IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No.

In the matter between:

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

and

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

NOTICE OF APPLICATION

TAKE NOTICE that the applicants hereby apply for an order in the following terms:

1. That the applicants be granted leave to appeal directly to this Court against the judgment and orders by Prinsloo J, sitting in the High Court of North Gauteng, such orders being delivered on Saturday 28 April 2012 and such written judgment on 16 May 2012 in case number NGHC 17141/12.

2. In the event that the Court decides to set either the application for leave to appeal or the appeal itself down for hearing, that the Court convenes the hearing on an urgent basis and issues directions regarding the filing of heads of argument on an expedited basis.

3. That the costs of this application be costs in the appeal.

4. That further or alternative relief be granted.

TAKE FURTHER NOTICE that the affidavits of PRAVIN JAMNADAS GORDHAN and NAZIR ALLI together with its annexures will be used in support of this application.

TAKE NOTICE FURTHER that the applicants have appointed the State Attorney, Johannesburg, 10th floor North State Building, 95 Market Street, cnr Kruis St, Johannesburg to accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if you intend to oppose this application you are required within ten days hereof to notify the applicants' attorneys accordingly in writing and file an answering affidavit, if any; and further that you are required to appoint in such notification an address at which you will accept notice and service of all documents in these proceedings. If no such notice of intention to oppose is given, the applicants will request the Registrar to place the matter before the Chief Justice to be dealt with in terms of Rule 11(4).

DATED at Pretoria on this 21st day of May 2012

State Attorney, Pretoria
Attorneys for the First, Third,
Fourth, Fifth and Sixth applicants
22 Long Street
CAPE TOWN

C/O: State Attorney,
Johannesburg
10th floor North State Building
95 Market Street, cnr Kruis St
JOHANNESBURG

And to: **WERKSMANS ATTORNEYS**
Attorneys for the Second applicant
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

To: **THE REGISTRAR**
Constitutional Court

And to: **CLIFFE DEKKER HOFMEYR INC**
Attorneys for First to Fourth respondents
1 Protea Place, Sandown
Sandton, 2196
Tel: (011) 562 1071
Fax: (011) 562 1671
Ref: PJ Conradie/01933299
C/O: JASPER VAN DER WESTHUIZEN & BODENSTEIN INC
887 Church Street
Arcadia, 0083
Pretoria

Tel: (012) 342 4890

Fax: (012) 432 4896

Ref: Y Coetzee

And to: **NATIONAL CONSUMER COMMISSION**

Fifth Respondent

The DTI Campus

Mulayo (block E)

77 Meintjies Street

Sunnyside

PRETORIA

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THE DIRECTOR-GENERAL, DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS	Sixth Applicant

and

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

FOUNDING AFFIDAVIT

I, the undersigned

PRAVIN JAMNADAS GORDHAN

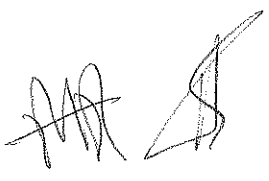
do hereby make affirmation and state:

1 I am the Minister of Finance, and accordingly authorised to bring this application on behalf of the National Treasury ("Treasury"). I am also authorised by the other applicants to bring this application on their behalf.

2 The facts contained in this affidavit are within my own knowledge and are, to the best of my belief, both true and correct.

3 Where I depose to allegations of a legal nature I rely on the advice of the applicants' legal representatives.

The purpose of this affidavit



4 This affidavit is filed in support of an application for leave to appeal directly to the Constitutional Court. The application is brought urgently under circumstances in which:

4.1 the applicants for leave to appeal are suffering ongoing and far-reaching irreparable harm as a consequence of the judgment sought to be appealed against;

4.2 any delay—even one limited to the period until the review application is heard—will carry with it consequences that irreparably compromise the applicants' capacity to exercise their statutory and fiduciary responsibilities;

4.3 the judgment sought to be appealed, although ostensibly granted on an interim basis pending the final determination of a review, is in effect a judgment of long-lasting consequence: on any plausible construction it is set to stand for a year or more while the main litigation between the parties proceeds through the

courts, and its financial effects will unavoidably extend beyond the period of review;

4.4 at the heart of the appeal lies the question of separation of powers under the Constitution and the role of the High Court in a constitutional democracy; and

4.5 the beneficiaries of the judgment—being the first to fourth respondents to this application—have shown from the outset a disinclination to have the review application heard and determined expeditiously. This is more so since the grant of the interim interdict, affording as it does indefinite relief to the first respondent.

5 The orders in respect of which leave is sought were handed down by His Lordship, Mr Justice Prinsloo in the North Gauteng High Court on Saturday, 28 April 2012. The reasons for the orders (hereinafter "the judgment") only became available on 16 May 2012. A copy of the judgment is annexed marked "**FA1**".

6 The judgment was granted in an urgent application launched by the first to fourth respondents for interim interdictory relief pending the outcome of a review. In the urgent application, the first to fourth respondents procured an interdict to prevent the second applicant ("SANRAL") from levying and collecting toll pending:

6.1 a review of decisions taken in March and July 2008 to declare certain of Gauteng's freeways as toll roads in terms of section 27(1)(a)(i) of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ("the SANRAL Act"); and

6.2 a review of various environmental authorisations issued by the eighth respondent in November 2007 and February 2008 acting under the National Environmental Management Act 107 of 1998 ("NEMA") in relation to the upgrading of the relevant roads.

Urgent application to this Court

7 This application has been made directly to this Court because of the urgent need to set aside the judgment of the High Court and to resolve the fundamental issues underpinning that judgment.

7.1 I deal with the importance of the issues in more detail below.

7.2 Suffice it to state that the questions of principle that underpin the judgment are so integral to the rule of law in South Africa and to the doctrine of separation of powers under the Constitution, that the applicants would in any event seek that the Constitutional Court hear and determine the appeal. The scale of the implications for public finances and the national economy has the same effect.

7.3 The only real debate can be whether or not the appeal should be heard directly by the Constitutional Court and whether it should be heard urgently.

7.4 For the reasons that follow, the applicants submit that the answer to both these questions should be in the affirmative.

8 The applicants have endeavoured to avoid the need for this application being heard on an urgent basis by seeking the first to fourth respondents' agreement to expedite the review proceedings.

8.1 If the review could be expedited and if the applicants are successful in defending the decisions under attack in the review,

which the applicants are confident they can do, then the interim order can be set aside when the reviewing court dismisses the review application.

8.2 Towards this end, the applicants sent a letter to the first to fourth respondents on 11 May 2012 in which they proposed a timetable which would facilitate the hearing of the review application as early as possible in the third term which commences on 23 July 2012.

8.3 The first to fourth respondents responded on 17 May 2012 by indicating that although they are "committed" to dealing with the review on an expedited basis, they could not agree to the timetable and gave no undertakings regarding the likely date on which the review application might be heard in the High Court.

8.4 Their letter also foreshadows the possibility of interlocutory proceedings, which may be brought by the first to fourth respondents, to address any deficiencies which they detect in the records filed by the applicants and the fifth to eighth respondents. Any such interlocutory proceedings would be likely to result in significant delays to the review proceedings. There is,

of course, no incentive for the first to fourth respondents to have the review application heard expeditiously; delays redound to the short-term advantage of these respondents as they mean that the persons whom the first to fourth respondents claim to represent will not be required to pay tolls.

8.5 In any event, the records which have been filed by the applicants and the fifth to eight respondents already run to thousands of pages. They will have to be read and assessed by the first to fourth respondents and a supplementary founding affidavit filed. Thereafter answering affidavits, a replying affidavit and heads of argument will need to be prepared and filed before the matter will be ripe for hearing.

8.6 After the hearing is concluded, a judgment will have to be delivered. There are almost certain to be further delays pending appeals and the like.

8.7 In addition, a number of parties have indicated an intention to join in the review application, either as co-applicants or as *amici curiae*. This process of admitting or refusing admission to potential applicants and/or *amici curiae* will inevitably also give

rise to delays. Copies of this correspondence are attached marked "**FA2**" and "**FA3**".

8.8 Even if, notwithstanding what is contained in their letter of 17 May 2012, the first to fourth respondents were to commit to a timeframe for an expedited review, in the light of what is set out above, an optimistic assessment would have it that any judgment on the review application is unlikely to be given before the end of August or the beginning of September 2012. An appeal process, during which the interdict remains in place, will extend this date well into 2013 and potentially into 2014.

