the environmental authorisation process. This is because SANRAL and the Department of Transport, under whose auspices the toll declaration

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330 SANRAL's Supplementary Answer para 255 - 256, pleadings pp2969 - 2971; Environmental Minister's Answer para 100 pleadings pp 3116; 3127.

331 At para 85.

process is conducted, assesses the impacts of tolling from a different perspective to that required of the environmental authorities.

319. It is for this reason that the applicants contend that the assessment of the impacts associated with the proposed tolling was required in the environmental assessment process and was required to have been considered by the Chief Director in granting the environmental authorisations to SANRAL.

320. It is common cause that the Chief Director did not consider the impacts associated with the proposed tolling in granting the environmental authorisations to SANRAL.[332]

321. This fact vitiates the decisions made and renders the decisions to grant environmental authorisation reviewable on the basis that:

321.1 a mandatory and material procedure or condition prescribed by an empowering provision was not complied with as contemplated in section 6(2)(b) of PAJA; and

321.2 relevant considerations were not considered as contemplated in section 6(2)(e)(iii) of PAJA.

**No internal remedies were available to the applicants**

[332] SANRAL's Supplementary Answer para 22.5, pleadings p 2748; Environmental Minister's Answer paras 10.4.2; 32 – 34; 93, pleadings pp 3116; 3127; 3144.

322. At the time the relevant environmental authorisations were granted to SANRAL, section 43(1) of NEMA provided that "*any affected person may appeal to the Minister against a decision taken by any person acting under a power delegated by the Minister"*.[333]Similarly, section 43(3) of NEMA provides that an "*affected person*" may appeal to the Environmental Minister against the grant of an environmental authorization.

323. Both SANRAL and the environmental respondents contend that since the applicants have at all times been "*affected persons*" as contemplated in section 43, they were vested with a right of appeal which they failed to exhaust before launching the present review proceedings. This, the respondents contend (relying on section 7(2) of PAJA) disentitles the applicants from approaching this Court for the review of the Chief Director's decisions to grant the environmental authorisations to SANRAL.[334]

324. This contention is inconsistent with the attitude adopted by SANRAL and the environmental respondents to the issues raised by the applicants regarding the environmental authorisation process.

325. The applicants' principal concern with the environmental assessment process followed by SANRAL in obtaining environmental authorisation for the GFIP is that the social, economic and environmental impact of the project and in particular the

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[333] Section 43(1) of NEMA was amended by Act 62 of 2008 which came into operation on 1 May 2009. The decisions forming the subject of this matter were taken prior to the aforesaid amendment.

[334] SANRAL's Answer para 12.9, pleadings p824; SANRAL's Supplementary Answer para 22.10, pleadings p 2750; Environmental Minister's Answer paras 16 – 26, pleadings pp 3123 - 3125.

proposed funding mechanism was not disclosed by SANRAL in its application for authorisation nor was it addressed in the BARs.

326. As mentioned above, both SANRAL and the environmental respondents are emphatic that the applicants' concerns with the proposed funding of the GFIP were not relevant factors for the purposes of the environmental authorisations sought by SANRAL.

327. As a consequence of the manner in which SANRAL and the environmental respondents defined the scope of the GFIP – as being concerned solely with the upgrading of Gauteng's freeways and not with how the project was to be funded – the applicants were not registered as interested and affected parties in the environmental assessment process which preceded the grant of the environmental authorisations.

328. It is accordingly difficult to reconcile SANRAL and the environmental respondents' contention that the applicants have at all times been "*affected persons*"[335] when they regard the principal issue with which the applicants are concerned (and which the applicants contend affects them most directly) as irrelevant to the environmental authorisation process.

329. In effect what SANRAL and the environmental respondents are saying is that the applicants are "*affected persons*" for the purposes of an appeal against an environmental authorisation but they are not affected persons as regards the subject matter of the environmental authorisation itself.

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335 Environmental Minister's Answer paras 20 - 21, pleadings p 3124.

330. This anomaly could not have been the intention of NEMA.

331. Although NEMA does not contain a definition of the phrase "*affected person*" as used in section 43, it is submitted that the phrase contemplates a person who has participated in the environmental assessment process leading up to the grant of an environmental authorization. It does not provide a remedy to a person to raise issues on appeal that have not been raised in the process leading up to the decision nor does it provide a remedy to a person who has not been involved in the environmental assessment process leading up to the decision.

332. It is instructive to have regard to the EIA regulations, which prescribe the process to be followed by an "*affected person*" in lodging an appeal as contemplated in section 43 of NEMA:

332.1 Regulation 62(1) of the EIA Regulations provides that "*a person affected by a decision referred to in regulation 60(1)*[336] *who wishes to appeal against the decision, must lodge a notice of intention to appeal with the Minister, MEC, or delegated organ of state, as the case may be, within 10 days after that person has been notified in terms of these Regulations of the decision*".

332.2 Regulation 10 of the EIA Regulations deals with the process of notification. It provides as follows:

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[336] Section 60(1)(a) of NEMA provides as follows: "This Chapter applies to decisions that (a) are subject to an appeal to the Minister or MEC in terms of section 43(1), (2) or (3) of the Act".

"(1) After a competent authority has reached a decision on an application, the competent authority must, in writing and within 10 days—

(a) notify the applicant of the decision and of the period within which the applicant must comply with subregulation (2);

(b) give reasons for the decision to the applicant; and

(c) draw the attention of the applicant to the fact that an appeal may be lodged against the decision in terms of Chapter 7 of these Regulations, if such appeal is available in the circumstances of the decision.

