

JASPER VAN DER MERWE
& ROOYEN

(012) 342 4890

REGISTERED
M.A.F. PRETORIA
PRIVATE BAG/PRIVAATSAK X67
2013 -01- 08
L. DREYER
PRETORIA 001
GRIFPIER VAN DIE HOEHOEF, GAUTENG
HOEHOEF, PRETORIA

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

CASE NO: 17141/2012

In the matter between:

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

and

- THE SOUTH AFRICA NATIONAL ROADS AGENCY LIMITED 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

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Applicants will, on a date to be determined by the Registrar, apply for leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order by His Lordship Vorster AJ, given on 13 December 2012.

TAKE NOTICE FURTHER that the application will be based on the grounds set out below:

1. The court misdirected itself and erred:
 - 1.1 By misconstruing the minority judgment of Froneman J as the judgment of the Constitutional Court.
 - 1.2 The court in this regard at p8 of the judgment stated that:

"The Constitutional Court in its judgment said the following..." (emphasis added).
 - 1.3 The learned judge then quoted paragraphs 94 and 95 of the reported judgment.
 - 1.4 The quoted paragraphs 94 and 95, however, do not form part of the Constitutional Court judgment, which is the majority judgment by Moseneke DCJ, but form part of the minority judgment by Froneman J.

2. 2.1 The aforesaid misdirection and error were perpetuated in paragraph 6 of the judgment in that it was there found:

"It is clear from the above *dicta* in the Constitutional Court judgment that the grounds of review in this review application is confined..."

and

"It is also clear that the costs of tolling, the merits of using toll as a means of financing the GFIP scheme and the proposed e-toll tariffs ... are irrelevant considerations for purposes of this review."

(Emphasis added).

- 2.2 The reference by the learned judge to the "above *dicta* in the Constitutional Court judgment" is a reference to paragraphs 94 and 95 quoted earlier in the judgment.

- 2.3 As pointed out earlier, paragraphs 94 and 95 do not form part of the Constitutional Court judgment.

3. The court, in addition and in any event, further misdirected itself and erred:

- 3.1 By failing to have regard to paragraph 64 of the Constitutional Court judgment where it was made clear:

"The exercise of all public power is subject to constitutional control. In an appropriate case an interdict may be granted against it. For instance, if the review court in due course were to find that SANRAL acted outside the law, then it is entitled to grant effective interdictory relief. That would be so because the decisions of SANRAL would in effect be contrary to the law and thus void."

3.2 By failing to appreciate that the Constitutional Court in the majority judgment by Moseneke DCJ only addressed and considered the question of judicial deference and comity to the separation of powers under the rubric of "balance of convenience".

3.3 By further and, in any event, misconstruing paragraphs 94 and 95 of the minority judgment and by not appreciating:

3.3.1 That Froneman J (in paragraph 94) only addressed one aspect of the argument based on unreasonableness, i.e. the argument that a fuel levy would be a better alternative;

3.3.2 That Froneman J did not find (and did not say) that the costs of tolling (i.e. of toll collection), the proposed tariffs or other aspects of the tolling scheme are irrelevant considerations;

3.3.3 That Froneman J's statement in paragraph 95 that:

"No fundamental rights of the respondents beyond that of just administrative action are at stake here"

was made at a time before the fundamental Section 25 property right was raised on the papers;

3.3.4 that Froneman J's minority judgment, as well as the judgment of the Constitutional Court, was based on the papers filed in the urgent Part A proceedings and on incomplete facts, and that the supplemented papers filed consequent upon the filing of the record were not before the Constitutional Court.

4. The court misdirected itself and erred by:

4.1 Failing to adjudicate the ground of review relied upon

4.1.1. that the Minister had failed to consider, or to take into account, the costs of toll collection;

4.1.2. in the alternative, that the information before the Minister on the cost of tolling was materially incorrect;

4.1.3. that SANRAL and/or the Minister failed to duly and properly consider alternative funding mechanisms;

4.1.4. that tolling of the GFIP network is irrational and unreasonable because it is practically unworkable;

4.1.5. that tolling of the GFIP network is irrational and unreasonable because it is disproportionately expensive.

4.2 by finding at paragraph 6 of the judgment that the above grounds are within the “preserve of executive government” and outside the jurisdiction of the Court;

4.3. by erroneously regarding the above grounds as irrelevant based on the misdirection that the quoted paragraphs 94 and 95 aforesaid formed part of the Constitutional Court judgment and, in addition, based on a misinterpretation of the said paragraphs.