8.9 For each month that the review application remains unresolved or the interim interdict remains in place, the applicants and South Africa as a whole continue to suffer irreparable harm.

8.10 Put at its simplest, this harm is that the second applicant is prevented from collecting revenue that it is empowered in law to collect, and that it is obliged to collect in order to meet debt and other financial obligations that have lawfully been incurred in the exercise of its statutory responsibilities. The harm extends not just to the specific revenue, debt and project implementation in

question, but to the financial standing and reputation of the second applicant and of the South African State. This cannot be allowed to continue and, in these circumstances and for the reasons dealt with in more detail below, the applicants are constrained to apply to this Court for leave to appeal against the judgment.

9 The applicants record, however, that conditional leave to appeal will also be sought from the High Court to the Supreme Court of Appeal. This conditional appeal will be pursued only in the event that this Court declines to hear an appeal against the judgment.

The structure of this affidavit

10 Against this brief introduction, this affidavit is structured as follows:

10.1 Firstly, I identify the parties to this application.

10.2 Secondly, I deal with the constitutional issues raised in the application.

10.3 Thirdly, I explain why it is in the interest of justice for this Court to grant the application for leave to appeal directly to it. Under this main heading, I deal with five subsidiary issues:

10.3.1 I describe the nature and extent of the harm that the applicants are suffering and explain how this harm also affects the rights and interests of every South African;

10.3.2 I explain why the interim order is appealable;

10.3.3 I deal with why it is appropriate that this Court, as opposed to any other court, should hear the appeal;

10.3.4 I discuss the impact of the Minister of Transport's decision to delay tolling until 31 May 2012 upon the application for leave to appeal; and

10.3.5 I describe the process which has been undertaken following the granting of the interim interdict to ensure that SANRAL is ready to levy and collect tolls once the interim order is set aside.

10.4 Fourthly, I deal with the applicants' prospects of success in setting aside the decision of the High Court.

10.5 Finally, I address the need to have this matter determined as quickly as possible by this Court.

The parties

11 The first applicant is the NATIONAL TREASURY, c/o the State Attorney, 10th Floor North State Building, 95 Market Street, cnr Kruis Street, Johannesburg. It is the department of State envisaged by section 216(1) of the Constitution and established by Chapter 2 of the Public Finance Management Act 1 of 1999 ("the PFMA"). Its constitutional and statutory role is *inter alia* to control government's compliance with its constitutional and statutory public finance duties, by promoting government's fiscal policy framework, co-ordinating macro-economic policy and ensuring the effective management of revenue, expenditure, assets and liabilities of public entities such as the second applicant.

12 The second applicant is THE SOUTH AFRICAN NATIONAL ROADS AGENCY LIMITED ("SANRAL"), a duly registered public company with registration number 1998/009584/06 and with its registered address at Ditsela Place, 1204 Park Street, Hatfield, Pretoria. SANRAL was formed and incorporated in terms of the provisions of section 2 of the SANRAL Act and is a public entity listed under Schedule 3 of the PFMA.

13 The third applicant is THE MINISTER OF TRANSPORT, c/o the State Attorney, Fedsure Forum, 4th Floor South Block, Van der Walt Street, Pretoria. The Minister's approval of the toll declarations in 2008 is under scrutiny in the review launched by the first to fourth respondents.

14 The fourth applicant is THE MEC OF THE DEPARTMENT OF ROADS AND TRANSPORT, GAUTENG c/o the State Attorney, Fedsure Forum, 4th Floor South Block, Van der Walt Street, Pretoria. The fourth applicant was cited in the first to fourth respondents' application for interim relief which is sought to be overturned in this application.

15 The fifth applicant is THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS c/o the State Attorney, Fedsure Forum, 4th Floor South Block, Van der Walt Street, Pretoria. The fifth applicant was cited in the first to fourth respondents' application for interim relief which is sought to be overturned in this application

16 The sixth applicant is THE DIRECTOR-GENERAL OF THE DEPARTMENT OF WATER AND ENVIRONMENTAL AFFAIRS c/o the State Attorney, Fedsure Forum, 4th Floor South Block, Van der Walt Street, Pretoria. The sixth applicant appears to have granted certain environmental authorisations which the first to fourth respondents attack in the review application.

17 The first respondent is THE OPPOSITION TO URBAN TOLLING ALLIANCE ("OUTA"), a voluntary association with perpetual succession with its main place of business at c/o Alchemy Financial Services, Unit 3 Bush Hill Office Park, Jan Frederick Avenue, Northriding. OUTA is an alliance formed specifically for the purpose of challenging e-tolling in Gauteng in general, and the application of

the user-pay principle in particular. It comprises a range of entities such as Avis and Europcar car-hire companies, civic action groups and individuals.

18 The second respondent is THE SOUTH AFRICAN VEHICLE RENTAL AND LEASING ASSOCIATION, a voluntary association with perpetual succession with its principal place of business situated at c/o Alchemy Financial Services, Unit 3 Bush Hill Office Park, Jan Frederick Avenue, Northriding.

19 The third respondent is THE QUADPARA ASSOCIATION OF SOUTH AFRICA ("QASA"), a voluntary association with perpetual succession with its principal place of business at 25 Hamilton Crescent, Gillits, KwaZulu-Natal.

20 The fourth respondent is THE SOUTH AFRICAN NATIONAL CONSUMER UNION, a voluntary association with perpetual succession with its principal place of business at SABS Campus, 1 Dr Lategan Drive, Groenkloof.

21 The fifth respondent is THE NATIONAL CONSUMER COMMISSION, a juristic person established in terms of section 85(1) of the Consumer Protection Act 68 of 2008 and situated at the DTI Campus, Mulayo (Block E), 77 Meintjies Street, Sunnyside. The sixth respondent was cited in the first to fourth respondents' application for interim relief which is sought to be overturned in this application.

Constitutional matter

22 The first to fourth respondents' application for interim relief was predicated on a series of some fourteen administrative decisions, stretching back to 2008, which they contend ought now be reviewed and set aside under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

23 When they launched their application in the High Court, the first to fourth respondents filed a notice in terms of Uniform Rule 16A setting out the constitutional issues raised in the application. A copy of that notice is attached hereto marked "**FA4**".

24 The first to fourth respondents accordingly correctly accepted before the High Court that the interim interdict application raised constitutional issues. Even Prinsloo J repeatedly referred during the hearing to the "constitutional flavour" of the application.

25 The judgment itself makes it clear that the application was brought on the basis of and decided with reference to the Constitution and the principle of administrative justice that derives from section 33 of the Constitution and which is reflected in PAJA. The Court found that

25.1 OUTA and QASA had *locus standi* in terms of section 38 of the Constitution (judgment pages 14 and 16 respectively);

25.2 the first to fourth respondents relied "on the review grounds codified in section 6" of PAJA as founding a *prima facie* right to the relief claimed in the review application (judgment page 22); and

25.3 the first to fourth respondents had satisfied the Court that *prima facie* there were prospects that they would succeed on the strength of these review grounds (judgment pages 26—27).

26 The order of the High Court also engages constitutional matters of considerable substance because it prevents an organ of State from acting in terms of statutory powers, despite serious potential consequences, on the basis of a *prima facie* likelihood that the applicants might achieve success in setting aside certain of its, and other organs of State's, administrative decisions.

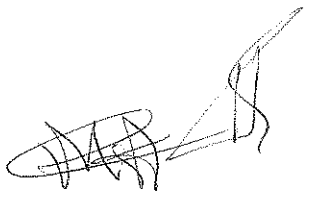
27 At the heart of the dispute in this case, lies a fundamental issue regarding the separation of powers and whether or not a Court—whether at the stage of a *prima facie* inquiry in relation to an interim interdict or otherwise—can exercise discretionary judgment over governmental policy decisions on appropriate funding mechanisms, revenue sources, and the allocation of nationally raised revenue.

27.1 It is, and at all material times has been, common cause between all parties involved in this litigation that the roads in Gauteng required extensive upgrading and improvement. It is similarly common cause that these upgrades have been carried out as part of the Gauteng Freeway Improvement Project ("GFIP"), which was approved by Cabinet and implemented and executed by SANRAL. The GFIP is an ongoing construction and financing

project that has taken many years to plan and undertake, during which time the first to fourth respondents and their members stood back and watched whilst road improvements were effected and debt was raised and preparations were made for the collection of toll revenue. These selfsame people now derive and acknowledge the benefits of GFIP, yet seek to have the planned revenue collection system overturned.