(2) The applicant must, in writing, within a period determined by the competent authority—

(a) notify all registered interested and affected parties of

(i) the outcome of the application; and

(ii) the reasons for the decision; and

(b) draw their attention to the fact that an appeal may be lodged against the decision in terms of Chapter 7 of these Regulations, if such appeal is available in the circumstances of the decision.

332.3 Regulation 1 of the EIA Regulations defines a "*registered interested and affected party*" as meaning "*in relation to an application, means an interested and affected party whose name is recorded in the register opened for that application in terms of regulation 57*".

332.4 Regulation 57 in turn provides as follows:

> "An applicant or EAP managing an application must open and maintain a register which contains the names and addresses of—
>
> (a) all persons who, as a consequence of the public participation process conducted in respect of that application in terms of regulation 56, have submitted written comments or attended meetings with the applicant or EAP;
>
> (b) all persons who, after completion of the public participation process referred to in paragraph (a), have requested the applicant or the EAP managing the application, in writing, for their names to be placed on the register; and
>
> (c) all organs of state which have jurisdiction in respect of the activity to which the application relates."

333. It is accordingly submitted that these are the "*affected persons*" who are given a right of appeal in terms of section 43(1) of NEMA. In effect, they are the parties who participated in the procedures resulting in the initial decision. Were the position otherwise, there would be no incentive for interested and affected parties to participate during the initial application procedures. They could simply await the decision of the delegated authority and if dissatisfied, appeal under the aforesaid section.

334. This interpretation of the phrase "*affected persons*" is supported by the unreported judgment in *Linksfield Grove (Pty) Ltd v Minister of Development Planning and Local Government, Gauteng* (21203/3003), which dealt with the appeal process in the Town-planning and Townships Ordinance 15 of 1986. In that legislative context, the Court held that the phrase "*other interested person*"

> *"cannot possibly have been intended to include every person or body with an interest in the matter, irrespective of whether such person or body lodged an objection or made representations in terms of the Ordinance or not. If that was the correct interpretation, anybody with sufficient interest could simply arrive at the hearing of an application and present oral evidence and argument" (para 28).*

335. The court held that only those persons who had participated during the application process were entitled to appeal the decision. It is submitted that a similar principle applies to section 43(1) of NEMA.

336. Since the proposed funding mechanism for the GFIP was not disclosed by SANRAL in its application for authorisation nor was it addressed in the basic assessment reports, none of the applicants were registered as interested and affected parties during the basic assessment process. It follows that they had no right to appeal in terms of section 43(1) of NEMA, and are therefore not hit by section 7(2) of NEMA.

**The reasons for the delay in launching review proceedings**

337. The reasons for the delay in launching the present review proceedings and why condonation should be granted are dealt with below.

338. Insofar as the environmental authorisations are concerned, the following facts must be highlighted:

338.1 The applicants learnt of the environmental authorisations, the fact that they are void and the further reviewable defects of the environmental authorisations after 22 February 2012.

338.2 In particular, the applicants -

338.2.1 learnt of the environmental authorisations and of the failure of the environmental respondents properly to consider the social, economic and environmental impacts of tolling during the course of the preparation of Part A of this application through research conducted by the applicants' legal representatives;[337] and

338.2.2 learnt of the fact that the environmental authorisations were granted by the Chief Director without authority after the filing of the environmental respondents' record in June 2012.[338]

338.3 The review of the environmental authorisations is, in substance, inextricably linked to the review of the Transport Minister's approvals and the toll declarations that put e-tolling in place. The reasons for the delay in bringing the application to review the Transport Minister's approvals and the toll declarations apply equally to the review of the environmental authorisations.

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337 Applicants' Founding para 299, pleadings p 232-233.

338 Applicants' supplementary founding paras 192-194, pleadings pp 2535-2538.

338.4 By virtue of the fact that SANRAL failed to publicise that Gauteng's freeways would be tolled, the applicants could not reasonably be expected to have been aware of the environmental authorisations, the reasons therefor and their invalidity prior to the above dates.

338.5 Had the applicants become aware of and scrutinised the environmental authorisations at the time they were granted, they would not have noticed they were reviewable for the reasons raised in this application. The applicants would also then have been blind to the fact that the environmental authorisations were granted by the Chief Director without authority.

**The relief sought is not academic**

339. The fact that construction of the initial phase of the GFIP may be complete or largely complete does not mean that the orders sought in this application will have no practical effect.

340. The funding mechanism, namely tolling, which according to SANRAL is inextricably linked to implementation of the GFIP (the social, economic and environmental impacts of which should have been investigated) has not yet commenced. The reviewing and setting aside of the environmental authorisations on the basis that the social, economic and environmental impacts of the GFIP, including its proposed funding mechanism, is therefore effective relief.

341. Further, having regard to the environmental authorisations that have been granted thus far in respect of the GFIP, it is evident that they have application beyond the construction phase of the project. They include, for example, provisions relating to the management of the activity through the compilation of a "dynamic" Environmental Management Plan, the on going monitoring of the project through recording and reporting obligations and provisions relating to site closure and decommissioning.[339]

342. The fact that construction of the initial phase of the GFIP may be complete or largely complete does not therefore mean that the environmental authorisations and their conditions no longer have relevance.

343. Accordingly, should this honourable Court remit the environmental authorisations to the Chief Director for reconsideration with directions, amongst others, that the impact of the proposed funding of the GFIP be investigated (through specialist studies and further public participation for example), new or different conditions could be included in the environmental authorisations which would have relevance to the future operation of the freeways comprising the GFIP.