5. The court misdirected itself and erred by finding in paragraph 9.2 of the judgment that:

“It is clear from the Constitutional Court judgment which I have quoted above that the capital costs of the proposed toll scheme as well as the operating costs and likely tariff to be imposed are matters which are not open for comment or public participation.

(Emphasis added).

5.1 The quoted paragraphs 94 and 95 aforesaid do not form part of the Constitutional Court judgment.

- 5.2 The court, in addition, misdirected itself and erred by misinterpreting paragraphs 94 and 95. Froneman J did not address the proper interpretation of Section 27 of the SANRAL Act at all and nowhere found that the matters referred to by the court are not open for comment or public participation. This was also neither considered nor addressed nor found by the majority of the court.
6. The court further erred by interpreting Section 27(4) of the SANRAL Act in a manner that renders public participation in the present case quite meaningless.
7. The court further erred in its interpretation of Section 27(4) of the SANRAL Act by failing to comply with the constitutional directive contained in Section 39(2) of the Constitution.
8. The court further misdirected itself and erred by not finding that SANRAL had failed to comply with Section 4 of PAJA:
- 8.1 The court's interpretation of Section 27(4) of the SANRAL Act necessarily results in the conclusion that a public participation process under Section 27(4) will – and would be – quite meaningless and that the procedure prescribed by Section 27(4) will – and would be – manifestly objectively unfair.

8.2 The court further erred by failing to appreciate and to find that SANRAL was, accordingly and in terms of Section 4 of PAJA, obliged to follow one or more of the procedures set out under Sections 4(1)(a), (b), (c) and (e).

8.3 In this regard, the court further misdirected itself and erred by finding in paragraph 1 of the judgment that:

"In terms of section 4(1) [of PAJA] ... it is specifically provided that an administrator is authorised to follow a procedure which is considered fair...."

(Emphasis added).

Section 4(1)(d) of PAJA permits the following of a prescribed procedure:

"which is fair".

(Emphasis added).

The criterion in terms of Section 4(1)(d) is objective fairness, not a subjective perception of fairness.

The section, accordingly, does not permit the following of a procedure which the administrator "considered" fair, but which objectively is not.

8.4 The court further erred in finding that the publication of the notices in the Gazette and newspapers were

"clearly adequate to inform interested persons of the proposed toll declaration...".

and by not finding:

8.4.1 That the notices gave no indication of the proposed GFIP and its attendant costs;

8.4.2 That the notices gave no indication of the anticipated tariffs;

8.4.3 That the notices were misleading in that it, in every case, referred to only "the existing road";

8.4.4 That the newspaper publications were too limited and too obscure;

8.4.5 That the extent of publication of the notices were woefully inadequate in the context of the proposed toll road scheme that would affect hundreds of thousands of road users every day, including urban commuters and residents, and would be the largest toll road scheme in South African history;

8.4.6 That the time period given to respond was inadequate under the circumstances;

8.4.7 That the publication did not cater for those who do not read newspapers and for the sight impaired at all, which constituted unfair discrimination under the Constitution.

8.5 The court further misdirected itself and erred by finding in paragraph 10 of the judgment:

"The argument that such notification was inadequate and therefore unfair rests on the erroneous assumption that each and every user of the proposed toll roads have the right to be informed...."

It was never Applicant's argument that each and every user had to be informed, as stated by the court.

9. The court erred in not finding that SANRAL had failed to comply with the mandatory provisions of Section 27(4) of the SANRAL Act, alternatively that SANRAL had failed to comply with the mandatory provisions of Section 4(1) of PAJA and that the approval by the Minister and the resultant toll road declarations were, accordingly, unlawful.
10. The court further erred in not finding that Applicants were entitled to an interdict to prevent SANRAL from implementing coercive criminal or civil steps to enforce the unlawful toll.

11. The court further erred by not finding that SANRAL's threatened implementation of the e-toll scheme would constitute unlawful deprivation of property under Section 25 of the Constitution.
12. The court misdirected itself and erred:
 - 12.1 by failing to consider, or to take into account at all that the present litigation constitutes public interest constitutional litigation where the applicant sought to vindicate constitutional rights and, where in terms of the Constitutional Court jurisprudence in this regard it is not appropriate to grant a costs order against an unsuccessful applicant;
 - 12.2 by failing to consider, or to take into account at all the Constitutional Court jurisprudence in this regard;
 - 12.3 by construing the costs order in the Constitutional Court leave to appeal judgment to imply that costs should follow the result in the review.
13. The court misdirected itself and erred:
 - 13.1 by dealing with the application as if it were only a review when the Applicants had alternatively, or in addition, brought a self-standing constitutional challenge and sought declaratory relief both in the amended Notice of Motion and at the hearing;

- 13.2 by failing to take into account, alternatively, afford due weight to the fact that the 1996 White Paper on National Transport Policy adopted both tolling and the dedicated fuel levy as methods of funding for the primary road network;
- 13.3 by failing to take into account, alternatively, afford due weight to the fact that SANRAL had resolved to implement tolling on the GFIP network pursuant to the provisions of the SANRAL Act two months before approval of National Cabinet had been sought and granted;
- 13.4 by failing to take into account, alternatively, afford due weight to the fact that Cabinet had granted approval to SANRAL to implement tolling of the GFIP network subject to the proper implementation of the proposed scheme in terms of the SANRAL Act and other relevant national legislation;
- 13.5 by failing to take into account, alternatively, afford due weight to the fact that the anticipated cost of tolling in the traffic and toll feasibility studies referred to at paragraph 4.6 of the judgment was materially incorrect and understated;
- 13.6 by not finding that SANRAL conducted an inadequate public participation process and/or failed to properly and adequately inform the public of SANRAL's intention to toll the GFIP network for the purposes of section 27 of the SANRAL Act or at all.

SIGNED at PRETORIA on this the 8th day of JANUARY 2013



CLIFFE DEKKER HOFMEYR INC

Attorneys for the first, second, third and fourth applicants

1 Protea Place, Sandown
Sandton

Tel: (011) 562-1000

Tel: (011) 562-1071 (Direct Line)

Fax: (011) 562-1671

Ref: PJ Conradie/R Thomson/01933299

C/O JASPER VAN DER WESTHUIZEN & BODENSTEIN INC

887 Church Street

Arcadia 0083

Tel: (012) 342-4890

Fax: (012) 342-4896

Ref: Y Coetzee/E184/12

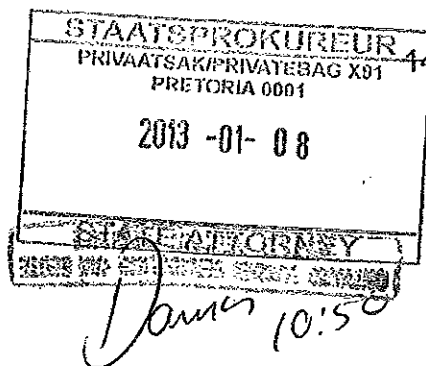
**TO:
THE REGISTRAR OF THE NORTH GAUTENG
HIGH COURT
PRETORIA**

**AND TO:
WERKSMANS ATTORNEYS
Attorneys for the first respondent
155 – 5th Street
Sandown, Sandton
Ref: D Hertz / N Kirby
C/O EDELSTEIN-BOSMAN INC
220/2 Lange Street
New Muckleneuk, Pretoria
Tel: (012) 452-8900
Fax: (012) 452-8901/2
Ref: Mr. W. Scrooby/RF/IW002081**

Received a copy hereof on this
the ___ day of JANUARY 2013

For: First Respondent's Attorneys

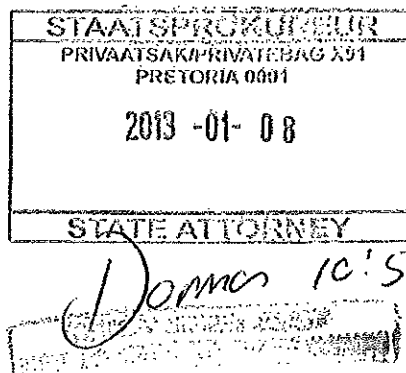
AND TO:
THE STATE ATTORNEY
Attorney for the 2nd & 3rd Respondents
255 SALU Building
Cnr Schoeman & Andries Streets
Ground Floor
Pretoria
Tel: (012) 309-1545
Fax: (012) 309-1649
Ref: GP Seleka



Received a copy hereof on this
the ___ day of JANUARY 2013

For: 2nd & 3rd Respondents' Attorney

AND TO:
THE STATE ATTORNEY
Attorneys for the Seventh Respondent
M. Biko
4th Floor, Liberty Life Centre
22 Long Street, Cape Town
Ref: 929/12/P2
C/O THE STATE ATTORNEY
SALU Building
Cnr Andries & Schoeman Streets
Pretoria



Received a copy hereof on this
the ___ day of JANUARY 2013

For: Seventh Respondent's Attorney