27.2 There appears to be no dispute that the cost of GFIP must be met and that it is for the Government of South Africa to determine how these expenditures are to be financed. There has been no argument that the GFIP should have been undertaken as a private sector undertaking, with costs to be recovered through commercial means.

27.3 The question at issue in the litigation is how the Government is to finance the expenditures. The Government has at all material times made clear that SANRAL would raise debt to finance the GFIP, to be recovered through an open road tolling system. This is commonly referred to as the "user pay" approach. There is, for understandable reasons, public opposition to the introduction of



tolls on existing roads, even though substantial expenditure on improvements is acknowledged and welcomed. The Government is mindful of these concerns and has on several occasions delayed the start of tolling in order to examine options for mitigating its impact, and has reduced the proposed toll charges considerably by comparison with those indicated when the GFIP plans were announced in 2007 and 2008. Not content with these reduced toll rates, the first to fourth respondents seek, at this late stage, and while acknowledging the benefits of the GFIP, to prevent the second applicant from proceeding with the tolling that is required in order to meet debt costs and ongoing road maintenance and operational expenditures. The first to fourth respondents argue that the Government should adopt some other financing arrangement for the GFIP. It is this narrow debate that lies at the heart of the application for interim relief and the review.

27.4 As early as 1996, the Government indicated in the White Paper on National Transport Policy that road tolling would form part of the financing arrangements for roads. Amongst the reasons for

including tolling as a source of finance for roads, are the following:

27.4.1 To supplement funds made available by Parliamentary appropriation, particularly in respect of major road projects requiring debt to be raised and repaid over long periods of time;

27.4.2 To support more rapid development and maintenance of road infrastructure in accordance with sustainable economic and financial considerations, recognising that substantial backlogs in road construction and maintenance have accumulated over many years;

27.4.3 To moderate traffic growth on congested throughways while encouraging more efficient land use and reducing travel distance and time; and

27.4.4 To contribute to the prioritisation of public transport over the use of private vehicles.

28 Section 27 of the SANRAL Act provides that the Minister of Transport may approve any specified national road to be a toll road; may levy

and collect a toll; grant an exemption for payment of a toll; suspend the levying of toll on a particular toll road; resume the levying of toll after the suspension; and may set the amount of toll that may be levied. The SANRAL Act obliges SANRAL to maintain separate sets of accounts for (a) non-toll road expenditure, which is financed out of annual appropriations by Parliament, and (b) toll road expenditure, which is financed out of debt and the recovery of costs through tolls.

29 In 2007, Cabinet confirmed that the Gauteng Freeway Improvement Project would be undertaken by SANRAL as a toll road, with tolls to be collected through an electronic open road tolling system. This decision was taken after due consideration of the feasibility of the proposed open road tolling system in comparison with alternative funding options (such as a fuel levy, shadow tolling, vehicle registration, licence fees, traffic fines and development impact fees). In consequence of this decision, SANRAL was obliged in terms of the SANRAL Act to finance the GFIP through raising debt, and not through funds appropriated by Parliament for non-toll roads.

29.1 Moreover, Cabinet in considering this matter, noted that the GFIP would in due course provide opportunities for improved

public transport in the Gauteng region, and that road tolling on these increasingly congested routes would encourage public transport use, discourage private car use and contribute over time to more efficient spatial and transport network development.

29.2 Behind Cabinet's decision there is a set of inter-connected logistical, spatial, developmental, economic and social considerations. These considerations form the subject matter of the planning and feasibility studies and the economic and environmental reviews undertaken prior to Cabinet's decision. In part because of the inter-connected nature of these issues, it is for Government, not for OUTA or with respect the courts, to decide on appropriate financing mechanisms for infrastructure investments such as the GFIP. It is for Government to consider, for example, the appropriate balance between general revenue allocations to roads, raising of debt and the need for road user charges, considering affordability constraints on the fiscus, citizens and taxpayers, and associated equity issues and policy objectives.

29.3 The GFIP is a major investment programme that generates substantial benefits to its users. Amongst the basic public finance considerations taken into account by Government is that it is reasonable, in view of these benefits, that part of the investment and on-going operating and maintenance costs of the GFIP should, through some form of benefit charge, be recovered from GFIP road users. In a country characterised by high quality road networks across the entire country, it might be fair and equitable to finance all road improvements through a general road levy. In South Africa's circumstances, where for economic and spatial development reasons the road network is built and maintained to standards which are far from equal across the country, it is not fair or equitable that fuel consumers across the country should contribute equally to the costs of a project such as the GFIP.

29.4 The application of the user-pay principle is authorised by law, has been carefully considered—in the light of all relevant alternatives and circumstances—as a matter of policy by Treasury in collaboration with other departments of State. It has

thereafter been adopted and applied by Cabinet itself through its decision of July 2007.

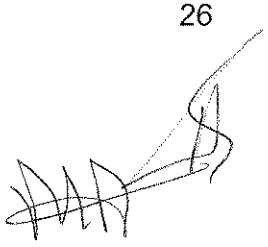
29.5 The reasons why Government adopted the user-pay principle in relation to GFIP are the following:

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

29.5.2 Funding from general revenue, whether through means of a fuel levy or not, would break the link between use and payment and would place a strain on the ability of the fiscus to address the maintenance backlogs in respect of the road system, currently estimated at R149.4 billion.

29.5.3 Ultimately, it is for policy-makers, elected by and accountable to those they represent, to choose between various forms of revenue collection. What the first to fourth respondents in effect sought through their applications before Prinsloo J is a directive by the Court, cutting across a decision by Government of several years' standing and a sequence of Ministerial and other decisions, regarding what the Court may consider to be a more efficient and transparent way of collecting revenue and paying for infrastructure. I am advised that such an intervention in public finance is both unprecedented and in fundamental breach of the division of powers.

29.5.4 As a matter of important principle in public finance in South Africa, citizens who enjoy higher-than-standard infrastructure ought not, as a matter of policy, to be subsidized by others who do not. That there may sometimes be regional cross-subsidisation is no reason for extending it here.



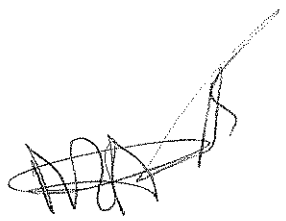
29.5.5 Financing the freeway project though general revenue or a fuel levy would be subject to the Constitution's requirements for an equitable division between provinces and between national, provincial and local government of these funds. National Treasury must in terms of section 214 of the Constitution ensure that the vertical division of revenue between the three spheres of government and the horizontal division of revenue between provinces is equitably distributed. An object of the Division of Revenue Act, 2011 is to provide for the equitable division of revenue raised nationally among the three spheres of government. Allocation of a disproportionate share of these funds towards a project which benefits mainly one province would conflict with the requirement of equity in allocating nationally raised resources.

29.5.6 Allocating nationally raised revenue towards a single province would not be consistent with the redistributive objectives of Government, aimed in part at redressing the spatial, social and economic imbalances of the

South African polity. In this regard, account has to be taken of the recommendations of the Financial and Fiscal Commission, which is established in terms of the Constitution. If an allocation is deemed inequitable in terms of section 214 of the Constitution, this would render the decision open to a constitutional challenge from other provinces.

29.5.7 Road user charges are more than just revenue raising measures: they also contribute over time to reducing congestion on major urban road systems, and encouraging more efficient spatial development, lower environmental damage and less urban sprawl.

29.5.8 The ability of user pay charges to address congestion has internationally led to the use of road pricing in dense urban areas to reduce congestion in general and for specific times of day. Well-documented examples include Singapore, the London congestion charge, the "toll ring" around Oslo, major throughways in Santiago, Chile and Beijing's expressways. The



economic costs of congestion are a major reason for the introduction of tolling and cannot be addressed by general revenue sources for road funding.

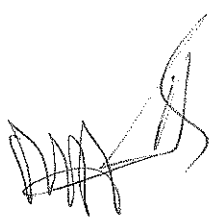
29.5.9 With respect to concerns that road tolls might impose a disproportionate burden on low-income road users, account must be taken of relevant research findings. A cost-benefit analysis of light vehicle users of the e-tolled Gauteng freeway conducted by Dr Roelof Botha, of the University of Pretoria Business School (GIBS) in February 2012 found that the highest income earning quintile in Gauteng will be responsible for more than 94% of the total toll fees paid. Combined with the second highest income earning quintile, the number rises to 99%. Financing the freeway improvement project in part through tolling is consistent with the principles of equity and fairness in fiscal arrangements and with the government's programme of poverty alleviation.