344. It is further evident from the environmental authorisations that have been granted thus far, that authorisation has been granted for activities that are not yet complete or have not yet commenced. Clearly the imposition of new or different conditions in the environmental authorisations will shape how those activities are undertaken in future.

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[339] See for example paragraphs 1.9 - 1.15 of Annexure B1, pleadings p 23.

345. There is accordingly no merit in SANRAL and the environmental respondents' generalisation that since the expansion, upgrade and construction of the freeways comprising the GFIP has been completed, the review and setting aside of the environmental authorisations can have no practical effect.

**CONDONATION**

346. The applicants' case for condonation as well as their reply to the contentions of the respondents is fully set out in their affidavits filed of record.[340]

347. Insofar as the applicants deal with allegations of Treasury or SANRAL in the field of economics and public finance, the applicants' rely on the advice of experts Dr Azar Jammine and Christopher Hart.[341]

348. For the sake of convenience, we will deal with the application for condonation under the following themes:

348.1 the Applicants' explanation for the delay;

348.2 reasons why condonation should be granted in this particular case; and

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[340] Applicants Founding para 323-429 pleadings pp 248-270; Applicants' Reply para 89-116 pleadings pp 2090 – 2096; Applicants ' Answer to Treasury para 35-42 pleadings pp2402-2403 and para 88-110 pleadings pp 2414-2418; Applicants Supplemen tary Founding para 247-269 pleadings pp 2573-2581; Applicants' Supplementary Reply para 385-473 pleadings pp 3528-473.

[341] Whose confirmatory affidavits are at "RA26" pleadings pp 3795-3799 in relation to the content of "RA26" and, in the case of Christopher Hart in confirmation of the content of the Applicants' Supplementary Reply at pleadings pp 3900 to 3902.

348.3 answers to contentions regarding prejudice to the respondents.

**The explanation for the delay**

349. The applicants' explanation for the delay in bringing the review is contained principally in the applicants' founding and replying affidavits in the Part A proceedings.[342]

350. As the referenced portions of such affidavits make clear, the explanation for the delay of the applicants may only be fairly considered from the perspective of the different applicants. The applicants can essentially be divided into three groups:

350.1 SAVRALA, which knew about SANRAL's plans to toll the network in July 2008 and could have launched a review, but did not because SAVRALA and its members originally had no reason to bring the review and originally sought to co-operate with SANRAL in the implementation of e-tolling;

350.2 QASA, SANCU and, it is alleged, many members of the public who learned about SANRAL's plans to toll and the impact it would have on them in February 2011, but who (along with SAVRALA) could not have been expected to launch a review until the final word was spoken in the budget speech on 22 February 2012;[343]

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[342] Applicants Founding para 323 - 429 pleadings pp 248 - 270; Applicants Reply para 89 - 116 pleadings pp 2090 - 2096

[343] The other constituent members of OUTA, namely, SATSA and RMI fall into this group of applicants: Applicants Supplementary Reply para 385 pleadings pp 3528

350.3 the disenfranchised public in the position of Maphorama, Leatswe, Tabakin and Osrin, who are represented by OUTA, and who, despite knowing since February 2011 about SANRAL's plans to toll, have had no ability to launch the review until OUTA came into being on 15 March 2012.

351. OUTA does not pretend to be entitled to condonation on the basis that it came into being on 15 March 2012.

352. As much is made clear already in the applicants' founding affidavit and reiterated in reply.[344]

353. It is true that the SAVRALA executive came to know of SANRAL's intention to toll GFIP in about July 2008.

354. However, as is dealt with in detail in the founding and replying affidavits, it was SAVRALA's[345] intention from the outset to comply and co-operate with SANRAL in the implementation of e-tolling.

355. SAVRALA at that stage had no reason to believe that its members should do anything other than seek to co-operate with SANRAL in preparing for the commencement of tolling.

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[344] Applicants Reply para 117 pleadings p 2096

[345] See generally Applicants Founding paras 371 - 412 pleadings pp 258 - 266

356. This SAVRALA and its members did by meeting with SANRAL and other key account holders at the end of 2010 and well into 2011.[346]

357. SAVRALA's position changed when the constructive engagement between SAVRALA and its members, on the one hand, and SANRAL on the other, deteriorated to the point that no real progress could be made. This was because SANRAL was not able to address operational obstacles that SAVRALA's members would encounter.[347]

358. It also changed when SAVRALA's members learned during the public consultations held during 2011 of material facts such as the disproportionate cost of tolling and the impossibility of reasonably implementing the scheme.[348]

359. SAVRALA sought, like many other stakeholders, to engage with SANRAL and the Department of Transport and voice opposition alongside the many other private stakeholders that similarly believed that the system would not be implemented. SAVRALA continued to make representations all the way through into February 2012 to both the SANRAL board and to Treasury at a stage when tolling had again been postponed.[349]

360. It was when the Minister of Finance gave the final word on e-tolling on 22 February 2012 that e-tolling would be introduced (after what was in the circumstances a time of

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346 Applicants Founding paras 385 - 395 pleadings p 261 - 263

347 Applicants Founding paras 397 - 399 pleadings pp 263 - 264 and "FA70" - "FA71" pleadings pp 660 - 664

348 Applicants Founding paras 400 - 412 pleadings pp 264 - 266

349 Applicants Founding idem; Applicants Answer to Treasury paras 35 - 42 pleadings pp 2402 - 2403

considerable uncertainty), that SANRAL sought legal advice and urgently prepared and launched proceedings in the High Court together with the further applicants.