29.6 Despite the question of the chosen funding mechanism being quintessentially a policy decision, Prinsloo J directly engaged in an inquiry into the "reasonableness" of tolling the GFIP—concluding that there were *prima facie* grounds for interfering with government's decisions (judgment at 22—24). He did this against the background of seeking to differentiate tolling of the GFIP from other forms of tolling (judgment at pages 17—19).

29.7 I have been advised that in adopting this approach, Prinsloo J overstepped the bounds of separation of powers—a matter that directly and unquestionably amounts to a constitutional issue.

29.8 Leaving aside the question of whether or not the judgment is interim or final in effect, the intrusion of the court *a quo* into an area of governmental preserve, in and of itself, warrants the attention—and correction—of this Court, given the seriously prejudicial effects of the indefinite interim order.

30 In the light of the above, there can be little doubt that this matter raises material constitutional issues and that therefore this Court has jurisdiction to entertain the application for leave to appeal.



31 In the next section, I set out why it would be in the interest of justice for this Court to hear the application.

Interest of justice

32 In this section of the affidavit, I deal with five issues which bear on whether it is in the interest of justice to grant the application for leave to appeal directly to this Court. Thereafter, I deal with the question of the applicants' prospects of success in the appeal. Although the latter aspect is a feature of the interest of justice enquiry, it requires a detailed assessment of the reasoning of the High Court and therefore I have chosen to deal with it in a separate section of this affidavit.

Irreparable Harm

33 In the papers filed in the interdict application, the applicants predicted that the interim order would have severe and deleterious consequences for SANRAL and impact on the country's reputation and credibility which brings with it a risk premium in the price South Africa pays for finance on domestic and international capital markets.

34 On this basis the applicants sought to oppose the claim for interdictory relief with evidence of real, irreparable and far-reaching harm that would actually be sustained if the interdict were to be granted. As compared with this, no irreparable harm had been demonstrated by the first to fourth respondents. At best, the first to fourth respondents' contentions amounted to a suggestion that harm might arise in that members of the public would have to pay tolls.

35 This complaint, that members of the public would in the interim have to pay tolls, must be understood against the background set out above—that there is no question that the cost of the GFIP must be paid for, the only question being whether or not the expenditure should be paid for directly, on the strength of the user-pay principle, through tolls, or indirectly by all South Africans in the form of increased taxes, increased fuel costs, or through compromises in other social service initiatives.

36 Prinsloo J resolved this debate on the twofold basis that:

36.1 Firstly, the harm complained of by the first to fourth respondents "was self-evident" in the form of the financial drain of having to pay toll fees (judgment at page 27—28); and

36.2 Secondly, the interests of the applicants and the commuters that they purported to represent outweighed the harm that would befall the applicants and South Africa as a whole (judgment at pages 28—29). In this regard, Prinsloo J opined as follows:

> *On the other hand tens of thousands of motorists, businesses and ordinary men and women, including family members of these affected motorists and business people, will suffer ongoing financial hardship if the interim relief is not granted. Ongoing and widespread protest actions against, and objections to, the proposed tolling underscore the exceptionally high levels of concern and resistance on the part of thousands of aggrieved motorists and business people. By the very nature of this extraordinary case it is difficult, if not impossible, to gauge in real terms the prejudice to be suffered by these aggrieved road users and business people, but what is plain is that it will be very substantial indeed. Given the vast numbers of motorists and business people involved, I am, after due reflection, of the view that on the probabilities the applicants [the first to fourth respondents in this application] have shown that the balance of convenience favours them.*

37 As far as the first proposition is concerned, Prinsloo J misconceived the nature of the inquiry and the evidence before him. The extent of the prejudice referred to does not take into account that government had made specific concessions to exclude public transport users, limit the impact on frequent users and provide for time of day savings. He concluded that the harm of having to pay for the GFIP through tolls was self-evident. Not only was this factually and legally unsound, but more importantly, it was in principle unsound: motorists in Gauteng have to pay for the GFIP in some manner or form and Government is obliged to adopt an appropriate financing arrangement to give effect to this, even if this faces opposition by particular interest groups. There is therefore no self-evident harm; indeed the Gauteng freeway improvement project was undertaken precisely because the evidence of the excess of its benefits over costs is so compelling.

38 As far as the second proposition is concerned, Prinsloo J made a fundamental and far-reaching error of judgment, the proof of which lies in the consequences that followed from his order. I pause to mention that notwithstanding the fact that these events occurred after the handing down of the order, they are relevant to this application for

leave to appeal because these very events were predicted by the applicants as the necessary consequence of the grant of the interim order.

39 Attached, marked "**FA5**", is a circular from Moody's Investor Services South Africa. As the circular makes plain, the delayed implementation of the toll system to provide for additional consultation with the public has already cost SANRAL R2.7 billion, which is a sizeable 40% of its estimated 2012 toll revenue budget. SANRAL estimates that its average monthly expenditure on the GFIP, including operational and capital cost payments and interest on debt, will amount to R601million in 2012/13, which in the absence of revenue as a result of the High Court's order will rapidly further erode the R5.75 billion extraordinary appropriation to SANRAL from the government to compensate for its decision to lower the toll tariffs in February 2012. To the extent that expenditure, including interest, exceeds GFIP revenue, there is a further deficit each month that requires more debt to be raised, thus burdening future road users or taxpayers.

40 As a result of these developments, in the week following the order of the High Court, Moody's announced a two-notch downgrade in its

rating of SANRAL. Moody's explained the rationale for this rating as lying in the fact that SANRAL's high gearing and the uncertainties brought about by the Court order meant that SANRAL was unlikely to be able to debt-finance the operating deficits resulting from its loss of e-toll revenue. Moody's recorded that in order for SANRAL's rating to be stabilised, there would need to be a positive resolution of GFIP issues. This would, in turn, lead to the stabilisation of SANRAL's financial position and prospects. According to Moody's, until the issues are resolved, SANRAL's position will remain precarious, and until it can begin to collect tolls to fund its debt commitments, the rating will remain negative.

41 As a result of Moody's downgrading,

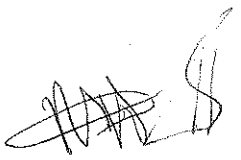
41.1 investors holding non-guaranteed debt may find themselves outside their mandates for the specific category of rating and therefore would need to rebalance their portfolios by selling SANRAL NRA bonds;

41.2 SANRAL has suspended its market-making activities and instructed the three outside market-makers to suspend market-making and to limit any sell-off in SANRAL bonds as this may

cause an increase in borrowing costs. This may increase the need for SANRAL to buy back these bonds. In addition, this suspension of market-making activities constitutes a breach of SANRAL's market-making agreements and therefore exposes SANRAL to a potential claim from its outside market-makers.

41.3 SANRAL has had to redeploy the R5.75 billion, which was originally received from Government to reduce its debt, in order to defray operational expenditure, interest payments and other toll-related expenditure. This redeployment will result, in the long run, in the need to recover greater amounts of toll from the public in order to service SANRAL's debt.

42 The suspension of tolling as a result of the interdict is liable to interpretation as an event of default under SANRAL's domestic medium term note programme, which is listed on the JSE Securities Exchange. In terms of clause 13.1.6 of the programme, the "discontinuation of a significant part of the Toll Business" is an event of default.



43 In the event of default, approximately half of SANRAL's total debt, which equates to approximately R21 billion, would immediately be due and payable.

44 The prospect of an event of default has led investors and credit analysts to advise both SANRAL and National Treasury that they are not in a position to purchase SANRAL bonds and that in the absence of a resolution of the matter, investors will be obliged to sell their holdings of SANRAL securities. This would lead to an expectation that Government would settle the total debt of SANRAL amounting to R37.5 billion.

45 In the weeks following the judgment, foreign investors, including the European Investment Bank, have made enquiries as to SANRAL's status and future. Government had to step in to confirm its support for SANRAL in order to allay fears regarding future drawdowns on the loan.

46 Finally, the Auditor-General has indicated to SANRAL that its financial statements for the year-end 31 March 2012 will need to reflect whether SANRAL is still a going concern for the next 12 months, in

order to avoid a qualified audit report. However, given the lack of certainty on when tolling may commence, the Auditor-General has indicated that he may issue a disclaimer by 31 July 2012. This would, in all likelihood, result in a further downgrade by the ratings agencies.

47 Of the total debt of R21 billion incurred by SANRAL to fund the GFIP in the first phase, a total of R19 billion of that debt in respect of the first phase has been guaranteed by the South African government acting through Treasury. Under the Note, a failure of SANRAL to implement GFIP, including its open road tolling system, will be an event of default triggering the immediate repayment of the entire loan or investors will be able to elect to allow government to step in and service the debt on behalf of SANRAL. In practice, this will mean that the guarantee stands to be called upon and government will have to support the rest of the unguaranteed debt of R14.1 billion.

48 Should the guarantee be called, there is a considerable risk of negative consequences for the South African Government's capacity to raise funds from capital markets. The credit rating of SANRAL in the money markets will in the first instance be severely affected, since it raises money by issuing bonds. The credit rating of South Africa,

and therefore the government's ability to raise sovereign debt, would also be impacted on negatively, since SANRAL is a wholly government-owned entity and its standing affects the Government's standing. If a country cannot raise funds because it has been downgraded, or if its cost of fund-raising rises, it follows that its capacity to meet future social and development commitments will be reduced. It is this reduced future capacity to finance education, health, infrastructure investment and poverty reduction measures that is the real long-term material harm that would result from the prevention of Government from continuing with the GFIP open road tolling system.

49 It is clear from this that the continued uncertainty over the ability of SANRAL to collect tolls—exacerbated in large part by the opposition exemplified by this application—will jeopardise not only the overall outlook for an entity as essential as SANRAL, but will also have negative consequence for the South African Government and its future fiscal and financial capacity.

50 Leaving aside the possibility of buyback on SANRAL bonds at the discretion of investors, as a result of the interim interdict, SANRAL's

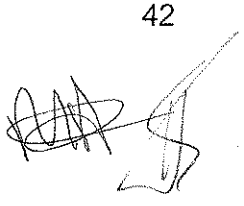
cash reserves will be depleted by the first quarter of 2013, unless offset by a higher tax burden and associated budgetary allocations for roads. SANRAL will lose its access to debt markets and toll revenue which currently adds approximately R9 billion annually to road investments. It will permanently be incapacitated in undertaking and financing major road construction and improvement projects across the country.

51 Treasury is the State department whose responsibility it is to safeguard the country's finances. It is required by section 216(1) of the Constitution to ensure "transparency and expenditure control in each sphere of government." Since SANRAL is a State-owned entity and in part dependent upon State funding, Treasury is the arm of government through which any funding of the GFIP would have to be made available as a result of the interdict.

52 As a consequence of the High Court's order, a real threat exists that SANRAL's creditors may call up the guarantee by Treasury of the funding of GFIP. OUTA itself envisaged this very prospect in its founding affidavit before the court *a quo*. It relied on what it foresaw happening for the proposition that SANRAL would suffer no prejudice

from an interim interdict because national government would simply become liable. This liability would extend not only to the monthly loss of revenue to SANRAL of approximately R270m per month, but also in respect of the entire capital debt for SANRAL on GFIP in excess of R20 billion. That, OUTA accepted on the papers, would arise as an accelerated indebtedness for Treasury if SANRAL were to default in respect of just one month.

53 SANRAL, which is obliged to finance its debt obligations through toll collections, will default if its toll collections are stopped and it does not receive alternative financing. In view of the fact that SANRAL is a state-owned entity and its default would impact negatively on Government, National Treasury has been obliged already to provide assurance to SANRAL's bondholders that the Government will ensure that SANRAL debt will be honoured. In the extremely difficult international economic circumstances which prevail, it has been very important for Treasury to seek to maintain South Africa's international reputation (both through government and parastatals). The South African Government has since 1994 never defaulted on its debt.



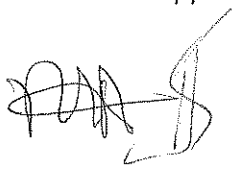
54 As recently as Friday 18 May 2012, I reported to Parliament on the unstable and extremely difficult current economic crisis. I said that South Africa is living through dangerous times and faces formidable challenges arising from both the dismal situation in Europe and the structure of its own economy and society. I described the external environment as remaining weak with risks high. Investment is being held back by both global and domestic uncertainties, one of which is the indefinite deferment of raising revenue for the road system by e-tolling. Particularly serious in the immediate future for both the global economy and the potential impact on South Africa is the continuing vulnerability of several larger European economies.

55 The interdict impacts immediately on SANRAL's ability to service its debts and raise credit to assist it in the discharge of its statutory functions and duties to its employees and road users.

56 If SANRAL's debt is called in by its investors, government will be obliged to take over at least the GFIP-related debt. It has to be expected that an involuntary takeover of R21 billion in debt, as a result of a loss of future tolling revenue, will be accompanied by a negative impact on South Africa's sovereign rating, higher interest

rates and reduced future access to capital markets. If these likely financial outcomes materialise, the Government's capacity to finance future social and development programmes will be negatively affected.

57 In addition, SANRAL's default would cause reputational risk for the country which would extend far beyond the road sector. An adverse credit rating impacts on investors' choices on all bonds issued by State-owned enterprises (like ESKOM and TRANSNET). Accordingly, the access of State owned enterprises to capital markets, and the risk premium in the price of the debt they raise, will be negatively affected. That in turn will impact on the State's infrastructure investment plans and their implementation. The interdict also impacts on all other state-owned entities and their ability to implement authorised projects: should they embark on wide-scale infrastructural projects and public private partnerships (which is an accepted public finance measure, and indeed an essential one for large projects in the developing world), there is a real risk that these can be annulled by any litigant who seeks to sever the project's financial sustainability by court interdict.



58 In turn and as a direct result, this impacts negatively on South Africa's reputation and ability to raise sovereign debt, which is crucial to any country's capacity to implement its policies and discharge its duties.

59 Finally, and perhaps most importantly, the interdict and its ramifications impact indirectly on other projects, programmes and causes for which Government has budgeted and will in future seek to appropriate resources. The effect of the interdict is to interfere with the current and future budgets, because

59.1 the fiscus, in taking on the debt costs associated with the GFIP, will in perpetuity have less revenue to allocate to other pressing social and economic priorities, particularly health care, education and basic infrastructure nationwide;

59.2 alternatively, alternative revenue sources will need to be identified and funds provided through an appropriation by parliament.

60 In the light of what is set out above, it is imperative that the applicants seek to set aside the High Court's interim order which prevents SANRAL from levying and collecting tolls.

Appealability

61 I am advised that this Court has repeatedly held that the test for appealability is the interest of justice. It has also stressed that it is not a jurisdictional requirement for an appeal to this Court that the matter must involve a "judgment or order" within the meaning of section 20(1) of the Supreme Court Act 59 of 1959.

62 The Court has also previously granted leave to appeal against interim orders and thus the fact that the order against which leave to appeal is sought in this case is "interim" is not, itself, a bar to the applicants securing relief from this Court. A range of factors must be considered when determining whether the interest of justice require leave to appeal to be granted, including whether the order will have immediate effect and whether irreparable harm will result if leave to appeal is not granted.

63 As shown above, the judgment has had and will continue to have an immediate and negative impact on SANRAL's credit rating and this could extend to South Africa's credit rating. Investor agencies have placed the country on "negative outlook" in view of the present

financial circumstances and policy uncertainty, and have indicated that the unresolved SANRAL toll revenue collection issue is amongst the concerns that might lead to a rating downgrade.

64 As the applicants set out in the papers before the High Court and as I have described above, for every month that tolling is delayed, SANRAL will forego hundreds of millions of Rand in revenue. Without this income, SANRAL faces the real prospect of defaulting on its loan obligations.

65 Because the applicants did not tender any guarantee against the losses that SANRAL would suffer if the interdict was granted, SANRAL would never be able to recover the losses it would suffer for as long as the interim interdict remained in place. SANRAL also cannot go back to the users of the road at a later point and demand the payment of toll. To prevent default therefor Government would need to identify additional revenue sources and provide for an additional appropriation by Parliament.