361. The launching of the review on 23 March 2012 was the earliest date upon which the applicants and their legal representatives were able to peruse a large volume of documentation, learn a complex factual history and explore the constitutional and legal setting in which the planned implementation of tolling had been conceived and was planned to be carried out.[350]

362. The other persons before this Court, including QASA and its members, the individual deponents Maphorama, Tabakin ,Leatswe, Osrin and the many hundreds of thousands of Gauteng road users only became aware of the fact that Gauteng's freeways would be tolled (tolling *per se*) after the publication of the tariffs in or about February 2011.[351]

363. These applicants, and it is submitted many thousands of road users who are represented by OUTA in the application, did not have knowledge of the facts which SANRAL, the Transport Minister and Treasury glibly allege were widely known in 2008.[352]

364. In this regard, we pause to mention that the delivery by the Minister of Transport of his key note address on 8 October 2007 is referred to by several of the respondents

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350 Applicants Reply para 111 pleadings pp 2095 - 2096

351 "FA5" - "FA8" pleadings pp 348 - 367; Applicants Founding paras 327 - 333 pleadings pp 249 - 250 and paras 413 - 425 pleadings pp 266 - 268

352 Cf SANRAL Answer pleadings p 11.10 - 11.11.13 pleadings pp 805 - 812 and Applicants Reply para 162 - 167 pleadings pp 2104 - 2107. The respondents fail to distinguish facts learned by the applicants during the course of 2011 and in the preparation for the application in February to March 2012 from when the applicants gained knowledge of e-tolling.

as if it were the moment when the tolling of GFIP became broadly and publicly known.[353] But this is obviously not correct since if the GFIP and SANRAL's plans to toll the GFIP were so broadly and publicly known then there would no doubt have been a massive reaction as there was to the publication of the tariffs in February 2011.

365. As we have already dealt with in the section dealing with the failure to publish notice of intent to toll, tolling of GFIP was not known in 2008 when SANRAL slipped through the notice of intent to toll and in 2007/2008 when SANRAL slipped through the notices of intent to toll when there was only intermittent and low key media coverage of SANRAL's plans. This is clear from the massive public outcry in February 2011 in conjunction with the broad scale of opposition and participation from all sectors at the GFIP Steering Committee hearings and the fact that over 90% of the representatives made objection then to tolling *per se.*

366. Both the applicants' founding and replying affidavits deal with the fact that it could not fairly be expected of the applicants or the public whom they represent to take action to set aside the declarations or the environmental authorisations in February 2011 and in the months that followed:[354]

367. The applicants set out in those affidavits how there was genuine uncertainty that prevailed concerning whether tolling would go ahead, notwithstanding the statements by SANRAL and by the Department of Transport that the principle of user pay had

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353 See, for instance, Transport Minister's Affidavit para 36 pleadings p 3273 and Environmental Minister's Affidavit para 14.3.3(b) pleadings pp 3120

354 Applicants Founding paras 333 - 363 pleadings pp 250 - 256; Applicants Reply paras 89 - 116 pleadings pp 2090 - 2096

been accepted and the purpose of the public consultation was to solicit comment on the amount of the tariffs.

368. This is definitively shown by the fact that, at all of the hearings, the majority of interested stakeholders opposed tolling *per se* (for the first time since they were given no opportunity earlier). It is evidenced further by repeated postponements of the commencement of tolling (sometimes indefinitely) and not less than two clarifying statements by the Minister of Transport that his earlier statements did not mean that tolling would not go ahead.[355]

369. As the applicants explain, despite the clarifying statements, public opposition intensified to such a level (with COSATU becoming increasingly militant and outspoken against e-tolling) that there was a genuine belief that e-tolling would not become a reality. It was in this context that the budget speech by the Minister of Finance on 22 February 2012 signalled the final word of the government on e-tolling.[356]

370. We submit that it was reasonable of the applicants not to bring the application before 22 February 2012 within the circumstances that obtained at the time and because they might very well have been met with the objection that the government had not yet made a final decision on whether to proceed with e-tolling.

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[355] See Applicants Reply para 98 pleadings p 2092 and para 105 pleadings p 2094

[356] See Applicants Founding idem and Applicants Reply paras 106 - 107 pleadings p 2094

371. We respectfully submit that the emergence of gantries on the GFIP network, the first of which is said to have been completed in June 2010,[357] does not colour the applicants' application for condonation.[358] June 2010 was, in any event, two years and more after the toll declarations and environmental authorisations had come into being and SANRAL would no doubt have opposed the review at that stage on the same grounds as it opposes it now. The difference from the perspective of the applicants and the public is that – while the emergence of the gantries no doubt started to cause an awareness to grow amongst the public generally that there were plans to toll GFIP – the public had no information on the impact that tolling would have on them or of the unlawful and unduly burdensome nature of tolling and its implementation. The applicants have learned this only during the course of 2011 and 2012.

372. In the above circumstances, we submit that a full and proper explanation of the delay in the bringing of the application has been provided by the applicants and that such delay is reasonable.

**Self-standing reasons why condonation should be granted in this particular application**

373. We respectfully submit that there are powerful reasons why this Court should grant condonation in this application. They distinguish this application from the tender cases relied upon by the respondents in the hearing of Part A.

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357 SANRAL Supplementary Affidavit para 33.6.3 pleadings p 2785

358 Applicants Supplementary Reply paras 395 - 398 pleadings pp 3530

374. The first is that should tolling in fact be unlawful, for failure to follow mandatory provisions of the legislation, because it is irrational or otherwise, then the harm that will be suffered by hundreds and thousands of members of the public will not be isolated and historic but ongoing.

375. Hundreds and thousands of members of society will be forced to suffer the material adverse effect of having to pay toll in terms of an unlawful tolling scheme indefinitely.[359]

376. We submit that such a situation is one that cannot be countenanced, particularly because it is primarily brought about by SANRAL's own failure initially to publicise properly and engage with the public on the largest and most far reaching toll project in the country's history.[360] This is particularly so in the context where road users are captive to what constitutes the only viable commuting road arteries around and between Johannesburg, Pretoria, Soweto and surrounding areas.

377. In this regard, it is more than likely that tolling, once it commences, will not be limited to the 24-year period of the scheme currently envisaged but will continue indefinitely into the future for the purpose of raising revenue for the maintenance of future upgrades of the GFIP network on the strength of the same invalid toll declarations.[361]

378. We submit that this is a ground that cannot be trivialised or answered by the respondents.

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[359] Applicants Supplementary Founding paras 249 - 253 pleadings pp 2573 - 2574.

[360] Founding Affidavit para 366 - pleadings p 256

[361] Applicants Supplementary Founding idem

379. An ongoing violation of the rule of law and the Constitution indefinitely into the future that affects the private pockets of individual South Africans on a daily basis cannot be allowed.

380. We submit that the second reason that condonation should be granted is that it is clear from the record that Gauteng's freeways would have been upgraded and expanded in any event.[362]

381. The record is replete with references in which the GFIP project is justified on the basis that by 2007/2008 the lack of capacity on the GFIP network had reached a critical stage that had begun to stifle economic growth within the economic heartland of South Africa. This was in addition to the wastage of petrol and the detrimental effects to commuters forced to commute up to three hours per day on the network.

382. This situation SANRAL made clear, in its applications to the Minister, had to be addressed.

383. "*Do nothing*" was simply not an option.

384. We submit that the respondents' denial that the GFIP network would have been upgraded is disingenuous and is tantamount to the government stating that it would have neglected its duty to attend to necessary public infrastructural projects.

385. SANRAL and the Department of Transport in fact clearly had no option but to upgrade and expand the network.

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[362] Applicants Supplementary Founding paras 254 - 257 pleadings pp 2574 - 2578

386. The third reason is that the GFIP network would have been upgraded and expanded in any event in view of the 2010 World Cup.[363]

387. We submit that, similarly, the government would not have allowed the failure to declare the GFIP network to be toll roads successfully to jeopardise South Africa's hosting of the 2010 World Cup. Quite apart from the evidence strewn through the record,[364] Treasury itself has made clear that it is of the view that the constitutional rights of the public could justifiably be infringed in view of the economic benefits that the World Cup would bring to the country.[365]

388. A further self-standing reason why we submit that condonation should be granted is that the roads will be and are being used by South Africa's citizens and the roads will be paid for in any event.[366]

389. We do not make this submission lightly. It is simply a fact that, as is accepted by all parties, the expenses of upgrading and expanding the network have been incurred and this debt will be paid by the public one way or another.

390. Should e-tolling not continue, SANRAL supported by government will have recourse to other funding mechanisms available to SANRAL in order to recover the funds.

391. If tolling does go ahead, the funds again will come from public, this time from the private road user.

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363 Applicants Supplementary Founding paras 258 - 261 pleadings pp 2578 - 2579

364 Applicants Supplementary Founding paras 66 - 118 pleadings pp 2478 - 2498

365 Treasury Supplementary Answer para 116 pleadings p 3379

366 Applicants Supplementary Founding paras 262 - 265 pleadings pp 2579-2580

392. It is not as if the roads will be torn down and left desolate.

393. It is apparently not even the case that the gantries and the e-toll infrastructure, including the transaction clearing house which was designed and built for the purpose of being a national transaction clearing house, cannot and will not be put to use.[367]

394. A further self-standing reason why we submit that condonation should be granted is that the interests of justice and the public interest weigh heavily in the favour of the upholding of the rule of law in this instance.[368]

395. This application is one of great public interest and great controversy.

396. It is also a matter of national importance.

397. We submit that it would not be appropriate or in the interests of justice that the rule of law be seen to be defeated by the technical objection of delay but rather that the matter should be decided on the merits.

**The contentions of the respondents regarding prejudice**

398. The applicants respond to the contentions of the respondents regarding economic prejudice to be suffered should e-tolling not go ahead principally in the applicants' answering affidavit to the Treasury intervention[369] and in the applicants' supplementary replying affidavit.[370] The contentions are also dealt with by the

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[367] Applicants Supplementary Reply para 426.14 pleadings pp 3539 - 3542

[368] Applicants Supplementary Founding paras 266 - 269 pleadings pp 2580 - 2581

[369] Para 88 - 110 pleadings p 214 - 2418

[370] Para 385 pleadings pp 3528 to para 473 pleadings pp 3551

applicants in the opposing affidavits in the Constitutional Court proceedings with the assistance of the experts, the relevant portions of which are attached to the supplementary replying affidavit.[371]

399. The applicants have been prevented from dealing fully with the allegations by SANRAL and Treasury on the basis of alleged financial prejudice to be suffered on account of contracts that will have to be terminated and guarantees that will allegedly be called up by their respective failures to respond to the applicants' notices in terms of Rule 35(12).[372] In the case of SANRAL, this is after the applicants went so far as to explain specifically the relevance of the documents requested and the need for them in order to deal with the allegations by SANRAL.[373]

400. Turning to the alleged financial prejudice to be suffered by SANRAL, this omission by SANRAL is telling because as the applicants demonstrate,[374] in cases where the applicants have the contracts in hand, in each instance contractual provisions allow for SANRAL to escape from the contract without any claim for premature termination being made against it.