66 As I highlighted above, the assumption that was made by the first to fourth respondents in their application for an interdict, was that

Government would step into the breach and meet SANRAL's costs for so long as an interim interdict remained in place. In his judgment, Prinsloo J recognised this was a likely outcome and recognised too that this might have negative effects permeating throughout the whole economy (judgment at page 28). Nonetheless, Prinsloo J disregarded these effects and granted the interdict on the assumption that Government would step into the breach.

67 Again, as I highlighted above, if the Government is called on to step into the breach to save SANRAL from defaulting on these obligations, its existing budget allocations to areas such as the implementation of health service, improvements to education, social welfare reforms and the provision of housing and basic infrastructure will be threatened. If this is to be required of the government, there is a real possibility that South Africa's own credit ratings will be compromised, to the detriment of future spending and budgetary allocations.

68 All of these consequences, that were predicted in the papers before the High Court and have now been confirmed in the events which have followed the granting of the interim relief, are irremediable and endure for as long as the interim order remains in place.

69 Furthermore, for as long as the interdict remains in place, SANRAL will be prevented from exercising its statutory powers to collect the revenue to finance the debt incurred on upgrading the freeway system around Gauteng.

70 As a public entity, SANRAL has a series of obligations under the PFMA. These include obligations to:

70.1 prevent any prejudice to the financial interests of the State under section 50(1)(d);

70.2 maintain effective, efficient and transparent systems of financial and risk management and internal control under section 51(1)(a)(i);

70.3 take effective and appropriate steps to collect all revenue due to SANRAL under section 51(1)(b)(i);

70.4 prevent irregular expenditure and expenditure not complying with the operational policies of SANRAL under section 51(1)(b)(ii); and

70.5 manage available working capital efficiently and economically under section 51(1)(b)(iii).

71 The interdict therefore has the immediate and definite consequence of prohibiting SANRAL from discharging its obligations to maintain financial discipline.

72 Perhaps the most important consideration on the question of appealabilty is the fact that for so long as the interim interdict remains in place, the High Court is *de facto* and on an interim basis administering a crucial aspect of government in the form of the revenue procurement and allocation. This interim administration has been undertaken by the High Court in circumstances where the Court has not finally decided that government is at fault, where the Court has neither the competency nor has been asked to intervene in the policy decisions of Cabinet, and where the dire consequences of the Court's intervention in these decisions have been described and accepted by the Court as likely to arise.

73 The willingness with which Prinsloo J has intruded into the executive domain is all the more concerning given that the decisions sought

ultimately to be challenged on review were taken four or five years ago. Consequential actions have been taken on the strength of those policy decisions, the GFIP has been built, national budgets have been determined, and fundamental social rights projects have been determined. In one fell swoop, however, these years of planning and implementation have been undone, without the High Court even having had an opportunity to consider fully the merits of the issues before it. The High Court's intervention is premised only on an apprehension that government might have erred along the way.

74 Cabinet generally, but Treasury in particular, cannot reasonably plan either in the short or long term in circumstances where the High Court can step in and, in effect, direct Treasury on how it is to conduct itself in matters of policy and funding strategy. This is especially so where the High Court decisions are operative on an interim basis. The consequences of such orders will be to preclude effective planning and administration.

75 There is a very real apprehension that, left unchecked, the judgment of Prinsloo J will serve as a precedent for future judicial intervention along similar lines. The potential consequences of a future judgment

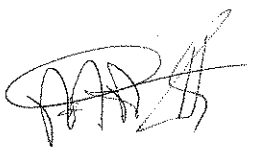
to similar effect may be even more far-reaching and potentially devastating for government, the economy or the financial integrity of South Africa as a whole. It is therefore imperative that the limits of this type of judicial intervention be determined.

76 As a fundamental question of separation of powers, therefore, the applicants generally, but Cabinet more particularly, request the Constitutional Court to consider this issue and the limitations of judicial intervention in circumstances such as these. It is overwhelmingly in the interest of justice that an appeal on this question be heard.

Direct appeal

77 The applicants seek leave to appeal directly to this Court for three reasons:

77.1 Firstly, the case does not involve the development of the common law. It requires first and foremost an interpretation of the Constitution and a balancing of the issue of separation of powers under the Constitution. It also engages questions of the



powers vested in the various organs of state under the SANRAL Act and NEMA. This much is common cause between the parties, as appears from the manner in which the first to fourth respondents framed the constitutional issues arising in the case in their notice under Uniform Rule 16A in the High Court. As a result, the resolution of these issues does not require the specific common law expertise of the Supreme Court of Appeal.

77.2 Secondly, the question of separation of powers is of such integral importance to the Cabinet and Treasury that it warrants the immediate attention of this Court. Cabinet itself resolved at its meeting on 16 May 2012 to seek the urgent engagement of this Court.

77.3 Thirdly considerations of cost and time warrant an application directly to this Court. I have set out in some detail above, the negative effects of the interim order. With every day that the interim order remains in place, SANRAL is precluded from discharging its obligations under the SANRAL Act and the PFMA and its position and that of the government as a whole, only worsens. It is therefore imperative to have the correctness of the

High Court's decision to award the interdict finally determined as quickly as possible.

78 If the applicants were required to appeal first to the Supreme Court of Appeal, whatever the outcome of that case, it is more than likely that there would be a subsequent appeal to this Court. That process would unduly prolong the period for which SANRAL will be prohibited from tolling and, as a result, the negative consequences for it and the government's ratings.

79 I respectfully submit that in these circumstances, the case warrants a direct appeal to this Court so that the order of the High Court may swiftly and finally be set aside and the underlying issues determined.

Impact of the decision to delay tolling

80 On 27 April 2012, the Minister of Transport announced that the e-toll commencement date would be extended to 1 June 2012. This effectively delayed tolling for a further month, independently of the High Court's order.

81 The postponement was decided in order for a process of consultation to be embarked upon to finalise regulations following input on regulatory and administrative issues from the public and interested stakeholders.

82 The postponement in no way undermined the Government's commitment to tolling as the appropriate funding mechanism for the GFIP. It was intended only to facilitate a further consultative process on regulatory and administrative issues connected with tolling.

83 It is unfortunate that Prinsloo J apparently saw this extra-curial occurrence as affecting the merits of the application before him (judgment at pages 7—8 and 28). The facts pertaining to this issue were not before him and any assumptions made by him or reliance on the further postponement of tolling was legally and factually irrelevant to the issues in dispute.

84 His reference to extra-curial circumstances commenced in his ruling on urgency, when he stated in conclusion that there was a high level of public protests, including demonstrations outside the court building. His judgment on the interim interdict echoes this.

85 It is the Department of Transport's firm intention to commence tolling on the Gauteng Freeways affected by the interdict as soon as the interdict is set aside. Towards this end, the Department has taken, and intends to take, a series of steps which are described below to ensure that tolling can commence in the event that this application is successful.

Implementation process

86 The declaration of a road as a toll road is a decision undertaken in terms of section 27(1) of the SANRAL Act. In the context of this case, these were the decisions taken in 2008 that are sought to be reviewed and set aside by the first to fourth respondents. The declaration of a road as a toll road is a necessary preliminary step before tolling can commence, but does not immediately permit of tolling.

87 In order for tolling on the Gauteng freeways to commence, there are two further steps which must be taken:

87.1 toll tariffs must be determined by the Minister of Transport and notice thereof given not less than fourteen days prior to the commencement of tolling in accordance with section 27(3) of the SANRAL Act; and

87.2 conditions of toll must be promulgated by SANRAL in accordance with section 27(1)(b) of the SANRAL Act.

88 Over and above these two mandatory requirements,

88.1 to the extent that SANRAL wishes to grant exemptions from the payment of toll, these exemptions must be published by SANRAL fourteen days prior to the date on which the exemption is to be operative in accordance with sections 27(1)(c) and 27(2) of the SANRAL Act;

88.2 to the extent that the Minister determines that it would be effective to pass regulations to facilitate the collection of toll from defaulting road users, these Regulations must be promulgated in accordance with section 58 of the SANRAL Act.

The exercise of these two powers is, however, not a necessary precondition before tolling can commence.

89 On 13 April 2012, a notice of the toll payable and the date from when it would be payable was published as contemplated in section 27(3) of the SANRAL Act. There were also various draft sets of regulations promulgated, which contemplated *inter alia* exemptions being granted and means being established for collecting toll.

90 The time when these notices and draft regulations were published appears to be something that weighed in the mind of Prinsloo J (judgment at pages 5—6). That he should not have done. They are distinct processes from the declaration of toll roads and were therefore not issues before him.