401. We submit that SANRAL will clearly not suffer the financial destruction it alleges in its answering affidavit it will.

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371 "RA26" - "RA27" pleadings pp 3707 - 3797

372 Applicants Supplementary Reply paras 413 - 419 pleadings p 3534 to 3535 read with "RA22" - "RA25" pleadings pp 3773 - 3706

373 "RA24" - "RA25" pleadings pp 3781 - 3786

374 Applicants Supplementary Reply paras 426 - 426.12 pleadings 3536 - 3538

402. As SANRAL itself has made clear, SANRAL has financially ring-fenced the GFIP project because it is proceeding on the basis that 100% of the toll revenue to be garnered will be used to cover 100% of the costs.[375] On SANRAL's own version, therefore, SANRAL's further projects are not financially dependent upon the e-tolling of the GFIP network proceeding.

403. In regard to SANRAL's financial obligations, the Government has made clear that it will support SANRAL and that allowing SANRAL to default on its GFIP obligations is "*not an option*".[376]

404. Further, we submit that, as the experts make clear, as a state-owned entity, SANRAL's ability to borrow rests on the credit rating of government which is and remains very good.[377]

405. Furthermore, SANRAL's credit rating, while presently adversely affected by uncertainty, will clearly be fully restored and even improved should finality be reached and SANRAL be funded either through the fiscus or an alternative funding mechanism (not with the inherent risks of tolling) put in place.[378]

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375 See "SAA4" pleadings p 2991

376 Applicants Supplementary Founding para 265 pleadings p 2580 read with "SA23" pleadings pp 2721 - 2725

377 Applicants Supplementary Reply paras 427 - 435 pleadings pp 3542 - 3543 read with "RA26" - "RA27" pleadings pp 3707 - 3797

378 Idem. See also Applicants Answer to Treasury paras 100 - 105 pleadings pp 2416 - 2417 and see also Applicants Supplementary Reply paras 438 - 442 pleadings p 3544

406. We submit further that it is clear that the interdicting of e-tolling on the GFIP will not be a zero sum game in regard to persons employed pursuant to the project. The system is designed as a national system and will be rolled out in respect of other toll projects.[379] Moreover, as the experts have explained, the placing of the public's resources elsewhere in the economy rather than in the low multiplier terrain of SANRAL and the toll operator's pocket will result in the generation of many more jobs in the economy.[380]

407. We submit that SANRAL cannot be heard to complain that if the review was instituted within the 180 day period after the declaration of the roads as toll roads or if proceedings had been threatened, it would not have proceeded with the project.

408. It is SANRAL that did not properly publicise notice of intent to toll and ensure the public was effectively informed of e-tolling at the proper time. Moreover, SANRAL acted precisely in contradiction with what Alli says in answer in the case of the Winelands toll, where review proceedings were threatened and SANRAL nevertheless took steps to implement the project.[381]

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379 Applicants Supplementary Reply paras 426 .20 - 426.23 pleadings p 3540

380 Applicants Supplementary Reply para 426.22 pleadings p 3540

381 Applicants Supplementary Reply paras 405 - 408 pleadings pp 3532 - 3533 and "RA21" pleadings pp 3766 – 3772. Moreover, SANRAL having been in a rush to get going, it had already expended R 5 billion on the GFIP between mid-2007 and mid-2009. See “NT1” pleadings p 3385.

409. We submit that the contentions by Treasury do not bear scrutiny.[382]

410. According to the experts, GFIP debt is miniscule in the context of public finance obligations[383], a rounding error amount of 0.2% per year. It is telling that despite these allegations by the experts already being levelled at Treasury in the Constitutional Court proceedings, they are not dealt with at all in Treasury's supplementary answer.

411. The experts explain that there is also flexibility in the budget in the form of budgeted contingency reserves that far exceed the GFIP debt obligations.[384]

412. Treasury may also have recourse to the fuel levy, which the Minister of Finance has made clear is an option open to government,[385] in which event there will be no effect on the fiscus whatsoever. There will also be, contrary to the incorrect allegations by SANRAL, a negligible effect on inflation[386] while the effect on inflation of e-tolling will be much higher.[387]

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382 Primarily dealt with in Applicants Supplementary Reply paras 436 - 473 pleadings pp 3543 - 3551 and Applicants Answer to Treasury paras 88 - 110 pleadings pp 2414 - 2418 read with "RA26" to "RA27" pleadings pp 3707 - 3797

383 Applicants Supplementary Reply paras 447 - 449 pleadings pp 3546 - 3547 read with "RA27" pleadings pp 3707 - 3797 and in particulars pleadings p 3792

384 "RA26" pleadings p 3792

385 "RA1" pleadings p 3588

386 "RA27" pleadings p 3801 - 3803

387 Ibid

413. There will likewise be nothing but a positive effect on the Government's credit rating should e-tolling not commence, because of the return of certainty and because it is self-evident that Treasury's credit rating could never be affected by its making good on contractual obligations of a state-owned entity.[388] It is certainly not the case that Treasury would not be able to meet SANRAL's obligations if it elected to do so.