91 As things stand, tolling cannot be implemented in accordance with the notice of 13 April 2012 because tolling is barred for as long as it takes to determine the review. I am informed that the Minister of Transport intends withdrawing the toll tariff determination which was published on 13 April 2012 whilst this appeal is pending and whilst the interdict remains in place.

92 In the event that the appeal is successful and before tolling can recommence, a new notice will be issued under section 27(3) of the

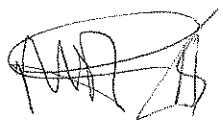
SANRAL Act, which will stipulate the toll payable and the date from when it will be payable. I am advised that, in the interim, the Minister of Transport, SANRAL, and the Department of Transport will continue to engage with the public and to consult on the draft regulations, the conditions of toll, and the amount of toll that will be payable.

93 As I set out later in this affidavit, the applicants propose that this application be set down for hearing in the second half of July 2012. By that time, the various public participation processes will in all likelihood have been completed and the promulgation of toll tariffs and conditions of toll can take place immediately thereafter in order for SANRAL to be in a position to toll immediately upon receipt of an order from this Court.

Prospects of success

94 I respectfully submit that the applicants' prospects of success in setting aside the interim interdict are strong.

95 Concerning the question of whether or not the High Court overstepped the bounds of separation of powers, the applicants have



very real prospects of success. There can be no doubt that the judgment intrudes impermissibly upon the executive domain.

96 The applicants also have very good prospects of success on the merits of the judgment as a whole.

97 I am advised that in deciding whether to grant the interim relief, the High Court was required to consider:

97.1 whether the applicants had establish a *prima facie* right to the relief in the review application;

97.2 whether there was a well-grounded fear of irreparable harm if the interdict were not granted;

97.3 whether the balance of convenience favoured the granting of the interdict; and

97.4 whether there was any alternative remedy which would provide adequate redress in the circumstances to the applicant for the interdict.

98 The High Court found in favour of the first to fourth respondents on all four of these aspects (judgment at pages 21—29). However, I respectfully submit that it erred in making every one of these findings. I shall set out the reasons for this in the sections which follow.

Prima facie right

Cost of toll collection

99 The High Court appears to have found that the first to fourth respondents had established a prima facie right in the review because they had shown that the cost of toll collection was not appreciated by the Minister of Transport at the time that he approved the toll declarations (judgment page 23 lines 2 to 6 read with page 26 lines 10 to 12).

100 I respectfully submit that this finding was incorrect for the reasons that follow.

100.1 First, the evidence before the High Court showed the following:

100.1.1 The costs of toll collection were addressed in a proposal prepared by the joint working group in September 2006. A copy of that proposal is attached hereto marked "**FA6**".

100.1.2 Under paragraph 10.2 of the proposal, reference is made to "*the yearly estimated operations and maintenance costs amounting to R200 million (excluding VAT, 2006 Rand)*".

100.1.3 That figure was based on the applicable estimates in 2006.

100.1.4 The Minister himself gave particular consideration to the proposal in reaching the decision to approve the toll declarations. As the Minister sets out in his affidavit, e-tolling "*was not a product of a decision made irrationally or capriciously ... it was the product*

of a consideration of various models of funding the freeway improvement, and the adoption of one of the available options which were justified for the reasons set out in [the proposal]".

100.2 Secondly, this evidence is inconsistent with a finding that the Minister was unaware of the costs of toll collection when he approved the toll declarations in 2008. The Minister's own evidence was that he considered the proposal which included the cost estimate when he approved the toll declaration process.

100.3 Thirdly, that the actual cost of toll collection ended up being greater than the amount estimated in 2006 does not render the decision to declare the toll roads, based as it was at the time on current estimates, irrational. The mere fact that the estimate put the cost of toll collection at R200 million (2006 Rand) per annum and the eventual sum was higher than that, even considerably higher, does not render the decision to approve the toll declarations irrational *at the time that it was made*.

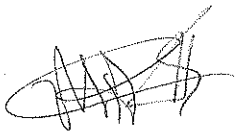
100.4 Fourthly, the cost of toll collection is only one factor amongst a myriad of considerations which are reflected in the proposal and

which all had to be weighed and balanced in the final decision to select tolling as the funding mechanism for the GFIP. That complicated policy assessment is one with which courts are generally reluctant to interfere. Therefore, in order for the first to fourth respondents to have established a prima facie right to the relief in the review, they had to show that it was probable that, notwithstanding the quintessentially polycentric nature of the decision which was made by the Minister, the reviewing court would step in and set aside his decision. I respectfully submit that the first to fourth respondents did not come close to establishing such a likelihood.

Internal Remedies

101 The approvals granted by the eighth respondent under NEMA for the upgrading of the roads and associated infrastructure, were taken nearly five years ago.

102 The applicants opposed the review of these decisions on the grounds that the first to fourth respondents had not exhausted the internal



remedies provided for under PAJA and had not sought condonation under PAJA for their failure to exhaust internal remedies.

103 In the judgment, Prinsloo J criticised the applicants for not challenging the merits of the review grounds against the environmental authorisations and characterised the applicants' opposition because of the failure to exhaust internal remedies as "a technical argument" (judgment at page 26).

104 In this Prinsloo J fundamentally conceived the nature and import of PAJA and the requirement that an applicant exhaust internal remedies. The learned judge also cut a swathe across the decisions of this Court that have emphasised the importance of the duty to exhaust internal remedies.

105 At the level of assessing the *prima facie* prospects of success of the review application, the rejection of this "technical argument" is, with respect, plainly wrong.

Delay

106 The decisions sought to be reviewed by the first to fourth respondents in part B of their application were taken just short of four years prior to the date on which they launched their urgent application for an interdict.

107 This considerable delay meant that, in order for the first to fourth respondents to be able to show a *prima facie* right in the review, they had to prove that the reviewing court would be more likely than not to condone their delay in bringing the review.

108 The applicants strenuously opposed the application on the basis of the delay: no *prima facie* right to succeed in the review application could be shown in circumstances where, as a necessary precondition to the upholding of the review, the review court would have to exercise a discretion whether or not to grant condonation for the delays.

109 Prinsloo J, in his judgment, did not consider the unreasonable delay point or section 7(1) of PAJA. His judgment is completely silent on this aspect. The only context in which delay was considered was in relation to the question of urgency (judgment at pages 7—8).

110 On this basis alone—namely, the failure on the part of Prinsloo J to appreciate that the unreasonable delay of four years was fatal to the review application and therefore the claim for interim relief pending the outcome of the review—this appeal should succeed.

111 With respect, if Prinsloo J had considered the question of delay as a barrier to the review, he could only have found that there was no prospect that the reviewing court would have condoned the first to fourth respondents' delay. I say this for three reasons.

111.1 Firstly, the only explanation given by the first to fourth respondents for having delayed until March 2012 to review decisions taken four years earlier was the fact that toll was due to be levied on the roads from 30 April 2012. According to the first to fourth respondents, they were only in a position to launch the attack when they learnt of the high level of the toll tariffs that would be imposed on the relevant roads.

111.2 However, this overlooks the fact that the levying of toll is a distinct administrative act from the declaration of the toll roads back in 2008. The declaration of the toll roads is undertaken by SANRAL, acting with the approval of the Minister; whereas the

determination of toll tariffs is undertaken by the Minister on the recommendation of SANRAL. As a result, the proposed levying of the tolls from 30 April 2012 was legally irrelevant to the declaration process which took place in 2008.

111.3 It was therefore incorrect for the first to fourth respondents to claim that the necessity for the application only arose when it was announced that tolls would be levied from 30 April 2012. The first to fourth respondents' cause of action arose as far back as 2008 when the relevant decisions were made and nothing which happened subsequent to that date had altered that fact. Indeed, as the papers showed, the media was in fact reporting the estimated amount of the toll tariffs as far back as 2007. Their application was, as a consequence, woefully late.

111.4 Secondly, the first to fourth respondents' explanation for their delay was also self-destructive. The first to fourth respondents claimed that it was "only after ... publication of the [toll] tariffs, when the news of the high level of the tariffs was made known in the media to the general public that the public first became aware of the impact the toll roads would have on them". In this

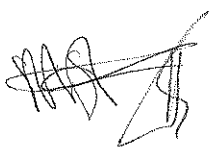
way, the first to fourth respondents linked awareness of the administrative decisions which they sought to impugn to knowledge of the high level of the toll tariffs. They did not link that awareness to the levying of the tolls *per se*, but rather to the high level at which the tolls were levied. It is important to note that the tariff without discounts estimated in 2008 (50c in 2007 prices) was higher in real terms than the tariff as agreed in Cabinet in 2011 and the 2012 announcement in April.