414. Treasury's allegations regarding the knock-on effect to other state-owned entities is obviously devoid of merit.[389]

415. In the above circumstances, we submit that it is self-evident that there is no real risk that SANRAL will default on its loan obligations or there will be the triggering of guarantees.

416. We submit that the allegations by Treasury in this regard should be rejected in any event given that Treasury fails to produce the guarantee instruments despite the applicants' formal request and given that Treasury has a changing version in this regard:

416.1 In the intervention application,[390] Treasury alleged that if SANRAL failed to implement GFIP by collecting tolls on 30 April 2012 "*that will be an event of default triggering the immediate payment of the entire loan*" guaranteed by Government. This clearly did not happen.

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388 Applicants Answer to Treasury paras 94 - 110 pleadings pp 2415 - 2418

389 Applicants Supplementary Reply paras 462 - 464 pleadings p 3549 read with "RA28" pleadings p 3805

390 Treasury intervention para 44 pleadings p 1994

416.2 In the Constitutional Court proceedings in the affidavit filed by Treasury in May, Treasury alleged that the failure to proceed with GFIP "*may*" be an event of default. The language changed for obvious reasons.

416.3 Treasury return again to saying in its supplementary answering affidavit that the failure to continue with GFIP will be an event of default.

417. It is, moreover, clear that SANRAL's toll portfolio will, apart from phase 1 of GFIP, be unaffected.

418. We submit that Treasury's allegations in this regard are disingenuous and without real foundation. We will deal further with the contentions of Treasury in oral argument.

419. The respondents oppose the application for condonation brought by the applicants in terms of section 9 of PAJA. They do so primarily on the basis that steps have been taken to implement tolling as part of the GFIP, which entailed expenditure and infrastructural investment on the part of the state. Had this application been brought timeously, they argue, that expenditure and infrastructural investment would not have been incurred.

420. In its heads of argument in Part A of this application, SANRAL said the following: "A court will not set aside the decisions in circumstances where a party has acted to his/her detriment in consequence of the decisions, especially where there have been

delays in the bringing of the review application."[391] SANRAL relied, in this regard, on *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA) and *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA).

421. In response to this contention, the applicants submit that:

421.1 The Constitutional Court has pointed out that:

> "Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law.'"[392]

421.2 This reasoning shows why the approach adopted by the Supreme Court of Appeal in *Moseme* (supra) and *Millennium Waste* (supra), should be seen as exceptional. As a general rule, the rule of law requires invalid administrative conduct to be set aside.

421.3 Furthermore, as explained above, the cases relied upon by SANRAL are tender cases. It is true that, in those cases, the court found an "imperfect administrative process". However, the interests which had to be balanced were (a) on the one hand, the primarily commercial interests of the unsuccessful, aggrieved tendered (ie, the review applicant); and (b) on the

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391 SANRAL Long Heads of Argument at para 160, pg 58

392 Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC) at para 29

other hand, the public interest in having the contract with the successful tenderer kept in force. Furthermore, a third factor had to be considered – the position of the innocent, successful tenderer, which would have been badly prejudiced by an order setting aside the tender.

421.4 None of these considerations is present here. There is no innocent party whose interests have to be accommodated. The public interest in upholding e-tolling is far outweighed by the negative consequences. And, unlike in the tender case, there is a much broader, public interest in the relief sought. This is not remotely a case of an individual, commercially-motivated applicant seeking to ensure, by court order, success in a tender.

**COSTS**

422. The Constitutional Court has said the following about cost orders:

422.1 In *Affordable Medicines Trust*:

> "The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[393]

[393] Affordable Medicines Trust and others v Minister of Health and others 2006 (3) SA 247 (CC) at para 138; Biowatch Trust v Registrar, Genetic Resources and others 2009 (6) SA 232 (CC) at para 21

422.2 In *Biowatch Trust*:

> "The rationale for this general rule is threefold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door."

422.3 The Constitutional Court, having explained that these rules will not apply to vexatious or frivolous litigation, also said the following in *Biowatch* (supra):

> "Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it."[394]

[394] Biowatch (supra) at para 24

423. In the light of the above-mentioned dicta, it is submitted that this Court should make the following orders as to costs:

423.1 If the applicants are successful, then they should be awarded their costs, including the costs of three counsel;

423.2 If the applicants are unsuccessful, then this Court should make no order as to costs.

424. These submissions are made for the following reasons:

424.1 The applicants have, in this case, sought to vindicate constitutional rights. They have sought to vindicate the rights of the public to just administrative action (through the prism of PAJA) and the right to property.

424.2 As the judgment in the Constitutional Court in the interim-interdict phase made clear, this case engages issues of manifest public importance.

424.3 In no sense could this litigation be described as frivolous or vexatious.

424.4 The way in which this litigation has been brought in the public interest is demonstrated by the fact that the litigation has primarily been funded by money donated to OUTA by the public.[395] Furthermore, OUTA is a non-profit

[395] Applicants' Further Supplementary Reply para 104 pleadings pg 3862

organisation the members and office-bearers of which derive no benefit or income.[396]

424.5 This is, as envisaged by *Biowatch* (supra) a classic case of a situation in which the focus is not only on the "interests of the particular litigants involved, but also on the rights of all those in similar situations".

**ALISTAIR FRANKLIN SC**

**PETER LAZARUS**

**ADRIAN D'OLIVEIRA**

**ADRIAN FRIEDMAN**

22 October 2012 Chambers, Sandton

[396] Applicants' Further Supplementary Reply paras 111-112 pleadings pg 3863

**APPLICANTS' TABLE OF AUTHORITIES**

**(a) Njongi v MEC, Department of Welfare Eastern Cape 2008 (4) SA 237 (CC)**

**(b) Baphalane Ba Ramokoka Community v Mphela Family and Others 2011 (9) BCLR 891 (CC)**

**(c) Matatiele Municipality and Others v President of the Republic of South Africa and Others 2006 (5) SA 47 (CC)**

**(d) Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA)**

**(e) Hofmeyr v Minister of Justice 1992 (3) SA 108 (C)**

**(f) Tantoush v Refugee Appeal Board 2008 (1) SA 232 (T)**

**(g) Walele v City of Cape Town 2008 (6) SA 129 (CC).**

**(h) Justice Alliance of South Africa v President of the Republic of South Africa and Others 2011 (5) SA 388 (CC)**

**(i) Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC)**

**(j) Glenister v President of the Republic of South Africa and Others 2009 (1) SA 287 (CC)**

**(k) Democratic Alliance v President of the Republic of South Africa and Others (Unreported judgment dated 5 October 2012 in CC Case No. 122/11)**

**(l) Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others 2001 (1) SA 545 (CC) at paras 21-25**

**(m) Zondi v MEC for Traditional & Local Govt Affairs 2005 (3) SA 589 (CC) at para 101 (emphasis added).**

**(n) *Minister of Home Affairs v Eisenberg and Associates: In re Eisenberg and Associates v Minister of Home Affairs and others* 2003 (5) SA 281 (CC)**

**(o) Joseph and others v City of Johannesburg 2010 (3) BCLR 212 (CC) at para 42.**

**(p) *Administrator, Transvaal and others v Traub & Others* 1989 (4) SA 731 (A)**

**(q) Administrator, Tvl & Others v Zenzile & Others 1991 (1) SA 21 (A);**

**(r) South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A);**

**(s) Administrator, Natal & another v Sibiya & another 1992 (4) SA 532 (A);**

**(t) Administrator Cape & another v Ikapa Town Council 1990 (2) SA 882 (A).**

**(u) Momoniat v Minister of Law & Order 1986 (2) SA 264 (T)**

**(v) Nkwinti v Commissioner of Police 1986 (2) SA 421 (E)**

**(w) Attorney-General, Eastern Cape v Blom 1988 (4) SA 645 (A)**

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**(y) Logbro Properties CC v Bedderson NO and others 2003 (2) SA 460 (SCA)**

**(z) Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism 2005 (3) SA 156 ©**

**(aa) Yuen v Minister of Home Affairs 1998 (1) SA 958 (C); Mhlambi v Mtjhaberg Municipality 2003 (5) SA 89 (O)**

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**(cc) Du Bois v Stompdrift-Kamanassie Besproeiingsraad 2002 (5) SA 186 (C)**

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**(ee) Platinum Asset Management (Pty) Ltd v Financial Services Board and Others; Anglo Rand Capital House (Pty) Ltd and Others v Financial Services Board and Others 2006 (4) SA 73 (W)**

**(ff) Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others 2000 (4) SA 621 (C).**

**(gg) See also Premier, Mpumalanga and another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC)**

**(hh) President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 (CC)**

**(ii) Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC)**

**(jj) Chairman, Board on Tariffs and Trade and others v Brenco Inc 2001 (4) SA 511 (SCA)**

**(kk) Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukhwevho Intervening) 2001 (3) SA 1151 (CC)**

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**(mm) *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA)**

**(nn) *Public Carriers Association and others v Toll Road Concessionaries (Pty) Ltd and others* 1990 (1) SA 925 (A)**

**(oo) Yates v University of Bophuthatswana and others 1994 (3) SA 815 (BG) at 835G.**

**(pp) Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others 1999 (1) SA 374 (CC)**

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**(ww) Ulde v Minister of Home Affairs 2009 (4) SA 522 (SCA)**

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**(yy) Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA)**

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**(ccc) Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others 2004 (4) SA 490 (CC).**

**(ddd) *R v Chief Constable of Sussex, Ex Parte International Trader's Ferry Ltd* [1999] 1 All ER 129 (HL) at 157**

**(eee) See Minister of Health and another NO v New Clicks South Africa (Pty) Ltd and others 2006 (2) 311 (CC)**

**(fff) Nyathi v MEC for Department of Health and another 2008 (5) SA 94 (CC)**

**(ggg) Koyabe and others v Minister of Home Affairs and others 2010 (4) SA 327 (CC)**

**(hhh) Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA)**

**(iii) See National Lotteries Board and others v SA Education and Environment Project and another [2012] 1 All SA 451 (SCA)**

**(jjj) *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another* 2002 (4) SA 768 (CC).**

**(kkk) Armbruster and another v Minister of Finance and others 2007 (6) SA 550 (CC)**

**(lll) Mkontwana v Nelson Mandela Metropolitan Municpality 2005 (1) SA 530 (CC)**

**(mmm) Rangani v Superintendent-General, Department of Health and Welfare, Northern Province 1999 (4) SA 385 (T)**

**(nnn) Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Environment, Mpumalanga Province 2007 6 SA 4 (CC)**

**(ooo) Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC)**

**(ppp) Affordable Medicines Trust and others v Minister of Health and others 2006 (3) SA 247 (CC)**

**(qqq) Biowatch Trust v Registrar, Genetic Resources and others 2009 (6) SA 232 (CC)**