111.5 However, the first to fourth respondents themselves admitted that they launched the application at a time when the applicable tariffs were not yet published. If the thing that alerted the first to fourth respondents to challenge the toll declaration process was the high level of the toll tariffs then those toll tariffs would have had to have been published when they launched the application. But, as the first to fourth respondents themselves confess, that was not the case when they launched the application.

111.6 Thirdly, in order to succeed in their prayer for condonation, the first to fourth respondents would have to show that it was in the interest of justice to condone a delay of four years

notwithstanding the fact that SANRAL had placed considerable reliance on the validity of the decisions under attack and had incurred substantial expenditure on the basis that those decisions would stand. Given that the toll declaration process had taken place in March and July 2008, it was reasonable for SANRAL to assume that in the absence of any litigation by July 2009, its decisions to declare the toll roads would not be subject to attack. SANRAL would not have undertaken such a risk unless it was able to place reliance on the fact that after the passage of a year, it was unlikely to face litigation designed to set aside the toll declarations.

111.7 Thus the requirement for certainty in this case is a compelling limitation to the first to fourth respondents' ability to obtain condonation from the reviewing court. Nothing the first to fourth respondents said in the papers before the High Court came close to establishing why this compelling need for certainty should be discarded and it is therefore unlikely that a reviewing court would be inclined to grant them condonation for their considerable delay.



111.8 While the interim interdict was being argued before Prinsloo J, OUTA's own website (as was pointed out to the court) disclosed that OUTA has been engaged for several months in preparing its application with its team of counsel and attorneys.

112 The question of delay cuts across the entire application for review and therefore for interim relief. Inasmuch as the High Court did not consider this issue—and, if it had done so, could not have granted condonation—there can be no prospect of the review application succeeding at all.

113 On that basis therefore, the appeal must succeed.

Irreparable harm

114 The High Court accepted that Gauteng motorists would suffer irreparable harm if the interdict were not granted (judgment at pages 27—28).

114.1 On closer analysis, this finding is fundamentally misplaced: it is premised on motorists having to pay excessive toll fees. There was no evidence before the High Court of excessive toll fees.

Indeed, the question of the amount of toll payable was not before the High Court at all.

114.2 Moreover, as I have indicated above, the question has never been up for debate as to whether or not the GFIP must be paid for: there is no such thing as a free lunch or a free passage. The only question was whether or not SANRAL, the Minister of Transport and Cabinet were entitled to adopt the user-pay principle.

114.3 The judgment therefore overlooks the distinction between not having to pay for the GFIP and not wanting to pay in a particular way.

114.4 Once it can be accepted that the GFIP must be paid for, there can be no question of irreparable harm arising if government chooses to make motorists pay in one manner as opposed to another.

115 In reaching the conclusion of irreparable harm, the court discounted the applicants' contentions that the motorists would be entitled to a refund of the tolls paid during the interim period if a reviewing court

ultimately found that the toll declarations were invalid and set them aside. The prospect of repayment was cursorily dismissed by Prinsloo J in the following words (at judgment pages 27—28):

> *Counter arguments offered to the effect that the perceived harm is not "irreparable", because toll paid unnecessarily, if it turns out that the final review application is successful, can be refunded to millions of aggrieved motorists, appear to me to be not persuasive enough to justify a finding at this stage that the applicants have failed to pass the required test.*

116 This conclusion is unsupported, irrational and unsustainable.

117 In the High Court, the first to fourth respondents argued that there was no guarantee that the Gauteng motorists would be repaid their tolls if the reviewing court subsequently set aside the toll declaration decisions because SANRAL was not intending to retain the tolls paid to it but, instead, to pay those monies on to its creditors in order to defray its debt obligations.

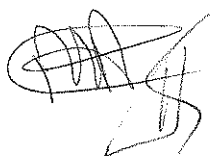
118 As a result, so the argument went, SANRAL would have a defence to any claim for repayment brought by motorists on the basis of non-enrichment. To the extent that this argument informed the High

Court's summary rejection of SANRAL's contentions that the motorists would be repaid if the decisions were ultimately to be set aside, then the High Court erred in accepting this line of reasoning.

119 Contrary to the first to fourth respondents' contentions, SANRAL would not be able to rely on the defence of non-enrichment in the face of claims for repayment by Gauteng motorists who paid the tolls during the interim period. The reason for this is simple:

119.1 First, SANRAL's enrichment would then take the form of a reduction in its liabilities—a ground of enrichment that has endured since Roman law.

119.2 Secondly, there is an important limitation to the defence of non-enrichment. As soon as the recipient of the enrichment is aware that the thing paid to him in error was paid *indebite*, he can no longer rely on the defence. Given the very fact of the first to fourth respondents' application to set aside the toll declaration decisions, SANRAL would never be in a position to claim that it was unaware that the tolls were paid *indebite*.



119.3 Furthermore, any attempt to rely on the defence would be evidence of bad faith on SANRAL's part because it would have received the payments knowing full well that there would be an obligation to repay the tolls if a reviewing court ultimately determined that the toll declarations should be set aside.

120 As a result, the High Court erred in finding that the Gauteng motorists would suffer irreparable harm if the interdict was not granted. Any tolls paid by motorists, pursuant to what is subsequently determined to be an unlawful demand by SANRAL, would be liable to be repaid to them.

Balance of convenience

121 The High Court found that the balance of convenience favoured the first to fourth respondents. However, this finding was influenced by the prior error related to the existence of irreparable harm. Once it is accepted that the first to fourth respondents would not suffer any irreparable harm if the interdict were not granted (because they would be repaid any tolls unlawfully demanded from them), there is nothing to balance against the considerable harm which the applicants

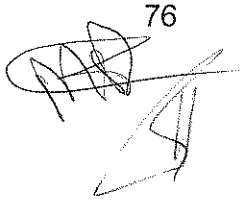
predicted they would suffer (and have suffered) as a result of the grant of the interdict.

122 I have sketched the consequences for Treasury and therefore for the country as a whole as a result of the grant of the interdict. I have also shown how Prinsloo J appeared to consider these insignificant as compared with the apprehended harm that motorists would suffer. His conclusion in this regard is indefensible.

123 I have also set out the details above of the severe financial consequences which SANRAL has already suffered as a result of the interdict. On the strength of these undisputed facts, there can be no doubt that the applicants enjoy reasonable prospects of success in relation to this aspect of the appeal.

Urgency

124 Given the facts set out above regarding the negative impact of the High Court's order on SANRAL and the government, I respectfully request that this matter be set down for hearing (either on the application for leave to appeal or the merits of the appeal), as a



matter of urgency, during the second half of July 2012 and appropriate directions be issued for the filing of affidavits and heads of argument.

125 For all the reasons set out above, I respectfully submit that the High Court's order cannot be allowed to remain in place—whether pending the determination of the review application or at all. The irremediable harm which the applicants, and the government as a whole, are suffering as a result of the order must, if possible, be brought to an end as quickly as possible in order to prevent the further decline in SANRAL's ratings and its ability to operate as a going concern.

126 I respectfully submit that the harm which I have described above and which SANRAL is suffering on a daily basis justifies this Court convening itself urgently and during recess.

127 I further submit that there can be no prejudice to the first to fourth respondents if this matter is dealt with expeditiously. They launched their own application for the interdict (which as stated above they had taken months to prepare) on an urgent basis in the High Court and they indicated repeatedly in the High Court proceedings that they

were in a position to expedite the review application. The respondents cannot possibly now claim that they would suffer any prejudice as a result of this Court's urgent consideration of whether the interim relief ought, in fact, to have been granted.

I accordingly ask for an order in terms of the notice of motion to which this affidavit is attached.

PRAVIN JAMNADAS GORDHAN

Signed and affirmed before me in the prescribed manner at PRETORIA on this the 21st day of May 2012, the deponent having stated that he has conscientious objections to taking the prescribed oath and that he regards the affirmation as binding on his conscience.

COMMISSIONER OF OATHS

Name:

Address:

Capacity: