

PH

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

Case No. 17141/12

In the matter between:

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

and

THE SOUTH AFRICAN NATIONAL ROADS AGENCY LTD	First Respondent
THE MINISTER, DEPARTMENT OF TRANSPORT	
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

ANSWERING AFFIDAVIT

I, the undersigned

NAZIR ALLI

do hereby make oath and say that –

- 1 I am a major male and the Chief Executive Officer of the first respondent, employed as such at 48 Tambotie Avenue, Val de Grace, Pretoria.
- 2 The facts contained in this affidavit are to the best of my knowledge and belief true and correct.
- 3 I am duly authorized to depose to this affidavit on behalf of the first respondent.
- 4 I have read the founding affidavit of Leopold Jean Joseph Pauwen, dated 23 March 2012.
 - 4.1 As I discuss in more detail below, the founding affidavit is filed in support of a review application and in support of an application for urgent interim interdictory relief pending the outcome of the review application.
 - 4.2 This answering affidavit, which has been prepared under circumstances of great haste and without adequate time being afforded

the first respondent, is intended to address the merits of the interdict application. I address the merits of the review application only insofar as is necessary in order so as to deal with the interdict application.

4.3 My failure to deal with any allegation under reply is not to be construed as an admission as to its correctness and any allegation not expressly admitted is to be taken as having been denied.

4.4 The first respondent also reserves the right, at a later to stage, to revisit any or all of the allegations addressed in this answering affidavit and to supplement its answers and responses.

5 I shall refer to the parties and the legislation in this answering affidavit in the same manner as they are referred to in the founding affidavit.

6 Where issues of law are dealt with in this affidavit, these issues are dealt with on the basis of advice provided by the attorneys acting for SANRAL.

A PRELIMINARY ISSUES

7 There are a number of issues to be dealt with that arise from the founding affidavit. These issues shall be dealt with by me in a number of *in limine* sections and I shall then deal with each of the allegations in the paragraphs contained in the founding affidavit separately.

8 At the outset, I wish to address the question of urgency.

9 **URGENCY**

9.1 This application was issued out of the above honourable Court on 23 March 2012 and served on SANRAL on the same day. The papers are some 717 pages and the founding affidavit alone runs to 166 pages.

9.2 The issues canvassed in the founding affidavit range far and wide, from the very inception of the tolling process and the decision to proclaim certain roads national roads and toll roads, to the tendering process, the construction of the roads and related infrastructure, the cost of the tolls and of tolling, the terms and conditions on which e-tags are bought and sold, the history of how and when certain information was made public and so on. These issues, to the knowledge of the applicants, raise numerous micro- and macro-economic concerns, concerning the current and future structure and viability of SANRAL as well as funding and budgetary decisions of the National Government. These issues and impacts are dealt with in more detail below, but suffice to state for present purposes that the application covers the field of issues in relation to tolling.

9.3 On 4 April 2012 the applicants caused a further notice and supplementary affidavit to be served on SANRAL.

- 9.4 In the supplementary founding affidavit and accompanying notice given in terms of Rule 16A of the Uniform Rules of Court, the applicants now raise a number of challenges—or potential challenges—to the constitutionality of legislation, including section 27 of the Act.
- 9.5 In terms of Part A of the Notice of Motion, the application has been set down for hearing on 24 April 2012. The basis upon which this date was chosen is alleged to be because tolling is scheduled to commence in Gauteng as part of the GFIP at the end of April 2012, being less than a week after the date of set down of the application. Assuming the application is heard and finalised on the 24th of April, the Court will have two court days within which to determine the application and grant an Order.
- 9.6 30 April 2012 is an arbitrary deadline imposed by the applicants before the passing of which they contend the application for interim relief must be finally determined and the relief granted. This deadline, they say, arises because that is when the tolls will be levied. This is, however, misconceived and artificial:
- 9.6.1 In their Notice of Motion, the applicants complain only about the declarations of certain roads "as continuous toll roads" and also the establishment of electronic toll points along the roads. No where in the Notice of Motion do the applicants complain of the process that is to be effected on 30 April 2012 to levy a toll and

no relief is sought in Part B of the Notice of Motion in relation to the decision to levy toll or the amount of the toll to be levied.

9.6.2 In fact, the applicants' Notice of Motion is entirely silent about the levying of a toll. It is only the levying of toll that will arise on 30 April 2012.

9.6.3 The levying of toll under the Act is effected in terms of an entirely separate power to the power to declare a road a toll road or to declare a road to be a national road. The levying of toll is also a separate process from the granting of environmental authorisation under NEMA.

9.6.4 The primary complaint by the applicants in the affidavit, especially SAVRALA and QASA, is the prejudice that will be visited on them and their members should the payment of tolls proceed. The prejudice that is complained of is thus one related to the actual payment of the tolls, not to the declaration of the roads as toll roads.

9.6.5 In this regard, SANRAL has made recommendations to the Minister of Transport regarding the amount of toll to be levied and the Minister of Transport will determine the tolls. These tolls will be made known in the *Government Gazette*. In addition,

SANRAL shall, where applicable and in terms of section 27(1)(c) of the Act grant exemptions from the payment of toll.

9.6.6 It has already been indicated by the Minister of Transport that these exemptions will include exemptions granted to qualifying public transport operators. Other categories of road users may also apply to such exemptions.

9.6.7 It is pertinent to record that SANRAL, as an administrative body, would be required to consider and address any request for exemption from the payment of toll for a category of road users. No formal request has been received by SANRAL, in this regard, from QASA or any other entity. SANRAL accordingly tenders that any formal request received for an exemption from the payment of toll, and which applies to a category of users and where need is demonstrated, will be considered and where appropriate an exemption will be granted.

9.6.8 In light of what is set out above, the complaints by QASA are largely irrelevant in so far as the payment of a toll by their members is concerned. The complaints set out in affidavits attached to the founding affidavit as annexure "FA5" to "FA8" are all addressed by the acceptance of the abovementioned tender. The categories of road users concerned will be entitled

to approach SANRAL, on the basis of need, to request an exemption from the payment of toll.

9.6.9 Accordingly, the applicants' application is misconceived on the basis that the decisions about which it now complains were made, on its own version, on 28 March 2008 in respect of the portions of the road described in paragraphs 1.1 to 1.6 of the Notice of Motion and 28 July 2008 in respect of the portion of the road described in paragraph 1.7 of the Notice of Motion.

9.6.10 The institution of proceedings to review and set aside these decisions on the basis that different powers of the Act are now being exercised to levy toll, is simply untenable and unjustifiable. Complaints about the payment of a toll cannot be used to justify a legal challenge to the declaration of roads as toll roads. The two issues are completely different in relation to the decision-making processes that underlie them and the application of their effects in law and fact.

9.6.11 Finally, in this regard, I point out that to the extent that the applicants complain about prejudice as a result of the impending levying of toll, this prejudice can at best be financial prejudice. Our courts have consistently held that financial prejudice is not a ground for urgency and this case is no different. On that basis

alone, the application for urgent interim relief falls to be struck with costs.

9.7 Under the Notice of Motion SANRAL was afforded nine court days within which to file its notice of intention to oppose and answering affidavit, in circumstances where SANRAL would ordinarily be afforded not less than twenty days within which to file both documents in an ordinary application. To the extent that the application amounts, in effect, to a review application—albeit one to be determined on an interim basis under the guise of deciding the merits of the grounds for review—SANRAL would ordinarily have not less than fifteen days within which to gather together all of the relevant documents and records that underlie the decisions and to furnish reasons for the decisions, and thirty days within which to file its answering affidavit, being a period in total of more than nine weeks from the date when the founding affidavit is first received. To the extent that SANRAL is required to address the merits of the review application in determining the entitlement to interim relief, it has effectively been asked to deal with this in nine days as compared with forty-five.

9.8 I point out, furthermore, that the period afforded SANRAL extends across the religious holidays of Passover and Easter, court recess and school holidays, in circumstances where a number of people are away or otherwise unavailable. Despite its legal representatives working over the weekends, including over the Easter/Passover weekend—the time

afforded SANRAL within which to file its answering affidavit has proved insufficient. In the circumstances, SANRAL has not been able to file its answering affidavit on the 10TH of April as specified in Part A of the Notice of Motion, but this has not been as a result of anything other than this time as originally afforded it being inadequate in the circumstances.

9.9 SANRAL has endeavoured to the very best of its abilities, to meet the deadline arbitrarily imposed by the applicants, but despite every effort it has not been able to meet this deadline. To the extent necessary, SANRAL asks that the above honourable Court excuse and condone its failure to file its answering affidavit by the 10TH of April 2012 and permit the answering affidavit to be received into the record. Legal argument in this regard will be addressed to the above honourable Court at the hearing of this application.

9.10 The interim interdict is sought by the applicants, in the main, pending the final determination of the relief sought in Part B of the Notice of Motion, which is in turn for the review and setting aside of decisions taken in 2007 and 2008. Save for OUTA, which was apparently only formed during March of this year (something which is dealt with in more detail below) and which therefore could not itself have had knowledge, there is no question that the applicants did not have knowledge for a very considerable period of time of the proposed tolling and the decisions that brought about tolling, which allow tolling to occur, and

which are sought to be reviewed and set aside in Part B of the Notice of Motion.

9.11 I point out, further, that the applicants, their members and their associate members have literally stood by and watched over the years as construction work has taken place to effect magnificent upgrades to the affected GFIP highways and the related infrastructure, including the construction of bridges, flyovers, on- and off-ramps, and related services. All of this construction work—which has included the construction of the gantries, the passage of motor vehicles under which records the liability to pay toll—has, to the knowledge of the applicants and their members and associated entities, been premised on the tolling of the GFIP highways and on the costs thereof being met by the tolling of the GFIP. The infrastructure upgrades and construction have been completed for more than six months and still the applicants did nothing.

9.12 As is apparent from the applicants' own founding affidavit, the existence of a toll levying process in Gauteng has been squarely in the public eye since proposals concerning this scheme were published in newspapers, to which the applicants refer extensively in the founding affidavit as annexures "**FA19**" to "**FA23**", and "**FA28**" to "**FA30**", and the construction of gantries across public roads in or about October 2007

9.13 On the applicants own version, they have known since at least February 2011 of the proposed amounts to be levied under the tolling of the GFIP. Since the first publication of these tolls, the amount of toll payable has been reduced to the benefit of all toll users, including most recently by the Minister of Finance in his annual budget speech of 22 February 2012. In addition, concessions have been allowed, including relating to taxis and other forms of public transport. Hence, over the course of the past fourteen months the position of the average toll users has improved rather than gotten worse. Still, the applicants did nothing. The reduction of toll tariff cannot serve as a violation of the applicants' rights so as to serve as a catalyst for the bringing of the urgent application.

9.14 Furthermore, and once again on the applicants' own version, the applicants have known since at very least 7 February 2012 that the official position of the Government of the Republic of South Africa was that tolling would definitely take place on the GFIP and that the only question was the extent to which the amount of the toll payable could be ameliorated. Despite this knowledge that tolling was, in the words of the applicants, "non-negotiable", the applicants waited a further six-and-a-half weeks before launching their application for urgent interim relief—a delay which is simply not explained in the papers at all.

9.15 I point out that even from the point of view of the last date when, on the applicants' version, they learned of material information — being

22 February 2012, the day of the budget speech of the Minister of Finance — the applicants delayed a further thirty days before launching the application for urgent interim relief. Once again, there is no proper explanation for this delay in the founding affidavit.

9.16 On any version, therefore, the applicants took somewhere between one month and five years to launch an application which they now expect SANRAL to deal with in nine days and the Court to decide and determine in two days.

9.17 The closest the applicants get to an explanation for these delays is that OUTA was only established on 12 March 2012. That is, of course, a contrived answer that can have no relevance in relation to the other applicants.

9.18 In this regard, it is simply not competent to state that the applicants who now bring this application were only constituted in March of this year. The constitution of a voluntary association and its coming into existence, by whatever means statutory or otherwise, is not an excuse for the purposes of tardily seeking legal relief or a basis upon which legal relief may be obtained urgently. The fact remains that in March 2008, the expressed uninhibited intentions of the respondents, including SANRAL, to declare certain portions of national roads running through Gauteng as roads on which a toll may be levied in due course was known and the legal processes were concluded. That state of

affairs did not change and has not changed irrespective of the date for the commencement of the actual levying or payment of a toll. More importantly, it can have no relevance insofar as concerns the members and office-bearers of OUTA:

9.18.1 The three members of OUTA who are referred to in the founding affidavit—SATSA, RMI and the AA—have been in existence for many decades. According to their respective websites, SATSA was formed in 1968 and the AA in 1930.

9.18.2 A perusal of OUTA's website reflects that its supporting associations include the Federated Hospitality Association of South Africa or FEDHASA, which has been in existence since 1949. The "businesses" listed on OUTA's website as being its members include the Democratic Alliance.

9.18.3 SAVRALA has, according to its website, been in existence since the 1970's, QASA's website reflects its incorporation in 1978, and SANCU's website states that it was formed in 1961. These three entities are also reflected on OUTA's website as being three of its founding members.

9.18.4 The General Manager of SAVRALA, Val van der Bergh, as early as July 2008 was invited to and attended a stakeholder session in Irene in Pretoria. At the meeting she enquired about the toll

tariff to which I indicated then that an estimated tariff of 50c/km was proposed for light vehicles. For nearly four years, therefore, SAVRALA has had all material information available to it on the strength of which it could have decided to challenge the declaration of the toll roads, but it has done nothing. It cannot now ride on the new coattails of OUTA as an explanation for its inaction.

9.19 Whilst it may be that OUTA was not in existence until 12 March 2012, there is no explanation given for why any of these other entities could not have brought the application earlier or why they have delayed unconscionably in launching a claim for relief.

9.20 Arguments concerning the public interest, in relation to the advancing of this application, cannot overcome the fact that the arguments that are presented are those that would otherwise have been available to the applicants or members of the various applicants in 2008 following the publication of the Government notices attached to the Notice of Motion. The fact that the applicants or the members of the applicants have only now managed to organise themselves into public interest organisations, for purposes of dealing with issues relating to the declaration of certain roads as toll roads in Gauteng, is not an apposite argument to the considerable delay with which these legal proceedings have been brought.

- 9.21 The urgent interim interdict is also sought pending the final determination of proceedings before the Commission. I deal at a later stage in this affidavit with the competency of this relief, but suffice it to state, for present purposes, that on the applicants' version SANCU has known since at least 30 January 2012 of the concerns that it relies on before the Commission with SANRAL's terms and conditions. The complaint was lodged before the Commission for the first time on 28 February 2012—nearly a month before the application was launched.
- 9.22 No explanation is given for the delays in seeking the interim relief pending the determination by the Commission of SANCU's complaint. These delays are at least since from the end of January 2012 or, at best for the applicants, from the end of February 2012.
- 9.23 In these circumstances, the urgency of the application is entirely self-created on the part of the applicants: there is no sufficient or adequate reason to explain why the applicants should be allowed to put SANRAL and the other respondents to the task of having to deal with the application on such an urgent basis. Moreover, there is no reason why the above honourable Court should be put to the task of deciding a matter of this magnitude and importance in the space of a few days.
- 9.24 Indeed, it shall be argued at the hearing of the application that the inference is overwhelming that the applicants have thereby sought to disadvantage SANRAL and the other respondents by having the

application pushed through and heard on an urgent interim basis in circumstances where neither the respondents nor the Court have the opportunity to deal properly and in the fullness of time with all of the issues raised, after the applicants themselves have had at least a month (since 22 February 2012; considerably more from 2007 and 2008) within which to draft their own papers.

9.25 Certainly this is the effect of the applicants seeking urgent relief under these circumstances: to materially and adversely prejudice SANRAL. In this regard, SANRAL has not had sufficient time to prepare this answering affidavit.

9.25.1 In particular, in the time available to it SANRAL has not been able fully and properly to set out its answers to the grounds of review relied upon by the applicants, let alone to put before the above honourable Court all of the relevant documentation detailing the processes leading up to the decisions to toll roads in Gauteng and the interaction between members of the public and SANRAL in relation to those processes.

9.25.2 SANRAL is also not able to detail fully the interaction between it and Government or the strategic thinking that went into the decisions to toll and the implementation of those decisions. Neither does it have the time available to it justify that decision with reference to other funding models—an issue that is

pertinently raised by the applicants in their founding affidavit and which the applicants place great reliance on in the context of the reasonableness of the decision whether or not to toll the Gauteng highways and freeways at all.

9.25.3 SANRAL would also like to have the opportunity, before finally delivering its answering affidavit, to consult with the Governmental respondents regarding those decisions that were taken by SANRAL and Government in consultation or by the one after consideration of representations made by the other. Once again, the time available to SANRAL to do so has been inadequate.

9.25.4 Indeed, SANRAL has not even had the opportunity fully to consult with its own legal representatives or to provide them with all of the relevant documentation and information which informed the decision to toll.

9.26 To this extent SANRAL has been materially prejudiced as a consequence of the circumstances under which this application has been brought and the self-created urgency on the part of the applicants. For that reason alone, it shall be argued at the hearing of this application that the Part A application for interim interdictory relief falls to be struck from the roll with costs.

10 THE NATURE OF THE RELIEF SOUGHT UNDER PART A

10.1 The applicants have formulated the relief sought under Part A as interim relief, which is claimed pending the finalisation of the relief sought under Part B and pending the determination of the complaint laid by SANCU before the Commission.

10.2 I have been advised that for the applicants to succeed in their claim to interdictory relief, they must satisfy the above honourable Court as to their prospects of success in the review application and/or in relation to the complaint before the Commission. That is, the right that is relied upon is a right in relation to the review application.

10.3 In the founding affidavit the applicants have advanced their claim to this relief on the strength of a *prima facie* right, on the basis that the application is interim in nature. That is, the applicants allege that they have *prima facie* prospects of succeeding in the relief sought by them.

10.4 The relief that is sought by the applicants is, however, not interim in nature, but rather is final in effect. In the event that the applicants succeed in obtaining the interim interdict, this will preclude SANRAL from tolling the Gauteng freeways and highways for so long as the interim interdict remains in place. This will be months and perhaps

even years, during which time SANRAL will be prevented from recovering money through tolling.

10.5 SANRAL will not be able, at a later stage, to recover this money from the persons who use the roads whilst the interim interdict is in place. Neither will SANRAL be able to recover the monies through another recovery mechanism—not only because of the unsuitability of some of these methods, as shown below, but also because SANRAL would first require that its decision to fund the GFIP through tolling be set aside.

10.6 After the interim interdict is discharged, SANRAL could not then go back to road users and demand payment of tolls incurred historically. Apart from the fact that the Act does not permit of such a course of conduct, it would be manifestly unfair to impose months or years worth of accumulated bills for tolls for the use of the Gauteng freeways and highways on people who have had no say in the decision to defer payment of toll in this way. Furthermore, SANRAL would then have to incur the expense of administering and operating the tolling network, without any income accruing. This would place SANRAL in breach of its contracts with ETC (Proprietary) Limited; it would also add further financial burdens to SANRAL in circumstances where it was not receiving a corresponding income.

10.7 Furthermore, SANRAL will also suffer the consequences associated with the interruption to its funding pathways. Aside from the obvious

consequence that this might cause SANRAL to default on its loans, which would compromise its international credit rating and jeopardize its ability to raise capital in the future, it will also compromise other projects that SANRAL is initiating or undertaking.

10.8 The applicants seem to adopt the view that there can be no harm in this because SANRAL's debts are guaranteed by the Government of the Republic of South Africa. This specious proposition belies the damage that will inure to SANRAL in the form of the damage to its creditability, but moreover it assumes wrongly that the Government has limitless resources at its disposal. As should have been clear from the budget speech of the Minister of Finance—which the applicants claim to have listened to intently—South Africa does not have limitless funds at its disposal, but is sorely confined in this global market to budget carefully and over the long term and to allocate what funds it has available to it for sorely needed projects elsewhere. These other projects include the implementation and development of National Health Insurance for all South Africans, improvements to education, social welfare reforms and provision of housing, and so on. In his budget speech the Minister of Finance explained how the budget had been determined and allocations of funding decided upon.

10.9 In the circumstances, the South African Government does not have at its disposal unlimited means enabling it to fund on an indefinite and ongoing basis, without any expectation of recovery of those payments,

the unexpected expenditure associated with the GFIP brought about through an interim interdict. Indeed, there is the real possibility that this would compromise South Africa's own credit ratings, to the detriment of future spending and budgetary allocations and contrary to the interests of all South Africans including the users of the Gauteng freeways and highways.

10.10 The applicants have not tendered any guarantee against the losses that SANRAL will suffer in this regard and, it is abundantly clear, they will never be in a position to do so in the future. None of the applicants have anything like the financial wherewithal to meet claims for hundreds of millions and even billions of Rand.

10.11 In the circumstances, the toll income that is lost to SANRAL and the harm that SANRAL—and the Government and accordingly South Africa as a whole—will suffer for so long as the interim interdict remains in place is irrecoverable from road users. Accordingly, the interdict will not be interim in nature, but will have final effect for its duration.

10.12 For the reasons set out above the interdict sought is final in effect and the applicants are required to show a clear right, not a *prima facie* right albeit open to some doubt.

10.13 I have been advised that, on the strength of the founding affidavit, the applicants have not discharged this burden resting on them and accordingly the application for interim relief must fail on its merits. Legal argument in this regard will be addressed to the above honourable Court at the hearing of this application.

11 DELAY

11.1 The relief sought in Part B of the application, and on the strength of which the application for the interim interdict is premised under Part A, is the reviewing and setting aside of certain decisions of SANRAL and the Minister of Transport.

11.2 In terms of section 7(1) of PAJA:

Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date-

- (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or*
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.*

11.3 Leaving aside, for the moment, the question of internal remedies, the relief sought in paragraphs 1 to 3 of Part B of the Notice of Motion was required to have been brought within the 180 day period referred to in section 7(1) of PAJA. That 180 day period expired in respect of the relief sought:

11.3.1 in paragraphs 1.1 to 1.6 of Part B of the Notice of Motion, on or before 24 September 2008;

11.3.2 in paragraph 1.7, on or before 24 January 2009;

11.3.3 in paragraph 2, on or before 24 January 2009;

11.3.4 in paragraph 3.1, on 18 October 2006 and 22 May 2008;

11.3.5 in paragraphs 3.2 and 3.3, on 22 May 2008;

11.3.6 in paragraph 3.4, on 17 August 2008;

11.3.7 in paragraph 3.5, on 16 August 2008;

11.3.8 in paragraph 3.6, on 5 May 2008.

11.4 The provisions of section 7(1) of PAJA are mandatory and serve to preclude a court from entertaining a review application where the

delays have been unreasonable and where the application for review is brought outside of the 180 day period provided for.

11.5 To the extent that the applicants have brought the review application outside of the 180 day period, they are *prima facie* barred from succeeding in the review application and accordingly have no prospects of success on review. Accordingly the applicants are also not entitled to succeed in the application for an interim interdict.

11.6 The 180 day period is capable of being extended by the court hearing the review application, but in deciding whether or not it would be in the interests of justice for this to be done the review court exercises a discretion that must be considered and weighed as against all of the facts and information before it. At the hearing of the application for interim relief under Part A it shall be argued that it is not open to the Court hearing the application for interim relief to pre-empt the exercise of this discretion by the review court and to, in effect, grant the extension of time under the auspices of granting interim relief in circumstances where the review is brought out of time.

11.7 In any event, it is clear that the interests of justice do not militate in favour of the extension of the 180 day time period in the circumstances of this case.

11.8 I have already dealt above, in considering the self-created urgency, with the abject failure on the part of the applicants properly or at all to explain the delays occasioned by them in the bringing of this application. The applicants' culpability in respect of those delays applies equally in relation to the question of delay for purposes of PAJA.

11.9 The applicants had every opportunity to bring such review proceedings on the basis of the annexures attached to the Notice of Motion all of which are *Government Gazette* notices that appeared in the *Government Gazette* on 28 March 2008 and 28 July 2008, as the case may be. No cogent or satisfactory explanation is provided in the founding affidavit as to why the applicants, either jointly or severally or their various members, were not able to institute proceedings to challenge the notices about which they now ostensibly complain and in respect of which they require urgent relief from the above Honourable Court.

11.10 In addition, on their own version as set out in the founding affidavit, the applicants know or ought reasonably to have known the following -

11.10.1 the proposed toll road network had its origins in a policy document produced in April 1998 (paragraph 86, 159);

- 11.10.2 in 2003, the former MEC for Transport and Public Works introduced the Gauteng Toll Roads Bill (Notice 1880 of 2003 in the Provincial Gazette) to give effect to the above policy." (paragraph 188, page 159);
- 11.10.3 in 2005 SANRAL proposed to the Minister of Transport a toll road scheme to upgrade and expand the freeway network in Gauteng (paragraph 91, page 160);
- 11.10.4 between 2005 and July 2007 the proposal was further developed and, in July 2007, the National Department of Transport submitted the GFIP toll road scheme as a proposal to the national cabinet (paragraph 92, page 160);
- 11.10.5 in July 2007, cabinet approved the implementation of GFIP as a state implemented toll road scheme (paragraph 93, 160);
- 11.10.6 on 8 October 2007 the then Minister of Transport, Mr Jeffrey Radebe, officially announced the launch of the GFIP (paragraph 94, page 160);
- 11.10.7 on 12 October 2007, days after the Minister's announcement, SANRAL, acting in terms of section 27(4) of the Act, published its notice of intent to toll sections of N1, N3, N4 and N12

surrounding Johannesburg and between Johannesburg and Pretoria (paragraph 95, page 160);

11.10.8 at or about the same time the above notices together with accompanying diagrams of the relevant road sections were published in various newspapers (paragraph 99, pages 164 to 165).

11.10.9 the closing date for representations by the general public in regard to the tolling of the above sections of the national road was 14 November 2007 while public authorities were given until 14 December 2007 (paragraph 104, page 167);

11.10.10 on 10 January 2008, SANRAL applied to the Minister of Transport for approval for the declaration of sections of national roads, N1, N3 N4 and N12 to be declared toll roads (paragraph 111, page 169);

11.10.11 on 28 March 2008, SANRAL declared the above sections of the national road as toll roads for the establishment of electronic toll; (paragraph 113, page 169)

11.10.12 the above notice and comment process followed by SANRAL in respect of the above sections of national road was repeated

about four months later in respect of the R21 (paragraph 114, page 169);

11.10.13 on 18 April 2008, SANRAL published a notice of intent to toll the newly proclaimed national road R21. The notice of intent toll was published in Government Notice No. 437 of 18 April 2008 published in Government Gazette No 3098 of 18 April 2008 (paragraph 119, page 172) and in various other publications on 18 April 2008 (paragraph 120, page 172);

11.10.14 on 9 May 2008, SANRAL issued a media release to the effect that it had awarded seven contracts for the first phase of GFIP (paragraph 130, page 174);

11.10.15 on 24 June 2008 work commenced in earnest on the GFIP and continued for the next two years in order to prepare certain sections of the proposed toll road network for the FIFA 2010 World Cup (paragraph 136, page 176);

11.10.16 after a three month period of inactivity during the FIFA 2010 World Cup, work on the freeways recommenced and continued into 2011 (paragraph 137, page 176). The precise date of the construction of the electronic gantries are allegedly unknown to the applicants who are only able to state that the construction of such gantries became a feature of the Gauteng landscape in the

period following the World Cup and into 2011 (paragraph 144, page 177);

11.10.17 on 4 February 2011 the Director General for Transport in the national government, Mr George Mahlalela published the toll tariffs for the proposed toll network in terms of section 27(3)(c) of the Act (paragraph 146, page 177);

11.10.18 when the news that toll would be payable and the amount of such toll ultimately reached the public there was a massive outcry which lead to the suspension of the application of the toll tariff which was scheduled to begin on 23 June 2011 (paragraph 148, page 178);

11.10.19 on 8 March 2011 the Minister of Transport announced that a steering committee would be formed to "address" all the concerns surrounding e-tolling in Gauteng (paragraph 151, page 178);

11.10.20 the GFIP Steering Committee duly held public hearings on 24 March, 4 April, 5 April and 6 April 2011 (paragraph 153, page 55);

11.10.21 after the end of the last of the scheduled public hearings during which presentations had been made by the public and heard by

the GFIP Steering Committee, the public hearing was adjourned to 30 June 2011 and those who attended were informed that on 30 June 2011 a final session would be held where the presentations that had been made would be discussed with a view to achieving consensus, as far as possible, as to the solutions to the problems facing the project (paragraph 160, page 181);

11.10.22 on 30 June 2011 no consultations took place. Instead the Director General held a press conference at which he announced the GFIP Steering Committee had drawn its conclusions and was ready to make its representations to the Minister on the revised tariff structure. The Director General told the meeting -

The principle of tolling had been accepted and that the matter under review was the proposed tariff of 66c/kilometer, initially suggested as the charge for a vehicle without an e-tag account.

(paragraphs 161 to 163, pages 181 to 182);

11.10.23 on 10 August 2011, cabinet approved the revised toll tariffs for phase 1 of the GFIP (paragraph 166, page 182);

- 11.10.24 on 11 August 2011, SANRAL issued a media release in which it stated that it welcomed cabinet's decision that in due course revised toll tariffs would be formally published and the public would be informed of the commencement date of e-tolling (paragraph 167, page 182);
- 11.10.25 on 23 October 2011 after a further public outcry following the news that the tolling of the proposed toll roads were set to proceed on revised tariffs, the Minister of Transport instructed SANRAL to halt all processes relating to the tolling of national roads ((paragraph 169, page 183);
- 11.10.26 despite the above statement by the Minister of Transport, on 27 October 2011, SANRAL issued a statement to the effect that the GFIP project would go live in February 2012 and advised of the commencement of e-toll registration from 7 November 2011 (paragraph 172, page 183);
- 11.10.27 at a hearing at the Gauteng provincial legislature on 11 November 2011 it was announced that the tolling of the proposed roads and the so called "user pay" were in place and that this would not be changed (paragraph 176, page 184);
- 11.10.28 the hope that SANRAL and the Minister of Transport may be seriously reconsidering the raising of funds for phase 1 of GFIP

by means of e-tolling was further shaken on 7 February 2012 when the Minister of Transport made a public announcement that the State would not be abandoning the "user pay" principle but was exploring modalities which would be "not so burdensome" for Gauteng motorists (paragraph 185, page 186). In his budget speech on 22 February 2012 the Minister of Finance announced that the toll system would be implemented with reductions in the amount of the toll payable.

11.11 I point out that the applicants are very coy in relation to the history of the GFIP as set out above. Having set out in some detail the history of the matter, the deponent states that not everyone knew about the proposed tolling of the Gauteng freeways and highways when the announcements were made and notices published in the newspapers.

11.11.1 The deponent does not state, however, that he was ignorant of the proposed tolling or that all of the applicants were ignorant of the proposed tolling under the GFIP.

11.11.2 Self-evidently, it could never be that all of the entities involved in the applicants were ignorant of the history of the matter or of the decisions taken to toll the Gauteng Highways and Freeways. On the contrary, there must have been a widespread appreciation of the fact that tolling was to be implemented. The AA in particular, has been aware of these decisions from the very outset, as has

SAVRALA, the Democratic Alliance, SANCU, and FEDHASA. Both the AA and the Democratic Alliance have, for a number of months, been threatening to review the declaration of tolls as part of the GFIP. Despite these threats, neither have done anything.

11.11.3 Moreover, the grounds on which the review application has been brought—including the alleged lack of proper consultation, the failure to state the proposed tolls at the time of the declaration of the roads as toll roads, the failure to publish the intended decision to toll sufficiently widely or for a sufficient period of time—have been known since the very decisions were made.

11.12 Therefore a number of the applicants and at least a substantial number of their members have known—or should reasonably have known—of the decisions now sought to be reviewed and set aside since the time when the decisions were first taken. Moreover, these same people have known—or should reasonably have known—of the grounds of review now relied on, since about the same time: namely, when the decisions to toll were first taken.

11.13 On any version, the applicants and their members ought to have known about the decisions since the proposed tolls were published—on the applicants' own say so, to tremendous hue and cry from the public—since February 2011.

- 11.14 It is self evident that the applicants have been aware for months and, in fact, for longer that the tolling of the proposed toll road network would proceed and waited until the proverbial eleventh hour to launch this application.
- 11.15 In the interim and on the strength of the decisions that the roads would be tolled and the approvals given for tolling, SANRAL has expended vast sums of money in upgrading the roads and related infrastructure. In the case of the GFIP and based on decisions taken, namely the declaration of toll roads and the obtaining of environmental authorisations, SANRAL accessed funding of approximately R20 billion from the domestic debt capital markets and from international investors to undertake the project. Whilst it was engaged in the process of calling for tenders and appointing contractors, there were no objections received by members of the public, including the applicants and their members.
- 11.16 If a review application had then been brought, setting aside the decisions to toll the GFIP or the environmental approvals given to SANRAL, then SANRAL would have had the option to revisit the GFIP as a whole and to give fresh consideration to the nature and extent of the improvements to be made.

11.17 The supine attitude of the applicants and their members, however, means that everything undertaken by SANRAL in the course of the GFIP upgrades was done on the strength of tolling and a funding model calculated on the strength of tolling. In addition to the expenditure in relation to the upgrades and construction work itself, SANRAL has also entered into long-term contracts in relation to the continued maintenance of and support for the GFIP roads. This includes the long-term contract to ECT JV. The financial agreements and capital structuring arrangements have also been concluded on the strength of—and commitments made both nationally and internationally on the strength of—the financial model posited in the form of tolling.

11.18 The upgrading of the freeways in Gauteng and associated toll infrastructure and financing costs that are subject to tolling has cost in the order of R20 billion. As stated above, this money has been borrowed by SANRAL, on the domestic debt capital markets and by the issue of bonds and from foreign lenders. The repayment of these bonds is required by the creditors concerned failing which a default will occur thus requiring the South African Government to honour guarantees that it has provided for the repayment of certain of the amounts concerned. Any default by SANRAL of its obligations will therefore prejudice not only SANRAL but also the South African Government and may very well have negative consequences for the sovereign rating of the Country. Ratings Agencies have already raised concerns in this regard.

11.19 Certainly, this matter is one of great public concern in relation to the potential inability of SANRAL to satisfy its debts to their creditors and the impact thereof for the South African Government who has guaranteed portions of this debt. SANRAL, as a state owned company, would have to look to Government for assistance in payment of any debt, which is not guaranteed. This situation is one that the applicants have exacerbated by virtue of the lateness of this application. The obligations of the South African Government in respect of SANRAL to make payment of its debt are now well established and have been since at least May 2010 and when the Government guaranteed a R31.91 billion Domestic Medium Term Note Programme of SANRAL's and which was listed on the Johannesburg Stock Exchange Securities Exchange.

11.20 If the decisions to toll the GFIP are set aside at this late stage, SANRAL will suffer losses in relation to the financial cost of these contracts, the wasted expenditure related to implementing tolling, and the long-term costs of continued borrowing whilst alternative funding is secured. Not only SANRAL, but third parties will also suffer losses. Retrenchments and job losses will inevitably follow. All of this is in addition to the loss of investor confidence and harm to SANRAL's credit ratings that will also ensue as a result.

11.21 The applicants and their members stood back and watched whilst this expenditure was being undertaken by SANRAL and whilst the roads were actually built and the infrastructure upgraded. It is highly telling that, in the years that it took to complete the construction work, none of the applicants or their members even issued a letter of demand or a demand under PAJA.

11.22 This delay is not and never can be construed as being reasonable. Moreover, it can never be considered to be in the interests of justice for this delay to be condoned or for an extension of time to be granted.

11.23 I have been advised, moreover, that even if a court subsequently finds that there are good grounds to criticize the decisions taken and which are sought to be reviewed, the above factors would in and of themselves justify the finding that the decisions should not be set aside irrespective of the grounds for challenging them.

11.23.1 I have been advised that, in this regard, our Courts have a discretion whether or not to set aside administrative action that is found to have been unlawfully taken.

11.23.2 One of the circumstances in which the Court will exercise its discretion not to set aside administrative action is where the action has been implemented, including through the construction

of the item that forms the subject matter of the administrative action.

11.23.3 This is preeminently a situation that would cry out for the exercise of such a discretion in favour of SANRAL and, at the hearing of the Part B application, SANRAL will seek an order to that effect. Once again, therefore, the review application does not have any prospects of succeeding.

11.23.4 Legal argument in this regard will be addressed to the above Honourable Court at the hearing of this application.

11.24 In the face of these delays, the applicants deal with condonation, as a distinct topic, in paragraphs 323 to 429 (pages 248 to 270) of the founding affidavit. The applicants correctly concede that in terms of PAJA the application should have been brought in a reasonable time and not later than 180 days of their having become aware of the decisions.

11.25 The specific grounds set out in these paragraphs of the founding affidavit will be dealt with below. Suffice it to state that the suggestion that the interests of justice dictate an extension of the 180 day limit to facilitate and allow condonation in circumstances where the applicants have waited years before launching proceedings is untenable, unjustified and falls to be rejected.

11.26 In general terms, however, the oft repeated suggestion that there was a general ignorance on the part of the public to tolling cannot serve to assist the applicants and some of their more prominent members, who were not similarly ignorant, but were well acquainted with and participated in the processes. Moreover, as I have shown above, this professed general ignorance is simply not plausible when seen in the context of what has transpired and in the publicity that has surrounded the intended tolling. At the most basic of levels, I point out that the construction of the GFIP has seen prominent signage displayed along all affected routes indicating that e-tolling would take place. There has been extensive advertising for months in print and electronic media of the proposed tolling and the desirability for members of the public to register for e-tags.

11.27 On the applicants own version it is stated -

More significantly, even members of the public who saw the notices when they were published in 2008 would have been entirely ignorant of the impact that such declarations would have on them until such time as the Minister first published the schedule of tariffs on or about 4 February 2011. (paragraph 331, page 250).

11.28 Accordingly, any notion of general ignorance cannot extend beyond February 2011. This clearly does not justify a delay in a period

aggregating to over a year for these proceedings to have been launched.

11.29 Insofar as SAVRALA is concerned, on their own version they were advised in or about 2009 by van Niekerk of SANRAL:

about the nature of the open road tolling system that had been planned and how it would work; and that the estimated cost of use of the toll road will be about 50 cents per kilometer (paragraph 375 to 376, pages 258 to 259).

11.30 Hence, SAVRALA can have no plausible explanation for why it did not launch the review application in 2009.

11.31 There were numerous meetings which are detailed in the founding affidavit between representatives of the first respondent and the first applicant which detail the extent of SAVRALA's knowledge and their complete inaction.

11.32 Whilst SANRAL sympathises with the position of QASA, they don't begin to approach the standards required for condonation to be granted, which should, in the circumstances, be refused.

11.33 In all of the circumstances, it is denied that a proper case has been made out for the extension of the time periods for the bringing of a

review application. As I have shown above, the interests of justice in any event are contrary to the granting of the extension of time.

11.34 Finally, on the subject of delay, I have been advised that the grant of an interim interdict pending the finalisation of a review application is a discretionary remedy. I have been advised further that one of the factors that a court will take into account in exercising this discretion is the extent to which the applicant for the relief has delayed before bringing the application for interim relief.

11.35 In this regard, an applicant who delays unnecessarily will be refused relief as a consequence of those delays. This is especially so in circumstances where the delays have led to prejudice on the part of the respondent or, as in this case, where the respondent has acted to his detriment by continuing with and completing the activity sought to be interdicted.

11.36 At the hearing of this application it will be argued that the circumstances of this case are precisely those in which the above honourable Court should, in the exercise of its discretion, decline to grant the interim relief sought as a result of the delays on the part of the applicants in seeking to review and set aside the declarations of the toll roads and the environmental authorisations.

12 THE REVIEW OF THE ENVIRONMENTAL AUTHORISATIONS

12.1 As I have indicated above, the applicants seek to review and set aside the environmental authorisations granted by the then Department of Environmental Affairs and Tourism under the auspices of the Director General of Environmental Affairs.

12.2 The applicants have annexed to the Notice of Motion marked "B1" to "B6" the authorisations granted in respect of the GFIP. A plain reading of all of these documents reflects that the decision was granted under the authority of the then Director General Ms Yako.

12.3 These environmental authorisations were, as is apparent therefrom, granted in terms of the provisions of the National Environmental Management Act No. 107 of 1998, as amended ("NEMA") read with the Environmental Impact Assessment Regulations of 2006 ("the EIA regulations").

12.4 For the sake of completeness, I attach hereto marked "**NA1**" a copy of the authorisation given in respect of the decision sought to be reviewed in terms of paragraph 3.7 of Part B of the Notice of Motion.

12.5 In terms of the provisions of section 43 of NEMA, the applicants were afforded a right to appeal to the Minister of Environmental Affairs against any decision taken by the Director General.

12.6 Section 7(2) of PAJA obliges the applicants to first exhaust this right to an internal appeal before they are entitled to bring review proceedings.

The provisions of section 7(2) provide as follows:

- (a) *Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
- (b) *Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
- (c) *A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.*

12.7 No internal appeal was lodged by any of the applicants against the environmental authorisations granted by the Director General of Environmental Affairs. The applicants have therefore failed to exhaust their internal remedies under PAJA.

12.8 The applicants do not explain in the founding affidavit why an internal appeal was not pursued. Significantly, had the applicants or their members timeously invoked the appeal provisions under NEMA, there

might not have been any need for this urgent application: the matter could have been dealt with properly and appropriately.

- 12.9 The applicants do not set out any exceptional circumstances why they should be exempted from having to exhaust their internal remedies and they do not seek an order exempting them from the requirement that they first exhaust their internal appeal under section 43 of NEMA.
- 12.10 In the circumstances, the review Court is precluded from entertaining the review application against the environmental authorisations by virtue of the provisions of section 7(2)(a) of PAJA. The applicants therefore have not demonstrated a reasonable prospect of succeeding in the review application for the setting aside of the environmental authorisations.
- 12.11 Moreover, in circumstances where the applicants have not exhausted their internal remedies, it is not for the above Honourable Court to intervene in this matter without first having the appeal processes completed in respect of the records of decision in terms of NEMA and the applicable regulations in terms of this Act.
- 12.12 Finally, I have been advised that the applicants have in any event misconstrued the nature and extent of the inquiry to be undertaken under NEMA and the EIA regulations. To this extent, the applicants

have failed to make out a proper cause of action for the relief sought under the review application against the environmental authorisations.

12.13 I deal with this aspect in more detail elsewhere in this affidavit and will deal with it in due course in the course of answering specifically Part B of the application. Legal argument in this regard will also be addressed to the above honourable Court at the hearing of this application.

12.14 Suffice to state, for present purposes, that the applicants have once again in this regard failed to demonstrate that they have prima facie prospects of success on review.

13 THE NCC COMPLAINT

13.1 The applicants have, in prayer 3 of Part A of the Notice of Motion, sought an order interdicting the implementation of tolling pending the final resolution of the complaint lodged by SANCU with the Commission or for the period referred to in section 114(2) of the Consumer Protection Act (in the Notice of Motion the applicants refer to the time period contemplated in section 114(1) of the Consumer Protection Act; there is no such reference in subsection (1) and, presumably, the applicants intended to refer to section 114(2), which does refer to time periods during which interim relief will operate).

- 13.2 In paragraph 455 of the founding affidavit it is stated that the applicants seek this interim relief under the Consumer Protection Act.
- 13.3 The complaint in question is a complaint made in terms of section 71(1) of the Consumer Protection Act to the Commission. The Commission is obliged, in terms of the Act, to take certain steps in the investigation of the complaint and it has powers that it can exercise once it has completed its investigation.
- 13.4 Section 114 of the Consumer Protection Act makes provision for interim relief to be granted by a court in the circumstances set out in that section. Section 114 does not apply to complaints made to the Commission under section 71(1) of the Consumer Protection Act, but only insofar as concerns complaints made to the Consumer Tribunal. The applicants do not allege that there has been any complaint made to the Tribunal and, as is apparent from the founding affidavit, at this stage the Commission is still in the process of investigating and/or dealing with the complaint made to it. At this stage, therefore, the Commission is yet to exercise any of its administrative powers under the Consumer Protection Act.
- 13.5 There is no other provision under the Consumer Protection Act for the granting of interim relief and, in particular, there is no provision in the Consumer Protection Act that entitles SANCU (or any other person) to

obtain interim relief pending the investigation of a complaint by the Commission.

13.6 I have been advised that, in law and in the absence of anything specific contained in the Consumer Protection Act, the applicants are not entitled to seek interim relief from the above honourable Court in circumstances where the relief is to be granted pending an investigation by an administrative functionary.

13.7 If SANCU is dissatisfied with the progress being made by the Commission in the investigation of the complaint, then the remedy for SANCU is not to interdict SANRAL but to compel the Commission to deliver an expeditious decision in relation to the complaint placed before it. That said, there is apparently no basis for any such concern—the Commission is investigating as it should and the provisions of the Consumer Protection Act are being adhered to.

13.8 I point out, finally, that the applicants are first required to exhaust the remedies available to them in law under the Consumer Protection Act before approaching the above Honourable Court for the urgent relief now sought.

13.9 No such action has been taken by SANCU notwithstanding a number of remedies available to it under the Consumer Protection Act, which

remedies will be addressed in argument at the hearing of this application.

13.10 For these reasons, the applicants are not entitled to the interim relief sought in Prayer 3 of Part A of the Notice of Motion and the application for interim relief on this basis falls to be dismissed.

14 Further argument with regards to these preliminary issues will be addressed to the above honourable Court at the hearing of this application.

SUBSTANTIVE ISSUES IN ANSWER TO THE FOUNDING AFFIDAVIT

15 I respond substantively below to the assertions contained in each paragraph of the founding affidavit. Prior to doing so I address the following matters -

15.1 the material allegations ("the material allegations") in the founding affidavit;

15.2 a summary ("the summary") of the toll declaration process;

15.3 a detailed exposition ("the detailed exposition") of the toll declaration process to illustrate the lack of merit inherent in the material allegations;

- 15.4 a response to the affidavits of Hilda Maphoroma ("Maphoroma's affidavit"), Denis John Tabakin ("Tabakin's affidavit"), Wayne Benjamin Osrin ("Osrin's affidavit") and Tshidi Leatswe ("Leatswe's affidavit") which are attached, to the founding affidavit marked "**FA5**" to "**FA8**" respectively (pages 333 to 367) and to the assertions advanced on behalf of QASA.
- 16 As will emerge from the summary and the detailed exposition this application lacks substantive merit. In the absence of substantive merit, the applicants attempt to found their entitlement to the relief sought on what can only be termed an emotive appeal to the court highlighting what they contend to be inordinate and severe prejudice which will be sustained by the applicants in general and the hundreds of thousands of users of the proposed toll road network should tolling commence on 30 April 2012.
- 17 It is also necessary for me to describe the role of the first respondent in South Africa, the challenges which it faces, and how this impacts upon the relief sought by the applicants.
- 18 Finally, and to the extent that any of the allegations in the founding affidavit have not been covered by what has already been dealt with by me, I include a *seriatim* response to the founding affidavit.

THE MATERIAL ALLEGATIONS IN THE FOUNDING AFFIDAVIT

19 The material allegations which found the applicants approach to the court for the relief detailed in the Notice of Motion are summarized in paragraph 29 (pages 141 to 142 of the founding affidavit).

"29.1 That SANRAL failed to give proper notice under section 27(4)(a) of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ("the Act") of the intent to toll the proposed toll network in that :

29.1.1 the content of the notice given was defective and/or insufficient;

29.1.2 SANRAL failed to ensure that such notice was brought to the attention of the public generally as well as to interested entities that would be materially affected by the tolling of the proposed toll network which were either known to or reasonably identifiable by SANRAL and/or the Minister of Transport; and

29.1.3 the time period allowed by SANRAL for comment from the public was manifestly insufficient in the circumstances;

29.2 that the approval by the Minister of Transport and/or the declaration by SANRAL under section 27(1) of the Act that the proposed toll road network be tolled was so unreasonable that no reasonable decision maker could have so decided, in that :

29.2.1 the expense of levying and collecting toll in the manner proposed is so disproportionate to the costs sought to be

recovered that it cannot reasonably be expected of users of the proposed toll network to bear such costs; and

- 29.2.2 *the proper enforcement of the open road tolling scheme on the proposed toll network is practically impossible;*
- 29.2.3 *there was a manifest failure on the part of SANRAL to meet the mandatory conditions set out in section 27;*
- 29.2.4 *SANRAL and/or the Minister of Transport were not open to and did not properly consider alternative methods of funding;*
- 29.2.5 *SANRAL's application to the Minister of Transport for approval omitted material information in the form of the inordinate cost of the levying and collection of toll on the proposed toll road network;*
- 29.2.6 *SANRAL and/or the Minister of Transport failed to apply its/his mind and/or take into consideration that the social impact assessment before him was "based on the assumption that an integrated transport plan is successfully implemented" and "in the event of there being viable alternative (routes)";*
- 29.2.7 *SANRAL's application to the Minister of Transport for approval omitted material information on the extent of the adequacy of public transport and/or viable alternative routes;*
- 29.2.8 *SANRAL's application created the impression (and the Minister of Transport's approval was granted on the basis) that adequate public transport alternatives were or would be put in place when in fact this would not be so;*

29.2.9 *SANRAL's application created the impression (and the Minister of Transport's approval was granted on the basis) that valid environmental authorization would be obtained by SANRAL prior to the implementation of GFIP Phase 1 when in fact this would not be so;*

29.3 *that SANRAL failed to follow the proper procedure for the obtaining of the necessary environmental authorization for the road works necessary for the upgrading of the roads that would form part of the proposed toll network;*

29.4 *that the basis upon which the environmental authorization was obtained was materially defective and/or misleading in substance in that it was not brought to the fourth and fifth respondents' attention that the road works to be conducted were for the purposes of the establishment of a toll road network;*

29.5 *that the operative clauses of the "E-Toll terms and conditions" are unfair, unreasonable and unjust in terms of the Consumer Protection Act 68 of 2008."*

20 The matters traversed in:

20.1 paragraphs 29.3 and 29.4 of the founding affidavit are addressed substantively in the schematic response to the assertions contained in the founding affidavit; and

20.2 paragraph 29.5 of the founding affidavit have been overtaken by events pursuant to the withdrawal of the E-toll terms and conditions which

constitute the subject matter of the complaint detailed in that paragraph.

21 These assertions, summarized above, are amplified throughout the founding affidavit and the material allegations which support these contentions require me to:

21.1 summarise the toll declaration process; and

21.2 articulate, by means of a detailed exposition, the salient aspects thereof.

22 The aforementioned analysis will address the substance of the applicants' complaint and demonstrate the lack of merit inherent in the material allegations.

A SUMMARY OF THE TOLL DECLARATION PROCESS

23 As appears from what is set out below, there were several attempts to determine an acceptable methodology to fund the upgrading of Gauteng freeways. Although it was widely agreed that the upgrading of freeways was required to ensure continued economic prosperity of the Gauteng Province, funding requirements had historically prevented this upgrading from taking place.

24 Indeed, there was a general consensus amongst all role players—including national and provincial government, industry and businesses, and members of the public generally—that an upgrade to Gauteng freeways and related infrastructure was necessary. As is detailed on the first applicant's website and as is conceded in the founding affidavit (at paragraph 32, pages 144 to 145) :

"OUTA supports the need for upgrades and road additions that have been effected and have been planned in terms of the Gauteng Freeway Improvement Project as well as all future urban and other route construction and improvements as and when these become necessary to meet transportation needs in South Africa."

25 Notwithstanding this ostensible "support" the first applicant -

"opposes E-Tolling as a means to fund such construction and road improvements, in particular in this instance ..."

26 In essence, therefore, the complaint before the above Honourable Court is not about whether the GFIP was required or necessary, but purely about whether or not the chosen method of funding the GFIP passes constitutional review. This question of how to fund the GFIP is preeminently a policy matter that falls within the ambit of the discretionary powers of an administrator into which ambit our courts—in accordance with the principles of separation of powers and judicial deference—will not intrude. Legal argument in this regard will be addressed to the above Honourable Court at the hearing of this application.

- 27 It can be immediately stated that the decision to fund the GFIP through tolling was not a decision that was taken hastily or without due consideration for other possible funding mechanisms.
- 28 Since the late 1990s, the Gauteng province considered tolling as an option to fund the upgrading of Gauteng freeways. The Gauteng province in fact, drafted legislation in this regard although it was not passed in the Gauteng legislature.
- 29 In about 2000, SANRAL together with the Gauteng province considered an unsolicited bid from the private sector to upgrade certain freeways and apply a toll to the upgraded sections. The bid was, however, not feasible and was not explored further.
- 30 In 2005, SANRAL proposed to the then Minister of Transport a scheme ("the Gauteng Freeway Improvement Scheme") to upgrade and expand the freeway network in Gauteng. The Minister of Transport required the proposal to be further evaluated and an inter-governmental (national, Gauteng Province, Tshwane, Johannesburg and Ekurhuleni Metropolitan Councils and district municipalities in Gauteng) workgroup was established and chaired by the Department of Transport to determine and agree project principles.
- 31 This inter-governmental work group produced a report titled :

"Gauteng Network Integration Process: Proposal for a Gauteng Freeway Improvement Scheme".

32 This report was finalized during mid 2006 whereafter the participants in the inter-governmental work group presented the report to political decision makers for acceptance. The report concluded that the Gauteng Freeway Improvement Scheme should be further explored with as its objective to :

32.1 improve living conditions;

32.2 ensure sustainable economic growth in the Gauteng Province; and

32.3 reduce traffic congestion and associated costs/delays to road users.

33 It was furthermore prescribed that the Gauteng Freeway Improvement Scheme was to be based on the following fundamental principles :

33.1 the promotion of public transport and travel demand management;

33.2 enhancing the concepts of intelligent transport systems and road network management;

33.3 ensuring sustainable maintenance, upgrading and expansion of the freeway network;

33.4 the utilization of the user-pay principle as a financing tool; and

33.5 its implementation as a State toll scheme.

34 SANRAL was tasked in further developing the Gauteng Freeway Improvement Scheme with participation of officials of the province and councils. In this regard, the social and economic impacts of the Scheme were investigated, specific road improvements as well as the integration with public transport and travel demand management were identified and a determination of toll feasibility was conducted.

35 From 2006 until mid 2007, SANRAL made several presentations to the Gauteng provincial government (legislature and portfolio committees) and metropolitan councils and portfolio committees.

36 As part of the design process, the provincial and metropolitan council officials participated in cluster meetings which focused on traffic and toll studies which were then being conducted. These studies explored, amongst other matters, the most equitable toll strategy and the impact of tolling on diversion to and attraction from the supporting road network onto the freeway network and travel demand management options. These cluster meetings also provided a forum where the proposed interchange improvements and road upgrades were discussed.

37 In mid 2007, the Department of Transport submitted, what had by then become known as the Gauteng Freeway Improvement Project ("GFIP") to the national cabinet for approval of its implementation. For the purposes of the cabinet's submission, a toll tariff (in March 2007 Rand terms) of 50 cents per kilometer for light vehicles was indicated. In July 2007, cabinet approved the implementation of the GFIP as a State implemented toll road. The Minister of Transport officially announced the project on 8 October 2007, after which the toll declaration process commenced.

38 The implementation of the Gauteng toll scheme was widely communicated in the media from 2006 and in early 2007 an estimated tariff of 50 cents per kilometer (March 2007 Rand terms) was reported to the media. Coverage about the freeway upgrading, tolling concept to be implemented and the expected toll tariff took place in the printed media, on radio and television. In the circumstances, the contrary statements made in the founding affidavit — to the effect that the applicants, their members and the members of the public could not properly consider the proposals to toll because they had no notion of what the toll fees would be — are simply untrue.

39 I have conducted an analysis of the media coverage during that time and attach hereto marked "**NA2**" a summary of the printed media publications in SANRAL's possession highlighting :

39.1 the publication;

39.2 the headline, alternatively the subject matter of the publication;

39.3 whether the amount of toll tariff was specifically reported on.

40 Following the official announcement by the Minister of Transport of the GFIP on 8 October 2007, which official announcement is attached hereto marked "**NA3**", the toll declaration process commenced.

41 In terms of the South African National Roads Agency Limited and National Roads Act 7 of 1998 ("the Act"), SANRAL was responsible for the declaration of the proposed National Road sections to be declared as continuous Toll Roads. The road sections that were declared as toll roads were :

41.1 national road 1: Section 20: Annandale to Midrand;

41.2 national road 1: Section 21: Midrand to Proefplaas Interchange (N4);

41.3 national road 3: Section 12: Old Barn Interchange to Buccleuch Interchange;

41.4 national road 4: Section 1: Koedoespoort to Hans Strijdom Interchange;

41.5 national road 12: Section 18: Diepkloof Interchange to Elands Interchange;

41.6 national road 12: Section 19: Gillooly's Interchange to Gauteng/Mpumalanga Provincial Border; and

41.7 national road R21: Section 1 & 2: Rietfontein Interchange (N12) to Hans Strijdom Interchange.

42 The declaration was preceded, in accordance with section 27(4)(a) of the Act, by the publication of a notice of intent, informing interested affected parties of SANRAL's intent to request the Minister of Transport to approve the above-mentioned sections as continuous toll roads. This notice of intent also reflected the approximate locations of the proposed Mainline Toll Gantry positions along each proposed section. A copy of this notice of intent is attached hereto marked "**NA4**".

43 During this process comments were received from interested and affected parties. In terms of section 27(4)(a) of the Act, SANRAL was required to give notice of its intention to request the Minister of Transport to declare a Proclaimed National Route a Toll Road, and in such notice to -

43.1 provide an indication of the approximate positions of the Toll Plazas/Gantry pay positions contemplated for the proposed toll roads; and

43.2 invite Interested and Affected parties, municipalities (district and local council) and premiers to comment and make representations on the proposed declaration and the positions of the Toll Plazas/Gantry pay positions and direct written comments and representations to SANRAL within thirty days of the date of the Notice for the interested and affected parties and sixty days for the remaining parties.

44 Apart from the required advertisements that were published in the Government Gazette the notices of intent were also published in the following regional and national newspapers :

44.1 the Star on 12 October 2007;

44.2 the Sunday Times on 14 October 2007;

44.3 the Sowetan on 12 October 2007;

44.4 the Pretoria News on 12 October 2007;

44.5 Beeld on 12 October 2007;

44.6 Mail & Guardian on 13 October 2007.

45 The closing date for representations for the general public was 14 November 2007 and 14 December 2007 for public authorities.

46 On 14 April 2008 the Premier of the Gauteng Province requested the incorporation of the R21 into the proclaimed National Road Network in order to become part of the GFIP. In this request the national Minister of Transport was requested to declare the sections of provincial roads P157-1 and P157-2 as national roads. This request was duly acceded to and the R21 was incorporated into the proclaimed National Road Network.

47 In addition to the publishing of the aforesaid notice of intent in respect of the R21 in the Government Gazette it was also published in the following print media :

47.1 the Star, Pretoria News and Beeld on 18 April 2008; and

47.2 the Sunday Times on 20 April 2008.

48 The closing date for representations was 18 May 2008 and 18 June 2008 for the general public and the public authority respectively.

49 Eighty-two representations were received from the public for the tolls during the toll declaration process that commenced on 12 October 2007. All these representations were considered and responded to. Comments were also received from the South African Bus Operators Association, ("SABOA"). These comments were not received in the manner stipulated in the notice of intent. SABOA was in favour of upgrade of major roads in the Gauteng area

but were concerned with the potential impact of tolling to the commuter and long distance bus industry. SABOA proposed that public transport services be exempted from the proposed toll fee. Only two representations were received from the public in so far as the toll declaration of the R21 was concerned.

50 These representations and comments identified the following key issues -

50.1 tolling would be of no benefit and use of public transport was not a viable alternative;

50.2 tolling of existent non-toll national roads was unacceptable;

50.3 toll tariffs and discounts;

50.4 methodology of payment;

50.5 that tolling would increase diversion to an already congested secondary network aggravating traffic congestion;

50.6 there would be no benefit to the economy; and

50.7 the cost of consumer goods would increase;

51 Written responses to all these representations were provided and attempts were made to accommodate the issues which had been raised. SANRAL provided the following comments in the report to the Minister of Transport with respect to the key issues raised, a copy of which is attached marked "NA5":

"TOLLING WILL BE OF NO BENEFIT AND USE OF PUBLIC TRANSPORT IS OF NO CONSEQUENCE

The Gauteng Freeway Improvement Project has been developed under the direction of the Department of Transport, together with, the metro authorities in Tshwane, Johannesburg, Ekurhuleni and the Province of Gauteng, to address the transportation challenges we are faced with. The project includes the upgrading and/or construction of approximately 560kms of freeways over the next 7 to 10 years in the Gauteng Province as well as the development and implementation of a public transport integration plan.

This plan considers future transport initiatives such as the Gautrain (including the Gautrain bus feeder and distribution network), the National Rail Plan and the Bus Rapid Transit systems being implemented by the local authorities. Opportunities for integration include the provision of intermodal transfer hubs, park and ride facilities, High Occupancy Vehicle lanes, etc.

Public transport initiatives such as the Gautrain may therefore not serve everyone's specific transport needs. However, all these initiatives collectively together should serve the needs of a large portion of the travelling public and relieve the current and future traffic congestion.

TOLLING OF EXISTING NON-TOLLED NATIONAL ROAD IS UNACCEPTABLE

The Gauteng Freeway Improvement Project will be implemented in phases, starting with the upgrading of approximately 235 km of the existing freeway network in Gauteng, including the sections of the N1, N3, N12 and potentially the R21. The improvements comprise of the provision of additional lanes, interchange upgrades, provision of auxiliary and climbing lanes before and after on –ramps, critical cross road intersection upgrades, toll related infrastructure and equipment, overload control facilities and integration with public transport projects. The existing freeway network will therefore be under construction in the two years leading to the 2010 FIFA World Cup. The total anticipated expenditure on the project up to 2012 is R15 Billion. The toll revenue will be directly utilized to finance, operate and maintain the freeway network.

Apart from road upgrading, the scheme makes provision for inter alia, concrete barriers between freeway carriageways, freeway lighting, Intelligent Transport Systems (including electronic signs, CCTV, traffic detection equipment etc.), improved incident management and the promotion of ridesharing through the provision of park and ride facilities, high occupancy vehicle lanes and integration with public transport services such as Bus Rapid Transport (BRT), Gautrain, longer distance road based public transport and the upgraded metro rail system.

All these initiatives collectively serve the needs of a large portion of the travelling public and should relieve the current and future traffic congestion. These benefits include options and access to public transport, reduced travel times, job opportunities, sharing in the wealth as a result of economic growth.

The freeway improvement toll scheme will reinvest the revenue into operations, maintenance and expansions of the project and public transport infrastructure. The income generated by the project will be

utilized for infrastructure provision to the benefit of residents of the province.

For the first phase of the project, new roads are not implemented, although it is planned to implement new routes in future. As explained above, these routes should be considered within a regional/urban context, since the construction of these routes will relieve congestion on existing freeways.

The user pay principle, including the tolling of existing infrastructure is an international practice. It is done internationally and for this project to benefit the public in general (improved services), for environmental reasons and for provincial and regional economic growth requirements.

METHOD OF PAYMENT

The toll transaction will take place electronically via Dedicated Short Range Communication (DSCR) through the use of electronic tags when a vehicle traverses a gantry point. The strategy is referred to as an Open Road Free Flow Tolling System where all vehicles will receive transponders (tags) and register accounts for toll payments. A transponder will be fitted on the windscreen of the vehicle communicating with overhead readers eliminating the need to stop, reducing delays and safety risks associated with manual toll collection. Secondary ways to identify vehicles without electronic tags, such as automated number plate recognition (ANPR) will be introduced.

Various methods of toll payment will be possible and may include:

- *Direct credit from credit cards or pre paid accounts*
- *Internet Payment*
- *Cell Phone Payment*
- *Cash or credit/ debit/ fleet card payment at convenient locations such as -*
 - *Toll plazas when approaching/ leaving Gauteng*

- *Customer service centres located along Gauteng freeways*
- *Supermarkets*
- *Fuel stations*

A system will also be implemented to allow occasional users, such as infrequent visitors to Gauteng, to declare or pay for their freeway use through a “day pass”.

TOLL TARIFFS AND DISCOUNTS

In South Africa, toll tariffs are determined after a thorough study and consideration of various factors including receiving representations. During this process the toll strategy, toll tariffs and discounts are considered.

It is the current practice to discount the posted tariff for various types of road users. The toll tariffs are approved by the Minister of Transport and thereafter gazetted. Toll tariffs are adjusted annually, according to the Consumer Price Index (CPI) for the past year. Therefore, the tariff stays the same in real terms.

TOLLING WILL INCREASE DIVERSION TO AN ALREADY CONGESTED SECONDARY NETWORK AND AGGRAVATE TRAFFIC CONGESTION

In the absence of upgrading the freeway network, there would be no alternatives except a congested freeway network and a congested secondary road network, where delays are experienced and safety risks escalate. The impact of traffic growth on the supporting network with no improvements/ expansions to the freeway network, needs has to be taken into consideration.

Traffic growth on the Gauteng freeways is in the order of 5 to 7% per annum and many freeways have already reached their capacity with

the result that any additional traffic will be “diverted” to the parallel/ supporting road network. Such diversion will also directly impact the efficiency of public transport which in South Africa is mainly road based.

Intensive traffic modelling indicated that an upgraded and tolled freeway network will attract traffic, in spite of tolling and therefore “absorb” some of the growth that would have taken place on the secondary network. The options provided to the road user through the upgraded freeway system with the expected benefits will rather attract users from the supporting network.

However, there is also the need for a multifunctional and integrated approach. It follows that it is critical to address the capacity deficiencies of the freeway system together with the promotion and integration of public transport and the expansion of the supporting network through the implementation of new routes.

NO BENEFIT TO ECONOMY

The ever increasing congestion and resulting impacts have a significantly negative impact on the economy and quality of life of people in Gauteng. When considering that the Gauteng economy generates nearly 38% of the total value of South Africa’s Gross Domestic Product (GDP), it is clear that Gauteng cannot afford any impediment to traffic flow, since such impediment will stifle economic growth and also have significant impacts on general human safety and quality of life.

A detailed economic impact study was undertaken, where the two most important macroeconomic effects, namely the contribution to gross domestic product (GDP) and creation of jobs were evaluated. Increased GDP – i.e. increased production – is experienced in the form

of job creation, higher wages and reduced economic hardship, which is clearly an important measure. Economic studies further indicated that the non-upgrading of roads will slow down economic growth in the Gauteng Province, which will affect the economic prosperity of Gauteng residents in general.

At the height of the construction period in 2009 more than 29 000 people could be directly employed as a result of the project. From 2012 onwards it is expected that

3 030 people would be directly employed on either maintaining the road or maintaining and operating the toll system. This number then increases to 12 843 in 2027, largely as a result of the business time savings. The majority of the direct jobs created during the construction period are created at the low income level, thus having the ability to contribute significantly to poverty alleviation. The project generates an even higher number of indirect job opportunities.

The proposed Gauteng toll roads would result in increases in transport capacity and, in consequence, lower transport costs and road user costs of the existing roads even after tolling compared to the 'do nothing' alternative. In addition, costs will be reduced on the road transport system generally as the increased capacity of the toll roads would result in reduced congestion on the road network. This also contributes to the reduction of air pollutants in the environment.

These cost reductions would be felt in the economy either as changes in spending patterns (as people spend these cost reductions) or as increased savings. The savings, in turn, would come back into the economy as increased loanable funds and potential increased investment. Not only do these changed spending patterns and increased investment impact directly on GDP but they also have their own multiplying effect on the macroeconomic variables.

In addition, the freeway improvement toll scheme will reinvest the revenue into operations, maintenance and expansions of the project and public transport infrastructure. The income generated by the project will be utilized for infrastructure provision to the benefit of residents of the Province. This would bring about additional growth in the national and especially Gauteng regional economies. As a result there would be substantial job creation and business growth impacts.

COST OF CONSUMER GOODS WILL INCREASE

The economic study evaluated the estimated cost increases for different types of consumer goods and the impact to consumers could face due to tolling. It found that households with incomes less than R 24 365 would face cost of living increases of 0.13%. This is equivalent to 13 cents for each R100 spent on consumer goods. However, this is a worst case/ direct cost scenario not considering the benefits accrued with the upgraded freeway network that will result in reduced road user costs. The aggregate estimated benefit to the user is in the order of two times the cost.

Furthermore, toll fees for business travel is a tax deductible expense. The impact of tolling for consumers is therefore minimal.

The levying of road user charges is an international practice, where countries in developed and developing countries utilize the user-charge principle for various reasons such as funding of road infrastructure, mitigating/ reducing the growth of emissions and the impact on the environment and to reduce the attractiveness of private and single occupant travelling. The propose scheme aims to address all of these principles.

Not expanding, upgrading or maintaining the existing freeway networks will slow down economic growth in the Gauteng Province, which will affect the economic prosperity of Gauteng residents in general.

52 Reports containing details of the process followed, information regarding studies performed and issues raised during the intent to toll process were forwarded to the Minister of Transport who, after considering the content of these documents declared the respective national road sections as toll roads.

53 Construction contracts were thereafter concluded and road construction itself then commenced. This construction that commenced was in terms of the GFIP and on the basis that the costs thereof would ultimately be funded by tolling of the sections of road in question.

54 On 9 May 2008 SANRAL issued a media release to the effect that it had awarded seven contracts for the first phase of the GFIP and on 24 June 2008, and as is noted by the applicants -

"work commenced in earnest on GFIP and continued for the next two years in order to prepare certain sections of the proposed toll road network for the FIFA 2010 World Cup" (paragraph 136, page 176).

55 The additional freeway capacity created through the implementation of the GFIP contributed greatly to the successful hosting of the 2010 FIFA World Cup event in Gauteng.

56 After a period of inactivity during the FIFA 2010 World Cup work on the freeway recommenced and continued into 2011.

57 On 4 February 2011 the Director General for Transport in the national government, Mr George Mahlalela published the toll tariffs for the proposed toll network in terms of section 27(3)(c) of the Act. This led to the public outcry to which the applicants refer and resulted in the Department of Transport suspending the application of the toll tariff which was scheduled to begin on 23 June 2011. As a direct consequence of the concerns which had then been expressed surrounding e-tolling in Gauteng it was decided during March 2011 that a steering committee would be formed to address concerns surrounding e-tolling in Gauteng.

58 As appears from annexure "**FA36**" to the founding affidavit the Minister of Transport stated inter alia :

"Today we announce the government-side of the Steering Committee, as a result of concerns surrounding the e-tolling in Gauteng. We decided on an intensive consultation process. We are consulting because we do not want to choke the economy and the people of Gauteng. At the same time, we want to meet our commitments for the repayment of this R20 billion debt".

"It was in November 1996 when the Province of Gauteng identified a toll roads network project for the province. This was followed in 1998 by the Gauteng Toll Road Strategy.

However, a province, unless it has special legislation to that effect, does not have the competence to declare and operate toll roads. This can only be done through national government and its agencies.

To this end, in 2005 a working group chaired by the Department of Transport consisting of the South African National Roads Agency Limited (Sanral), Gauteng province and the City of Johannesburg was formed and produced a report in June 2006.

This working group also prepared a Cabinet Memorandum which empowered Sanral to become the project manager and fund-raiser for this toll roads project.

I must emphasise that this was the first phase. On 2 February 2011, the plan for the second phase was presented to government which extends the project to other networks in Gauteng.

By 2006 the GFIP had already been adopted as a joint project of the Department of Transport, the Gauteng Department of Public Works, Roads and Transport as well as municipalities in Gauteng, namely Johannesburg, Tshwane and Ekurhuleni and Sanral.

In 2007, the Mayoral Committee of Johannesburg received a report on the Gauteng Freeway Improvement Project (GFIP). In 2007, the City of Johannesburg further produced its own report.

Discussions continued between 2006 and 2009 with and between the City of Johannesburg, Gauteng province and Sanral and included the future beyond Phase 1 (the current Phase) of the Gauteng Freeway Improvement Project (GFIP) to the subsequent phases.

In October 2007, Notifications on the intention to Toll were sent to the directly affected Districts and Municipalities. This included the Ekurhuleni Metro, City of Johannesburg, City of Tshwane, Metsweding Municipality and the Nokeng Tsa Taemane Municipality.

At the same time, Notification on intention to Toll was also sent to districts and municipalities not directly affected by the proposed tolling GFIP scheme.

These were the West Rand District Municipality, Westonaria Local Municipality, Mogale City Local Municipality, Midvaal Local Municipality, Emfuleni Local Municipality, Randfontein Local Municipality, Sedibeng Local Municipality, Leseding Municipality and Kungwini Municipality.

It was in February and July of 2008 that the R21 - between Tshwane and the OR Tambo International Airport - and parts of the network around Johannesburg were declared toll roads.

The issue facing Gauteng province together with the municipalities at the time was how to fund this ambitious programme.

It became clear given the fiscal constraints at the time that the only available option was to fund the programme through debt funding. For this reason Sanral was proposed as project manager because of its capacity to raise funds in international markets.

This is the reason why provincial roads such as the R21 - all roads with R are provincial roads, those with N, national roads - were transferred to Sanral. The transfer and proclamation as national roads had to take place because tolling is a competence of the national Department of Transport.

It is now my responsibility as the Minister of Transport to address all the current concerns relating to this issue. We will deal with all the attendant challenges in this regard together with the people of Gauteng.

As indicated above, following our meeting of 22 February, we made a commitment that a Steering Committee would be formed to address all the concerns surrounding e-tolling in Gauteng.

I must state that tolling remains one of the most viable means of funding transport infrastructure all over the world. Many countries - developing and developed - including China, the United Kingdom, the United States of America, use tolling to raise funds for the construction of much-needed transport infrastructure. There is no debate in our country about whether or not we require well-maintained roads, world-class airports or a modern rail sector; the debate is only about how these projects must be funded."

59 The GFIP steering committee held public hearings on 24 March, 4 April, 5 April and 6 April 2011.

60 This process culminated in cabinet approving revised toll tariffs for phase 1 of GFIP on 10 August 2011.

A DETAILED EXPOSITION OF THE TOLL DECLARATION PROCESS TO ILLUSTRATE THE LACK OF MERIT INHERENT IN THE MATERIAL ALLEGATIONS

61 The founding affidavit reveals a lack of appreciation of the complexity of the process which has culminated in the decision to commence tolling on the proposed toll road network on 30 April 2012. Whilst I do not intend reiterating what is set out above, an analysis of certain documents which were produced during the course of this process, and have been alluded to above and to a

limited extent in the founding affidavit, reveals the lack of merit in the material allegations.

62 The Gauteng transport network integration process produced a proposal ("the Proposal") for a "Gauteng Freeway Improvement Scheme" during or about September 2006. A copy of the document which encapsulates the Proposal and which was produced as part of "*a joint initiative of the Department of Transport, Gauteng Department of Public Transport, roads and works, Municipalities in Gauteng and SANRAL*" is attached hereto marked "**NA6**".

63 I detail hereunder salient extracts from that document commenced with a high level executive summary in which it is recorded :

"EXECUTIVE SUMMARY

The Gauteng province finds itself confronted by a challenge of diminishing freeway capacity, which threatens rapid and free mobility between business centres, business centres and residential areas and to tourism destinations within the province. This situation is caused by a combination of factors including the marginalisation and under-use of public transport within the province; insufficient road space relative to transport demand within a compact economic powerhouse of South Africa; the increasing use and reliance on private cars within a context of historically sub-optimal public transport systems; and the spill over effects of a failing rail system that has suffered years of under-investment and poor service quality.

Transport policy is however very clear in defining the vision and priorities to be pursued by all transport and roads authorities. The

White paper on National Transport Policy calls for the development and maintenance of transport infrastructure and prioritises its development in accordance with sustainable economic and development principles. It indicates that this should happen within the content of a sound financial base. It also refers to the need to encourage more efficient land use, correcting past imbalances and reducing travel distance and time. It further calls for the prioritisation of public transport over private transport. It specifically indicates that future national road network management will be administered through the creation of a Roads Agency, but also acknowledges the statutory roles and responsibilities of provincial and municipal roads authorities and sets clear principles of cooperative governance.

The various spheres of Government have developed strategies and plans that seek to implement the vision and principles of the White Paper, and within Gauteng these include the Department of Transport's draft Road Infrastructure Strategic Framework, which is the blueprint for roads development planning; the Gauteng Province's Strategic Agenda for Transport; the Integrated Transport Plans of municipalities within Gauteng and the SANRAL's Horizon 2010 Vision of the national road system. What has perhaps been lacking has been a degree of aggression in implementing these plans and the achievement of inter-sphere coordination to ensure plan integration and coordination of delivery programme to avoid duplication, fragmentation and conflict.

In a new joint Government process, the various roads authorities undertook a process of developing a plan for the improvement of the Gauteng Freeway System, guided by a broader intention to ensure Transport (all modes) Network Integration in Gauteng. This process has been conducted with an agreed strategic intention to manage the demand for road network capacity in the province through an integrated system of infrastructure development and travel demand management. The objective of the Freeway Improvement proposal developed was thus defined to be "to provide a safe and reliable

strategic road network system which would optimize the movement of freight and passengers, manage congestion and focusing on the promotion public transport through the efficient and effective use of existing and future freeway road space, in order to grow the economy and enable sustainable development to the benefit of all in the province.

Noting the need to discourage private vehicle use and promote public transport use, and acknowledging the challenge of funding shortages for the required major freeway system improvements that are required, several funding models were investigated and their appropriateness evaluated. The most suitable funding mechanism was identified to be a user payment based toll scheme, with electronic fare collection as a basis to ensure free traffic flow. Care was taken to align the scheme with transport policy by defining a set of principles that should guide such scheme development. As a result the proposed scheme has defined targeted interventions that should form part of the scheme including the prioritisation of public transport on the freeway system; the incorporation of ride sharing to promote high vehicle occupancy; the cross-subsidisation of public transport from toll revenues; the integration of the freeway scheme with Strategic Public Transport Networks (SPTNs) and the Gautrain and the regulation of heavy vehicle movement.

The proposed toll scheme comprises a combination of existing road network capacity expansions and the development of new freeway. The existing road network improvements comprise the ring road network, the Ben Schoeman highway and the R21 and R24 links to the Johannesburg International Airport. The new freeway sections include the construction of essential missing links both in the north-south and east west directions including the PWV9 north and south; and the PWV5 and PWV14 respectively. The scheme is designed to open up the hitherto 'silo" design of the Gauteng Freeway system in order to give more options to the road user and provide multiple routes to any

single destination. The proposed scheme however faces some challenges relating to the implementation schedule that should be seriously considered and discussed to ensure that they get addressed before they become serious impediments to scheme success. These include agreement on the total scheme; elements that will comprise the initial construction works (ICW); construction industry capacity in the next 5 years; the FIFA World Cup 2010 deadline; the environmental compliance processes.

The proposed freeway improvement toll scheme will be used to also implement other Government priorities such as employment creation, skills development and the roll out of Broad Based Black Economic Empowerment (BBBEE), with particular focus on SMME development within the construction industry. It is however emphasises that the success of this initiative depends on the commitment of all three spheres of government to working together to arrive at an agreeable, integrated and demand responsive freeway system for the province, which will not only address current bottlenecks in the freeway system but also contribute to the provision of an adequate and sustainable pro-public transport road network system for the province."

64 The challenges which were being faced, were identified and included -

64.1 insufficient road space relative to transport demands;

64.2 increasing usage and reliance on private vehicles;

64.3 marginalisation and under use of public transport;

64.4 systematic under-investment in the rail system;

64.5 insufficient public funds to increase road space and improve existing road space management.

65 In summary, and prior to traversing certain of the problems which are foreshadowed above and amplified below, it is recorded in the introduction to the problem statement (page 6) :

"The Gauteng province is confronted by a challenge of diminishing freeway system capacity, which is threatening rapid and free mobility between business centres, business centres and residential areas and to tourist destinations. "

66 In relation to the first so-called challenge, being insufficient road space relative to transport demand, the following is recorded -

"2.1 Insufficient road space relate to transport demand

Gauteng, the economic hub of South Africa, is experiencing phenomenal growth due to favourable economic conditions, which demand the rapid movement of commodities and passengers to and from local and international markets and business centres.

The ability of transport systems, particularly the road network system, to cope within demand is being tested on a daily basis. The public, business and media increasingly complain about the negative impact of some of the prevailing conditions on the roads e.g. high congestion on most freeways and major arterials, high accident statistics, sub-optimal road maintenance and the high percentage of trucks on the road system.

Traffic volumes on the national freeway network in Gauteng have grown by an average of 5%. This growth against the backdrop of very little infrastructure construction of the past 25 years is the main reason for congestion currently experienced."

67 The Proposal then proceeds to highlight the exponential effect of traffic growth which varied from 63% to 129% within the Gauteng freeway system. It is recorded in this regard -

"There is also evidence that vehicle ownership is increasing exponentially. Currently Gauteng has 2,55 million registered vehicle owners. A 7% growth was recorded for 2005."

68 The Proposal then proceeds to identify the most common negative impacts of insufficient road space which include :

68.1 deterioration in quality of life -

"2.1.1 Quality of life

Due to the rapid traffic growth morning and afternoon traffic peak periods have extended to almost 3 hours respectively, resulting in increased travel times between home and work, and decreased private time for family, education and leisure.

The bulk of public transport in South Africa is road based. Traffic congestion therefore affects the quality of life of

many poor South Africans reliant on public transport who often need to commute long distances.";

68.2 reduced productivity -

"2.1.2 Productivity

Many productive hours are wasted as a result of increased travel times. Long travel times must also impact on people's productivity when they finally arrive at work.";

68.3 failure to achieve economic development potential -

"Research based on a Sectoral Macroeconomic Model indicates that South Africa has a chance to attain an output growth rate of close to 6% per annum over the medium term, reaching 7,5% over the long term. But a caveat exists, namely the ability of government to address constraints such as the lack of skills and inadequate infrastructure including road infrastructure.

Successive Ministers of Transport have referred to the performance of South Africa's transport system as "poor" and various official documents have warned about the negative effects that inadequate transport infrastructure exert on the country's ability to generate sustained and high economic growth.

Studies have found that transport constrained development can be expected to lag between 0,5% to 1,5% below unconstrained development.

Further, insufficient road capacity negatively affects the profitability of developments in the province. The inability of traffic reaching certain destinations (new developments), or the additional financial burden conveyed to the developer to provide road infrastructure as a condition of approval, makes many of these developments non-viable. As a result of this additional cost burden, business may relocate and/or scale down their local operations.

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

In addition, the lack of development of the West Rand vs. the East Rand can partially be attributed to the way in which these areas are served with freeways. The East Rand has the N12, N17 and R21, whilst the West Rand is only connected to the Pretoria with the N14 (R28).";

68.4 an increase in direct cost of travel -

"Extended trip time and stop go conditions increase fuel consumption and vehicle wear and tear, this increasing user transport costs.";

68.5 environmental impact -

"The increase of vehicle emissions as a result of traffic congestion on the roads has a negative impact on the environment. World wide, great emphasis is being placed on managing travel demand and reducing environmentally unfriendly vehicle emissions."

69 The Proposal, as indicated above, identified an increasing usage and reliance on private vehicles.

70 A third factor identified was what has been termed a marginalization and under-use of public transport.

71 The Proposal also revealed that there had been a systematic under-investment in the rail system.

72 Finally, and perhaps most importantly, the insufficiency of public funds required to increase road space and improve existing road space management is highlighted in the Proposal.

73 The fundamental objective of an integrated transport solution was traversed in paragraph 3 of the Proposal -

*"The Gauteng Transport Intergovernmental Charter sets out a number of objectives to achieve in respect of transport infrastructure
These include to:*

- *"Manage our existing road space better by shifting our focus to providing capacity for moving people and goods, rather than vehicles.*
- *Minimise the construction of new major roads, guided by our objectives of promoting public transport, densifying our urban areas and containing urban sprawl.*

- *Upgrade township and access roads.*
- *Transform the way in which we deliver road infrastructure including a focus on public- transport-friendly and walking-friendly measures.*
- *Integrate with the Expanded Public Works Programme, contractor development BBBEE and rural local economic development approaches in building our transport infrastructure.*
- *Provide quality public transport infrastructure.*
- *Ensure maximum road safety for pedestrians and commuters.”*

"In respect of road space management our objectives include to:

- *Ensure that optimal use is made of existing road space for the effective movement of people and goods with a bias towards public transport.*
- *Ensure that road space is shared equitably between all its users and that proper provision is made for pedestrians and public transport vehicles.*
- *Ensure that the costs of transport infrastructure are apportioned fairly among the users.*
- *Promote a positive public attitude and growing consensus around the need for TDM measures, including the need for alternatives to the single- occupant car."*

Drawing from the above, it is proposed that our objective in respect of the Gauteng freeway system is to provide a safe and reliable strategic road network system which would optimize the movement of freight and passengers, manage congestion and focusing on the promotion public transport through the efficient and effective use of existing and future freeway road space, in order to grow the economy and enable sustainable development to the benefit of all in the province."

74 The strategic intention of the Gauteng freeway programme is traversed in paragraph 4 of the Proposal, which reflects that introducing tolling was part of the strategic planning from the outset and which was aligned to the other concerns and objectives highlighted in the Proposal -

"The strategic intention of a Gauteng Freeway Improvement Programme is to manage the demand for road network capacity through an integrated system of infrastructure development and travel demand management.

It is proposed that this should involve three elements:

- Introducing a toll scheme on the majority of the freeways in Gauteng which would aim to prioritise public transport users, manage private car use and ensure freight moves efficiently on the freeways system.*
- From the funds generated by the toll scheme, provide new freeway and public transport infrastructure (dedicated lanes, shelters, lighting, pedestrian walkways etc) on designated public transport roads adjacent, adjoining or affected by the freeway system.*

- *Introduce travel demand management measures such as car pooling and sharing, traffic flow control and incident management to ensure that private car use of the freeways system is more efficient.*

It is anticipated that the impact of these three elements would be to:

- *Reduce congestion;*
- *Provide public transport prioritization so that public transport users are prioritized and public transport can become the preferred mode; and*
- *Ensure that freight moves efficiently around the province.*

Critical to the achievement of this balance will be the integration of planning across the spheres involved in road network management in Gauteng, optimization of the use of the different modes of transport and the effective management of road network operations."

75 As matters transpired it was resolved that in order to keep the toll tariff as low as possible, that this infrastructure cost should be funded through the fiscus subject to appropriate legislation being enacted.

76 Precisely how the improvement of Gauteng's freeways could contribute to achieving national and provincial priorities is dealt with in paragraph 5 of the Proposal which concludes with the following statement -

"A freeway improvement scheme is but one form of strategic infrastructure, among those referred to above, that by reducing congestion and increasing mobility of goods and people can ensure that Gauteng's competitiveness improves and the economy grows."

77 Having summarised out the key objectives in respect of transportation and infrastructure the Proposal then details how these objectives should translate into principles to guide the GFIP.

78 There are several key principles which are amplified in the Proposal -

78.1 public transport must be prioritised;

78.2 recognition of unique functions of different parts of the transport system and the promotion of modal integration and alignment;

78.3 optimal use must be made of road space;

78.4 there must be equitable and sustainable maintenance, upgrading and expansion of the road network system;

78.5 different transport interventions must be integrated and contribute to the economic and development strategy for Gauteng;

78.6 there must be what is termed "co-operative governance".

79 Each of these considerations is reflected in the Proposal at paragraphs 6.1 to 6.6. Aspects of each of these principles as recorded in "NA6" are highlighted below -

"6.1 Public transport must be prioritised

All spheres of government are committed to the prioritisation of public transport. In metropolitan areas, the use of public transport is essential for integrated and sustainable transport management. In accordance to this principle, the promotion of public transport should be an integral to all transport projects including the proposed freeway improvement scheme.

Thus respect of freeways the principle could be implemented in the following ways:

- *Identification of parts of the freeway and major road network as public transport corridors in instances when the major mode/user of the road network is public transport vehicles (buses and mini-bus taxis).*
- *Designing relevant parts of the network in ways which are public transport friendly. This can include provision of dedicated public transport/high occupancy vehicle (HOV) lanes, lighting, shelters, taxi and bus bays, and transport facilities etc.*
- *Ensuring that if part of the network is designated as a public transport corridor, competition with other modes such as freight or private car is minimised. This may imply in practice that major arterials are designated and designed for public transport while freight and private cars are forced to use*

the freeway system. In general, the freeway system is not the most desirable for public transport.

- *Treating public transport differently in any user charging scheme so that it is more affordable and thus more attractive SPTN routes could also be subsidised from toll revenue. Designing new parts of the road network in a way that in the future it could accommodate light rail in the cross section.*
- *Integrating the strategic road network with commuter rail corridors so that rail and road complement and do not compete with each other.*

6.2 Recognition of unique functions of different parts of the transport system and the promotion of modal integration and alignment

The draft Road Infrastructure Strategic Framework for South Africa (RISFSA) identifies a number of different road classes with different functions. In Gauteng, particularly as a result of rapid urbanisation many of the original functions of roads have changed and mobility corridors now serve purposes of accessibility. There are high levels of competition on some roads between freight and public transport as well as inappropriate use of road by some freight sectors that should be using rail. To ensure optimal use of our transport system, it is important that the road network system is reviewed with the intention of ensuring that each road class is designed and used in accordance with its designated function. In addition, to ensure network sustainability, road and rail transport systems should increasingly be designed to complement each other rather than compete.

In Gauteng, the DPTRW together with national and local government have embarked upon an exercise to review the strategic road network. Part of this exercise will include looking at the key functions and appropriate design standards for different classes of roads in accordance with RISFSA, as well as aligning the relationship between road and rail.

In respect of the freeway improvement scheme, this principle could be implemented to:

- Promote the movement of freight within designated corridors in a cost effective and seamless manner, using the most appropriate mode.*
- Ensure that the different parts of the freeway system perform in accordance with their primary functions i e freight movers should have the required strength and durability, while public transport routes should have the required public transport friendly amenities.*

6.3. Optimal use must be made of road space

Gauteng is a small highly urbanised province where land is costly and in short supply. While some new links in the road may need to be constructed the priority should be to maximise the use of existing road space and optimise the use of any new additional capacity.

This principle can be implemented through the adoption of the following kinds of measures, referred to as Travel Demand Management (TDM):

- **Promotion of trip sharing** through the provision of special lanes for high occupancy vehicles, discounted tariffs for the use of the road in the event of a toll network, dedicated lanes at intersections, the creation of lift club and pool vehicles, etc.
- **Implementation** of Intelligent Transport Systems (ITS) which enables road authorities to monitor the network to identify incidents, effectively manage them and pro-actively inform the public of these events to alter their trip planning ITS also makes it possible to redirect traffic to other routes by means of Variable Message Signs, Travel Time Estimation etc.
- **Congestion pricing** to manage travel demand during peak hours and encourage users to rather use public transport. This can be done by increasing toll tariffs for all or specific vehicle classes in congested periods. For example, in the event of a toll system the toll tariff for heavy vehicles may be increased dramatically in peak periods in order to encourage deliveries to take place outside peak hours. Alternatively, it may not be increased on identified freight corridors, in order to encourage the use of heavy vehicles on those specific corridors.

It should be noted that in order to actively manage the use of road space, it is important that an integrated road network of ring roads and open networks are available to redirect traffic

6.4 There must be equitable and sustainable maintenance, upgrading and expansion of the road network system

To sustain economic growth in the province, funding streams for infrastructure maintenance, upgrading and expansion should be sustainable and consistent across spheres of government and classes of roads. Well maintained roads reduce the scale and severity of road accidents.

Different funding sources (tolls, developer contributions rates, fiscus, loans, grants) can be used to fund different classes of road infrastructure and different kinds of transport infrastructure. Where appropriate, ‘The user pay principle’ is key to achieving sustainable sources of funding for transport. In particular the private car and freight car users should be paying a greater portion of the real costs of using the road network.

6.5 Different transport interventions must be integrated and contribute to the economic and development strategy for Gauteng

The different spheres of government are committed to an integrated transport system including road, rail, Gautrain, taxi and bus operations. Thus any freeway improvement scheme proposal must contribute pro-actively to achieving such integration.

Measures to implement this principle in respect of a freeway improvement scheme include:

- *Including congestion management as one of the objectives of a tolling scheme and setting toll prices in a way to achieve this objective;*

- *Setting the toll price in a way that would push private car users travelling in a North/South direction to use the Gautrain and road based public transport;*
- *Reaching agreement across spheres of government on relevant action plans for identified national freight corridors;*
- *Ensuring that where appropriate freight is moved by rail and not road;*
- *Prioritisation of public transport on the freeway system, thus also supporting taxi recapitalisation and bus transformation; and*
- *Introducing legislation to encourage high vehicle occupancy through car pools and ride-sharing supported by the provision of HOV lanes; and having a single incident management system for all parts of the major road network.*

Similarly, while it has been argued above that a freeway system will contribute to economic growth and transport mobility, this principle also ensures that the freeway system actively contributes to the growth and development priorities of all spheres of government. These include:

- *The setting and meeting of BBBEE targets in the maintenance of the freeway network and management of a user charging scheme;*
- *Maximising the use of EPWP methods in the construction and maintenance of the freeway system;*

- *Prioritising new links to the network which will facilitate economic activity in previously disadvantaged areas e g West Rand;*
- *Improving links in the network, which provide access to prioritised tourist destinations such as Dinokeng, Cradle of Humankind and Eye of Africa in the South.*

6.6 Co-operative governance

In his State of the Nation address in February 2006, President, Thabo Mbeki said: integration of planning and implementation across the government spheres ... one of the prime areas of focus in our programme for the next term of local government. In this regard we will be guided by the Inter-Governmental Relations Framework Act. We must in practice respect the system of cooperative governance ..."

The Gauteng Intergovernmental Transport Charter agreed to by all MECs and MMCs in Gauteng is a practical manifestation of co-operative governance. It sets out the different roles and responsibilities of local and provincial government as well as areas where joint action should be taken.

It would therefore be important that in respect of a freeway improvement scheme, all three spheres of government should be involved in the conceptualisation, planning and operations/management."

80 Public transport was promoted as is evident from the BRT as well as the Gautrain with its supporting bus feeder network. In so far as differential

treatment for public transport is concerned, in August 2011 Cabinet resolved to exempt qualifying public transport from paying toll fees for the use of the GFIP roads.

81 In so far as the principle that "optimal use must be made of road space" is concerned –

81.1 following this report, SANRAL performed detailed studies in relation to the implementation of HOV lanes and dedicated public transport lanes, which are being further investigated to be implemented on specific road sections;

81.2 ITS systems have been implemented;

81.3 SANRAL has implemented a time of day discount regime to encourage vehicles, and in particular heavy duty vehicles, to travel outside peak hours.

82 The funding of the GFIP is a matter which is subject to a great deal of criticism by the applicants and yet, as early as 2006, there was a motivation for a state funded toll scheme to improve the Gauteng freeway system. That motivation appears in paragraph 7 of annexure "NA6", which reflects the consideration of other forms of funding and in which the following is recorded –

"7. **MOTIVATION FOR A STATE FUNDED TOLL SCHEME TO IMPROVE THE GAUTENG FREEWAY SYSTEM**

Having illustrated the need to develop and improve economic infrastructure, and understanding that road infrastructure is very expensive both from a capital and maintenance perspective, particularly if the latter is not done timeously, roads authorities need to carefully determine where sustainable funding will be sourced. The following sections give an overview of some of the available funding options:

7.1 Fuel Taxes

South Africa had a ‘dedicated fuel fund’ in the past that ring-fenced funds for road projects. However, the levy was abolished in 1986. Since then, all road maintenance and construction costs for non-toll roads have been funded from the fiscus through local, provincial and national budget allocations. Toll revenue is accounted for separately and is, in terms of legislation, only expended on toll roads.

There is a tax levied on each litre of fuel sold in South Africa. This levy is a major revenue generator for Government, however apart from the allocation to the Road Accident Fund; much of it goes to the central fiscus for allocation across the spectrum according to needs and government priorities. A similar tax is applied all over the world, which is in most instances much higher than the fuel tax in South Africa. From a roads perspective, it is felt that more of this money should be allocated back to roads.

The reinstatement of a “dedicated fuel fund” is debated and demanded by many. It should however be kept in

mind that fuel levies do not guarantee a dedicated ongoing revenue stream. Even in the pre 1986 era, the fuel levy was not CPI linked and this resulted in a constant battle to obtain more road funding. The draft RISFSA initially proposed that this funding mechanism be reintroduced however National Treasury was not in support of the proposal

The DOT has indicated that it will investigate this matter further with the intention of tabling it again at a later stage.

7.2. Vehicle registration/license fees and traffic fines

In South Africa, income generated from vehicle registration and license fees as well as traffic fines, although collected by provincial and local spheres of Government, is not necessarily available to transport authorities for infrastructure provision. It generally gets absorbed into the central fiscus and is allocated in accordance with provincial or local priority investment areas. It is an important source of 'own' revenue for provincial and local government, and understanding the competing demands at this level, there can never be any guarantee whether it will find its way back to the roads sector.

7.3. Development impact fees

Developer contributions towards infrastructure provision are taking place in South Africa, although not on a formalized, national basis. In some instances, developers make a bulk services contribution, others provide

infrastructure as part of the conditions of approval for land use amendment schemes, and others do not provide/pay anything.

Currently, efforts by the Gauteng Provincial Government and some of the bigger metropolitan authorities are underway to formalize a policy for developer contributions. However, current legislation does not allow provincial and national authorities to benefit from these contributions.

Developer contributions can play an integral role to finance the local supporting road network. It is unlikely that developer contributions will be sufficient to fund upgrading and expansions of the freeway network. A system to determine which developer should contribute is also very difficult to establish. This mechanism may be more applicable to municipal road networks.

7.4. Shadow tolling

Shadow tolls have been used in the UK, Finland and the Netherlands, and the terminology has confused many people. No tolls are levied from road users under this approach. Instead the shadow tolls are paid by Government to the operator, based on traffic counts on the road, an agreed rate per vehicle/vehicle type and an agreed set of performance criteria.

The benefits of this system do not therefore stem from the development of a new source of funds, or from making users internalize the external costs of their

travel but rather from Government commitment to continued financial support over several years.

The shadow toll approach does not require traffic to slow down for toll collection. It does require the Government and private sector to agree the vehicle counts and because of the difficulties surrounding legal arrangements, the transaction costs can be very high. The current PPP framework in South Africa has not been tested in this regard, but more importantly extensive lobbying will need to be made at National Treasury to get commitment of public funds for repayment of the private investment over a concession period of typically thirty years.

7.5. Tolling

Tolling is a user based funding mechanism for road infrastructure development It enables the mobilisation of substantial capital funds upfront, usually through debt equity, for the construction of infrastructure such as freeways. The implementation of toll roads by governments in developing countries and countries in transition is becoming an attractive option since:

- It allows fast implementation of infrastructure projects necessary to stimulate much needed economic growth.*
- It does not require the government to make available additional funding from their*

current revenue base for these projects.

- *It allows them to rather spend the funds for essential services such as health and education and other parts of the transport system such as upgrading of gravel roads in townships.*

Toll financing has a distinct advantage of accelerating the availability of initial funding for construction as compared to traditional tax-supported highway finance. The initial capital cost for a project could therefore be financed over a shorter period than through limited tax based budgets. As a result, the benefit of increased roadway capacity is available to the republic sooner. Therefore, tolling is an equitable way of implementing the user-pays principle and does not compromise fiscal integrity.

Under a toll scheme two options are available for raising debt, namely private project financing and a state toll scheme.

With private project financing, a complex process of risk identification and cost detailing is undertaken prior to the preparation of concession agreements. Risks and costs can usually be offset by benefits, and the ratio of these normally determines the feasibility of such ventures. For the Gauteng freeway system, an unsolicited bid proposal for the upgrading and expansion of the freeway network was considered and

evaluated. In the end it was concluded that the proposal was not feasible.

The second option is for application of the 'state toll road option. This option will allow road authorities to provide a balanced toll and not only focus on the more profitable sections. The scheme can be implemented systematically, as and when demand requires it, and when all land acquisition and environmental processes are completed.

It is thus proposed that improvements to the Gauteng freeway network be financed as a State Toll Road. A preliminary financial analysis of the scheme showed that it could be viable to implement as a State Toll Road, which will provide excellent benefits to road users at an acceptable toll tariff."

83 Paragraph 8 of the Proposal details how a toll scheme can meet the principles to guide a Gauteng freeway improvement scheme and paragraph 9 details features of the proposed toll scheme. The salient features are amplified below:

"9.1 Open road free flow tolling

A conventional toll collection on urban freeways where all vehicles are stopped and payment is by means of cash, credit or electronic card will result in unacceptable delays or large toll plazas.

It is therefore proposed that toll collection takes place using Electronic Toll Collection (ETC) tags, such as those being used for the Bakwena toll concession.

In order to encourage ETC usage, ETC users will receive a substantial discount, or alternatively, non ETC users will be penalized to make provision for the back office costs to collect toll charges from them.

9.2 The strategy should not affect route choice

In order to ensure good distribution of traffic throughout the network it is proposed that toll points be positioned in such a way that they do not affect route choice. For example all freeway routes from Johannesburg to Pretoria would be tolled and at the same tariff. Users would also be able to switch routes without any effect on the toll charged (Figure 1).

9.3 Directional tolling in corridors

It is proposed that a directional toll system should be used to provide more fairness. Tolls charged to users using a portion of the route will be minimised. For example, users travelling between Pretoria and Midrand will be charged once travelling southbound. For the return journey, they will not be charged. On the contrary, users travelling between Pretoria and Sandton will be charged for both journeys since they may utilise the full extent of a new or upgraded section.

Although the directional toll seems to be fair and viable, other options such as closed toll systems will also be evaluated.

9.4 Equal toll tariff at toll points based on 20km of travel

It is proposed that the toll charge be based on a cent per km rate related to approximately 20 km of travelling on the network. Thereby, the same toll tariff will be charged at all the mainline toll points for the same vehicle type."

84 In relation to the proposed toll scheme the following matters are detailed -

84.1 the scope of proposed upgrading and expanded network;

84.2 funding requirements in regard to which it is recorded :

"10.2 Funding requirements

The estimated initial construction costs are shown in table 2.

The final Scheme (after the 30 years analysis period), has a total construction investment of up to R25 billion construction investment (2006 Rand, Excl VAT) and will potentially include an additional 111 km (55km initially & 66km further on in analysis period) of freeways.

The yearly estimated operations and maintenance costs amounts to R200m (Excl VAT, 2006 Rand).

It is estimated that the cost for e-tag users will amount approximately 30 to 35clkkm (2006 Rand) to travel the network. It is based on an average distance of travelling on the network of 20km. Non e-tag users can be allowed on the network, but at a substantial increased tariff to

allow for the additional effort to collect the toll charge from them.

Apart from the initial improvements and expansions of the freeway network, the cost for periodic maintenance actions, such as resurfacing and rehabilitation of the road pavement are included in the scheme. These costs amount to at least R800m (2006 Rand) per annum. Routine road maintenance actions (grass cutting, pothole repairs, guardrail repairs, etc.), as well as the toll collection operational costs are financed through the scheme.

The income generated at such a tariff seems adequate to finance the capital, maintenance and operational costs of the scheme. It still needs to be confirmed by means of specialist studies, which will commence after the principles of a freeway improvement scheme have been agreed upon."

85 An implementation programme and timeframe was provided in paragraph 10.3 of the Proposal which is recorded as being dependant on a number of factors including -

85.1 capacity of the civil engineering industry;

85.2 impact of construction activities on traffic conditions;

85.3 confederation and World Cup soccer tournaments;

85.4 environmental impact assessment and toll declaration processes;

85.5 composition of the actual ICW and total schemes.

86 A number of milestones were then proposed which envisaged that the upgrading of existing freeways would be completed by July 2012.

87 Paragraph 11 of the Proposal ("**NA6**") detailed what are termed "targets of the interventions within the Gauteng freeway improvement scheme". It was then proposed that the following interventions be incorporated into the toll scheme –

87.1 prioritisation of public transport on the freeway system;

87.2 ride sharing;

87.3 subsidisation of public transport from toll revenues;

87.4 integration of toll scheme with SPTNs and the Guatrain;

87.5 heavy vehicle regulation – overload control.

88 Paragraph 12 of the Proposal details the socio-economic implications and BBBEE in regard to which it is recorded -

"It can be proven through input/output table analysis (of the national accounts) that increased expenditure on road building activity generates multiplier effects in the economy that eventually warrant the fiscal resources necessary for such expansion. The draft report 'BL110: Macro-economic analysis and projections relating to road infrastructure provision in Gauteng, prepared for the Department of Public Transport, Roads and Works, September 2005', indicates that the total impact on GDP of every rand spent on road building involves a multiplier effect of almost 1.27 times.

Approximately 24,000 jobs are created in the economy for every R1 billion spent on road projects. In addition, from a government revenue perspective the combined taxation effect of road building activity results in a combined fiscal backflow effect of R298 million to the Exchequer for every R1 billion (R1 000 million) spent on such activity.

On the basis of the above, the following macro benefits of the Freeway Improvement Toll Scheme can be projected, assuming an estimated initial construction cost of R8,5 billion:

Job Creation: 204 000 jobs can be created.

Fiscal backflow into the economy: R2,5 billion.

Detailed socio economic impact studies will be performed to determine the project specific impact of the proposed scheme on socio economic development in the Province."

89 The Proposal then highlights the way forward - :

"This freeway improvement toll scheme proposal will undergo several processes before all necessary details of the scheme are finalised.

Of priority will be the granting of approval for scheme go-ahead by political principals at the various spheres of government.

The next step will be the incorporation of the scheme in the various planning processes of the various spheres of Government, to enable plan integration. These will include the scheme's integration in Municipal Integrated Transport Planning processes under the broader Integrated Development Planning framework, and its integration in the provincial strategic road network review.

In terms of processes relating to scheme further detail planning, the following will be conducted:

- Agreement on the total freeway improvements to be rolled out over the next 30 years;*
- Review and finalisation of the Initial Construction Works (ICW);*
- Detailed design of the targeted interventions of the toll scheme including public transport prioritisation on the toll scheme, subsidisation of public transport from the toll scheme, integration of the toll scheme with SPTNs and the Gautrain, and overload control.*
- Agreement on the institutional arrangements for joint scheme planning, surplus toll revenue apportionment for public transport, and scheme implementation.*
- Execution of specific studies such as traffic modelling, toll strategy analysis and financial modeling.*
- Environmental studies; and*

- *Engineering design processes."*

Consultation at all levels will be an important cross cutting element in all of the above processes, both within and outside Government. The most critical will be public consultation which will be particularly necessary in the following areas:

- *The principle of tolling;*
- *The planned Initial Construction Works;*
- *The nature and price of the planned toll scheme.*

Finally, the success and timely delivery of this proposed scheme depends on the commitment of all three spheres of government to working together to arrive at an agreeable, integrated and demand responsive freeway system for the province, which will not only address current bottlenecks in the freeway system but also contribute to the provision of an adequate and sustainable pro-public transport road network system for the province."

90 The next significant event in the GFIP process was the presentation to cabinet. The cabinet memorandum presented to the Department of Transport ("the cabinet memorandum") in July 2007 is attached marked "**NA7**" and was accompanied by a slide presentation which is attached "**NA8**".

91 The subject of cabinet's memorandum was the Gauteng freeway improvement scheme proposal and the purpose was -

"2.1.1 To present the proposed Gauteng Freeway Improvement Scheme to Cabinet, including the findings of the feasibility study, the macro-economic impact study and the social impact study; and

2.1.2 To request Cabinet approval for its implementation."

92 I would ask the above honourable Court to have regard, in the first place, to the "Summary" recorded in paragraph 3 of the cabinet memorandum, which gives an overview of the proposed project.

93 The cabinet memorandum reflects consideration of the various funding models and support for a user-payment based toll scheme with the electronic recording of tolls payable. The more important portions of the memorandum read as follows -

"4.2 Noting the need to discourage private vehicle use and promote public transport use, and acknowledging the challenge of funding shortages for the required major freeway system improvements that are required, several funding models were investigated and their appropriateness evaluated. The most suitable funding mechanism was identified to be a user payment based toll scheme, with electronic fare collection as a basis to ensure free traffic flow. Care was taken to align the scheme with transport policy by defining a set of principles that should guide such scheme development. As a result the proposed scheme has defined targeted interventions that should form part of the scheme including the prioritisation of public transport on the freeway system; the incorporation of ride sharing to promote high vehicle occupancy; the cross-

subsidisation of public transport from toll revenues; the integration of the freeway scheme with Strategic Public Transport Networks (SPTNs) and the Gautrain and the regulation of heavy vehicle movement."

"4.5. *The macro-economic impact study estimates the macro-economic contribution of the proposed scheme to include a GDP contribution of R14.2bn in 2006, R15.3 in 2009 and a cumulative GDP contribution of R60bn by 2027. Respective GGP contributions to Gauteng are R6.3bn, R6.7bn and R25.6bn. At the height of construction it is expected that 29 369 direct jobs will be created, with a further 138 929 indirect jobs opportunities created as a result of the project. The project will also contribute R39.7bn to capital formation, R6.5bn to taxes by 2027 and R32.4bn in indirect household income by 2027."*

"4.6 *The Social Impact Study found that the "do-nothing" option in Gauteng would have negative impacts, while the freeway improvement option through the toll scheme would have majority positive impacts in relation to socio-economic, personal, family and work related effects."*

94 The financial implications are detailed in paragraph 7 of the cabinet memorandum in regard to which the following is recorded -

"7.1 *The first phase of the freeway scheme is estimated to cost R15bn (2007), i.e capital costs plus toll system, public transport and operations centres.*

7.2 *Phase 2 will cost an additional R6.7bn (2007), i.e. capital costs only. Long term freeways will cost a further R11.7bn (2007), capital costs only.*

7.3 *The SANRAL will use borrowings from Capital markets to finance the freeway scheme, and debt servicing will be through toll tariff collections."*

95 The cabinet memorandum was accompanied by a series of documents and a formal slide presentation which slide presentation is attached marked "**NA8**". I refer the above honourable Court to the contents of the slide presentation and avoid quoting extensively from it in order so as to avoid undue prolixity. Without derogating from the slide report as a whole, I would direct the Court's attention specifically to the section dealing with project financing and implementation, which discusses *inter alia* the questions of cost and affordability.

96 Against this background and contrary to what has been stated by the applicants, SANRAL and the Government considered all of the relevant information and debated the issues at stake. The decisions to declare the roads toll roads and to implement upgrades in the form of the GFIP on the strength of a proposal to toll were fully informed by relevant information and considerations.

97 As appears from the slide presentation, cabinet in approving the implementation of the Gauteng freeway improvement project, were advised

that the anticipated full tariff was to be 50 cents per kilometre and discounted tariff 30 cents per kilometre.

- 98 Following cabinet's approval for the implementation of the Gauteng freeway improvement scheme, the intent to toll process followed in October 2007. It was concluded in March 2008 when the roads were declared toll roads. Thereafter in May 2008, the announcement of construction works took place once this was completed. An interactive process occurred with civil society including SAVRALA, the second applicant in this application. I attach hereto marked "NA9" -

"Notes from Questions and Answer session with civil society stakeholders, held at the Irene Country Lodge on 7 July 2008 (incorrectly referred to as 2007) at 10h30"

- 99 SAVRALA was represented by Val van den Bergh, who enquired after I gave a general GFIP overview presentation how this would impact on billing for rental vehicles and what the cost estimate was for the 11 km sections to which I had referred during the course of my presentation. It is recorded in this regard -

"Nazir explained that we are looking at 50c per km, but this will be discounted. What we would like you to do is pre-pay so that tag can register an immediate payment. We can link this to a credit card of bank system. Daily roll ups will ensure regular payments."

100 The document ("**NA9**"), recording that a number of other issues were traversed including -

100.1 payments from international customers;

100.2 vehicles without number plates;

100.3 problems with peak hour traffic;

100.4 co-operation with "public transport systems;

100.5 the fact that costs on a monthly basis would aggregate to "about R400 to R500 per month to use the freeway".

100.6 Interestingly, the AA represented by Gary Ronald enquired :

"Is there any means or mechanism that SANRAL can use to use the CCTV system, the 24 hour control room as an enforcement tool to improve safety. Why are we not using the technology for enforcement.",

which enquiry I addressed.

101 Following interaction with civil society stakeholders SANRAL delivered a number of presentations over an extensive period in which it addressed the concerns, which had been raised by civil society stakeholders. These

presentations were not made in terms of a formalised program. SANRAL, during this period agreed to present at various public forums to explain key principles related to the GFIP.

102 One of these presentations is attached marked "**NA10**". This presentation traversed the following topics :

102.1 background/the bigger picture;

102.2 road funding;

102.3 GFIP funding;

102.4 economic impact of congestion;

102.5 the economic impact analysis;

102.6 tariff determination; and

102.7 process going forward.

103 Salient extracts from this presentation are detailed below.

103.1 As intimated above this presentation commenced with a summary of "the bigger picture" in regard to which the following is recorded -

- *"SANRAL's objective is to provide a safe well engineered road to the - user movement of people, services and goods*
- *Value of time - time is valuable, both commercial and private*
- *To enable the economy to grow - creating wealth and job opportunities, saving on road user costs sufficient infrastructure is required*
- *In order to provide above, there are different focus areas:*
 - *As minimum, roads must be well maintained:*
 - *Routine road maintenance (crack sealing, pothole repair, grass cutting, road signs and markings, guardrails, etc)*
 - *Periodic maintenance - reseals and overlays*
 - *Rehabilitation*
 - *Available funding optimized using tools such as pavement management systems, HDM4*
 - *Capacity improvements (combine with rehabs):*
 - *Additional lanes*
 - *Paved shoulders"*

103.2 There is a misconception on the part of the applicants in relation to user funding in South Africa. Although this issue is amplified more fully

below, there are three sources of road funding in South Africa which are detailed in the presentation -

- *"Rates, Taxes and Fees:*
 - *Provincial*
 - *Municipal*
- *Fiscus*
 - *National*
 - *Provincial*
- *User pay - Tolling:*
 - *National only*
 - *State toll roads*
 - *Public Private Partnerships (PPP's)"*

103.3 Dealing specifically with road funding for SANRAL it is recorded -

- *"In general, funding backlog experienced*
- *Many roads reached the end of their design life*
- *Insufficient funds available from fiscus to address backlog there is an overall budget deficit*
- *Doing nothing not an option, since overall economic decline with associated economic opportunity and job losses will occur*
- *Delayed maintenance and expansion expenditure give rise to exponential deterioration of road network*

- *In order to implement large infrastructure projects such as GFIP, user pay principle can be applied as per SANRAL mandate".*

103.4 GFIP funding is a separate topic. It is explained in this presentation that -

- *"GFIP is not funded through the central fiscus*
- *Funds are raised on the Capital Markets through SANRAL's Domestic Medium Term Note Programme*
- *The user-pay principle (tolling) is used to re-pay the loans, as well as for future operation and maintenance of these roads.*

103.5 The economic impact of congestion is dealt with in the presentation at great lengths. In summary -

103.5.1 most freeways in Gauteng have reached their capacity;

103.5.2 peak hours are extending by 10 to 15 minutes each year;

103.5.3 this results in congestion and uneconomical use of time with increased vehicle operating costs and carbon emissions.

103.6 This presentation then referred to various reports, tests and surveys which supported the conclusions reached from an economic impact analysis perspective -

- 103.6.1 The first of these is a CSIR report dated August 2001 which traversed, what it termed : "Imperatives for a Toll Freeway Network for Gauteng". The CSIR report :
- 103.6.1.1 highlights the importance of an effective and efficient transport system for Gauteng;
- 103.6.1.2 recommended tolling as a value based alternative to fiscal transfers – on the back of social demands on the fiscus;
- 103.6.1.3 provided a positive macro economic impact and in fact reduced overall transport costs, an issue amplified more fully below;
- 103.6.1.4 recorded that a project of this nature should contribute R9 billion to GDP (2001 Rand) and would create 40 000 jobs both directly and indirectly.
- 103.6.2 The second of these is a 2004 Gauteng provincial report which investigated the economic impact of congestion and of insufficient maintenance of the road network and which found that :

103.6.2.1 for every billion rand spent there was a R300 million back flow into the economy;

103.6.2.2 the potential loss to economic opportunity in Gauteng alone arising from congestion and insufficient maintenance could amount to R155 billion over the period 2004 to 2025;

103.6.2.3 for every R1 billion spent nearly 9 200 direct employment opportunities would arise. In addition such expenditure has a multiplying effect of 1.5 creating therefor nearly 24 000 job opportunities in total.

103.6.3 The third reference source was to a January 2010 report by the South African Chamber of Commerce and Industry ("SACCI") which -

103.6.3.1 expressed concern about the impact of congestion and insufficient maintenance on business due to congestion and insufficient maintenance;

103.6.3.2 advised that based on conservative assumptions, the cost of congestion on the Ben Schoeman highway amounts to R15 million per hour which excluded costs associated with -

103.6.3.2.1 fuel and maintenance;

103.6.3.2.2 late freight deliveries;

103.6.3.2.3 lost business opportunities; and

103.6.3.2.4 accident costs.

103.6.4 The fourth reference source was to a test conducted in August 2007 by the AA focusing on the economic impact of congestion and insufficient maintenance which test revealed that congestion between Johannesburg and Pretoria during peak times, utilising a 1 600 cc vehicle -

103.6.4.1 resulted in 122 minutes of additional driving per day (forty additional hours per month);

103.6.4.2 caused engines to operate for longer times utilising 1,5 litres of fuel per hour when idling;

103.6.4.3 resulted in an additional 705 litres wasted (469 hours idling) per annum costing an extra R4 935 at R7 per litre, which price has dramatically increased;

103.6.4.4 when applied to 80 000 people resulted in R395 000 000 being wasted a year, which excludes working time, frustration and accidents.

103.6.5 In the sixth state of logistics survey for South Africa and conducted during 2009 into maintenance and repair cost increases due to worsening road conditions, it was, not unexpectedly, found that road conditions contribute directly to increased maintenance and repair costs per kilometre finding that if roads were bad, the average percentage increase in truck maintenance and repair was 120.94% above what those costs would be if the road conditions were good leading in turn to nearly a 10% increase in company logistic costs over and above the costs which would be incurred in the event that the trucks in question travelled on what were termed good roads. It is recorded in that survey -

"The results obtained from the comparison indicate that the maintenance and repair costs of a truck increase as the condition of the road on which the truck is travelling deteriorates. When moving from a good condition road to a bad condition one, increases in vehicle maintenance and repair costs of approximately 121% can potentially be experienced. In addition, the increase in truck repair and maintenance costs due to deteriorating road conditions can potentially lead to an estimated increase of around 10% in the total logistics costs of a company.

Other costs that can potentially be attributed to deteriorating road quality are increased vehicle operating costs, increased fuel consumption, increased cargo damages and ultimately increased vehicle design and manufacturing costs.”

103.6.6 Not unexpectedly, roads maintenance costs increased exponentially the longer a road remains in a state of disrepair, increasing six times per kilometre when roads are poor and up to eighteen times per kilometre when they are very poor. This appears from the graph at page 14 of annexure 9.

103.6.7 SANRAL commissioned an economic impact analysis by the Graduate School of Business of the University of Cape Town. The analysis provided a robust indication of the GFIP value to the economy and showed that the project was economically viable and would provide extremely high benefits to the Gauteng Province and in turn to South Africa. The table at page 15 of the presentation indicates :

103.6.7.1 a benefit cost ratio of 8,4;

103.6.7.2 an economic internal rate of return of 37%; and

103.6.7.3 a net present value of benefits minus costs (in billions of Rand) aggregating to R209,8 billion.

103.6.8 There are numerous other impacts of congestion which are
derailed in the presentation -

103.6.8.1 it has a negative environmental impact leading to an
increased carbon footprint;

103.6.8.2 it results in negative social impacts on society due to
more time having to be spent on roads and less time at
home/leisure.

103.6.9 As shocking as this statistic is, some people spend almost 25%
of the day (over a twenty-four hour period) commuting. As a
result of improvements to the proposed road toll network
including widening of the freeways, thirty-four interchanges
being significantly upgraded and median lighting being provided
there was -

103.6.9.1 less congestion;

103.6.9.2 time savings as a consequence of reduced travel time;

103.6.9.3 increased production;

103.6.9.4 safer journeys;

103.6.9.5 reduced carbon emissions; and

103.6.9.6 the creation of 20 000 jobs during construction.

103.6.10 As foreshadowed above, there were numerous direct benefits of GFIP including -

103.6.10.1 ITS (an acronym for Intelligent Transport Systems), an incident management system incorporating -

103.6.10.1.1 network monitoring;

103.6.10.1.2 the provision of information to road users radio stations;

103.6.10.1.3 incident management (towing vehicles, medics on bikes, incident vehicles etc);

103.6.10.1.4 the achievement of the objective of clearing the road as soon as possible in the event of an incident and to assist road users;

103.6.10.2 routine road maintenance including fixing of guardrails, potholes, crack sealing, collection of litter, grass cutting, lighting maintenance and electricity.

103.7 In the final analysis, the following was recorded in the presentation as constituting the basis for determination of toll tariffs -

- *"Economic benefit cost ratio exceeds 8 to 1*
- *Toll tariff less than the benefit that will be experienced over time*
- *In calculating above benefits and costs, the do nothing option and the impact of continued traffic growth is compared to an upgraded road user network which are funded through the pay principle*
- *Service and repay loans to fund initial capital cost*
- *Interest payments during term of loans*
- *Asset preservation*
- *Routine road maintenance*
- *Operational costs*
- *Project should be self funding*
- *GFIP is state toll road - no profits/dividends*

- *Toll revenue spent for the benefit of the project only".*

103.8 The considerations for the setting of tariffs are also detailed in this presentation and in summary are as follows -

- *"Since 2007, indicated tariff of 50c/km (2007 Rand) - tariffs announced is similar in real terms*
- *Benefit to user should be greater than overall cost (toll tariff less than total benefit to user over time)*
- *Project should be financially viable must be able to repay debt incurred, as well as cover operational maintenance costs"*

103.8.1 The precise toll tariffs are amplified as well as their application. It is recorded in the presentation in this regard -

- *"if user elect to use e-tag for identification an e- Toll Tag Tariff for light vehicles is applied = 49,5c/km*
- *Vehicle Licence Number (VLN) users only identified through their number plates (elected by user) = 66c/km (VAT incl) for light vehicles*
- *VLN accountholder does not qualify for all applicable discounts*
- *Motorcycles VLN tariff = 40c/km"*

104 Tolling was not considered in isolation and Gauteng prepared a presentation, which is directly responsible for public transport integration in the province, on what it termed -

"Public Transport Transformation"

A copy of that presentation is attached hereto marked "**NA11**".

105 The salient aspects of this presentation are reflected in the "Introduction" to which I refer the above honourable Court. The user-pay system is one of these salient features.

106 Following the exhaustive steering committee process, the steering committee delivered a comprehensive report ("the Steering Committee report"). The report which numbers over one hundred pages, is attached hereto marked "**NA12**". I refer to the "Introduction" which summarises the salient aspects of the Steering Committee report and confirm that this is an accurate, albeit necessarily brief, summary.

107 The Steering Committee report also sets out, in paragraph 2, the background to tolling strategy generally and to which I refer the Court as reflecting the thinking of the Steering Committee.

108 The events culminating in the GFIP are then traversed in the Steering Committee report. Much of what is set out therein is detailed above, however of moment to this application is the following recordal :

"Finding solutions for the transportation problems of the Gauteng metropolitan area, is complex, and there is no single solution to this challenge. An integrated approach, incorporating improved public transport systems/modes, travel demand management (TDM) measures, intelligent transport systems (ITS), appropriate infrastructure and more importantly land use planning that discourages urban sprawl, is needed to improve transportation in general. However, in most instances, the one is dependent on the other for success. The impact of poor land use planning has had an adverse impact on the quality of life of the citizens of Gauteng that cannot be solved by public transport and better roads alone.

Transportation and its effectiveness have a major impact on the social and economic wellbeing of people, especially in the metropolitan areas in South Africa. Due to increasing demand on the transportation network, travel times between home and the work place in the Gauteng metropolitan area extends up to 3 hours per direction of travel, resulting in less time spent with family, and wasted productive person hours.

The impact of emissions, including exhaust gasses, on the environment, is a global concern. Many countries are implementing integrated transport solutions which discourage the ineffective use of private transport, and encourage the use of public transport. Gauteng has the busiest roads in South Africa, and will also need to address the impact of transport related emissions on the environment.

It is also critical that the transportation network allows for the effective movement of goods and services, due to the impact it has on economic activities. In a study in 2007, the Automobile Association estimated the annual impact of congestion, for an assumed 80 000 commuters between Pretoria and Santon/Johannesburg is:

- *56 million litres of fuel wasted*
- *R400 million of fuel wasted (based on January 2008 fuel prices)*
- *1,57 million person days wasted*

At a conservative value of time of R45 per hour, the cost of wasted time is R1,69 billion per annum"

109 The components of the proposed phase 1 of the GFIP are then recorded and include -

- *"Road Improvements: Phase A1 of the Gauteng Freeway Improvement Scheme, comprise of the upgrading of approximately 185 km of the existing national freeway network. The focus of the proposed work comprised the adding of lanes and interchange upgrades. Road widening took place to the inside and/or outside of the existing carriageways, depending on the available median width or road reserve width. Interchange improvements include the provision of auxiliary lanes at on and off ramps, additional bridges and/or bridge widening, converting diamond interchanges into single point interchange configurations, as well as adding pardo type on-ramps. At some interchanges, improvements to the cross roads and/or cross road intersections were required.*
- *All road sections currently without lighting will be fitted with lighting.*

- *The provision of Intelligent Transport Systems (ITS) and Travel Demand Management (TDM) measures.*

- *The tolled road network will be equipped with ITS equipment such as:*
 - *Variable Message Signs;*

 - *CCTV Cameras; and*

 - *Electronic Traffic detection Equipment;*

- *Incident Management: A very important aspect of the project is improved Incident Management (IMS). Through traffic detection equipment and CCTV, incidents are detected and validated, where after the incident management process commences. It is an objective of the project to provide road users with quick response times to incidents in order to save lives, and to minimise the impact of incidents on traffic flow.*

- *Promotion of Public Transport and Travel Demand Management (TDM) measures: Considerable effort is made to determine opportunities to integrate the GFIP with public transport initiatives from the public transport operators including the metropolitan councils and province. It is currently proposed that increased formalised public transport services should be implemented on the upgraded freeway network to provide longer distance road based public transport alternatives to the public. Road user charging is a worldwide practice to discourage private vehicle usage and to encourage the use of different forms of public transport, especially in peak period conditions. Hence, the application of a road user charge will promote the use of public transport and reduce the use of private car usage with its associated impact of the carbon footprint."*

110 Paragraph 3 of the Steering Committee report traverses socio-economic impact studies and details -

110.1 social impact of the GFIP;

110.2 economic impact of the GFIP;

110.3 benefit cost analysis;

110.4 micro-economic analysis;

110.5 macroeconomic analysis.

111 In relation to each of these studies a detailed summation of the conclusions of the Steering Committee is provided, explaining the thinking and findings of the Steering Committee in relation to each aspect. I do not quote from the report in this regard, in order so as to avoid prolixity, but refer the above honourable Court to its contents particularly at pages 13 to 16.

112 In paragraph 4 of the Steering Committee report, the toll declaration process, including public participation, is detailed. Much of this has been traversed above and that no useful purpose will be served in reiterating this process at this juncture. I refer to the discussion contained in the report in this regard.

113 What are termed the "*GFIP Steering Committee's Substream reports*" are traversed in paragraph 5 of this report. It is recorded in this regard -

"The main issues that were raised during the public consultation process which relates to the financial work stream are the following:

- 1.1. *Is the toll model, which is used to calculate the toll tariff correct?*
- 1.2. *Can the tolling of Gauteng Freeways be cancelled?*
- 1.3. *Is it possible to utilise the fuel levy, or ring fence the fuel levy to pay for the GFIP?*
- 1.4. *Is the payment of VAT not double taxation, and can toll be VAT exempted?*
- 1.5. *What measures can be taken to reduce the toll tariff?*

This report provides the Minister of Transport, for consideration, specific replies to these issues, as well as possible mitigation measures and risks associated/additional requirements associated with these mitigation measures."

114 The responses to each of these main issues are detailed in the Steering Committee report and I quote them extensively for ease of reading as they are directly relevant to *inter alia* the issues of process and reasonableness of the decision to opt for a user pay tolling system -

"Is the toll model which is used to calculate the toll tariff correct?"

Two auditing firms namely Deloitte's and PWC were appointed to review the SANRAL financial model. Deloitte reviewed the inputs to the SANRAL Cost Model and the overall results presented. PWC reviewed the formulae and outputs of SANRAL Cost Model, and the inputs, formulae and outputs of the SANRAL Revenue Model.

The conclusions reached by PWC are quoted below:

"Conclusion of key findings:

- In its current form, we could not find any major errors in the Income Model. None of the findings above had an overall impact of more than 1% on the overall results.*
- In its current form, we could not find any major errors in the LSR Model. The concerns we have highlighted are around change control – i.e. if the model is passed on to someone unfamiliar with how it works, then that may expose the user of the model to operational risk.*
- The scenario analysis was performed correctly by Tolplan across both models under review."*

From the conclusions reached above, it is clear that no profits, sharing of toll revenue or too conservative risk assumptions were made, that could be used to revise the toll tariff.

Can the tolling of Gauteng Freeway be cancelled?

The tolling of the GFIP can not be cancelled. The improvements have been made and the benefits of these improvements are being enjoyed

by road users. As shown below, the disparate demands made on tax-based revenues, make it extremely challenging for the GFIP to have been funded through the fiscus. Therefore, the funding of this project through the “user-pay” principle is required. This is an equitable way of funding the project, since the benefits will be enjoyed by those who pay for it.

Revenue from the transport sector, such as from fuel levies are collected as normal taxes and accrues to the national revenue fund. To ensure transparency and accountability all revenue collected is surrendered to the national revenue fund as provided by the Constitution. All allocations are managed through a single budget process which determines the division of revenue and sectoral allocations. Funds are only earmarked for the skills levy and the Road Accident Fund (RAF) which acts as a limited liability insurance.

The Table 1 shows public sector expenditure and estimate by sector. The revised estimate for transport and logistics amounts to R80,5 billion for the 2010/11 budget year.

Table 2 shows the backlog for road maintenance that amounts to R149 billion, based on the condition of the road network in South Africa. It is noted this is only taking into account the funds required for strengthening the paved network (due to increased loads) and re-gravelling the gravel network. It is also based on the latest available data which in some instances is four years old.

To provide basic service levels the state is able to provide public goods through the fiscus, this will equate to the standard of roads such as the R101 and R55 between Pretoria and Johannesburg. Current revenue levels do not provide sufficient funds to provide equitably for higher levels of service. The “user-pay” principle allows for higher standard of services to be provided such as the N3 to Durban, the N1 to Musina, the N4 to Maputo and the N4 to Botswana. The “user pay” principle is

equitable in that those who enjoy the benefit pay for it and reflects the value to the individual road user; while those who do not receive the benefit do not contribute to that particular road

The toll fees or the road user charge is calculated based on the cost of providing, maintaining and refurbishing that specific road. These toll fees should be less than the benefits such as reduced travel times and vehicle operating costs that a user is experiencing when using the toll road. The costs of providing road infrastructure have to be recovered from either specific road user beneficiaries or the general taxpaying public at large. Toll fees promote economic efficiency as well as improving accountability and transparency. In contrast, in the absence of tolls, road costs would have to be borne by all taxpayers, irrespective of the extent to which they derive individual benefits from specific road infrastructure expansion and maintenance projects. Unlike a user charge, a tax does not confer a direct benefit for the payment made.

The costs for the GFIP implementation (Phase 1), inclusive of the tolling system and intelligent transport systems (ITS), will amount to approximately R 20 billion (VAT Excl). It is clear from the above information that apart from the many other social and infrastructure demands for additional budget allocations, including the existing backlog on the strengthening and re-gravelling programme of the South African road network – (estimate R149 billion) compels us to find other sources of funding for the much needed improvements. Furthermore, the GFIP has been funded through borrowings from the capital markets. These loans have to be re-paid by SANRAL through the tolls collected. If the loans are not paid through toll fees, the loans will have to be paid by Government by raising taxes or reducing the allocations to other sectors. Both these options – levying additional taxes and/or reducing the allocation to the other sectors – are not prudent for Government to implement. It is therefore not possible to cancel the toll project.

Is it possible to utilise the fuel levy, or ring fence the fuel levy to pay for the GFIP?

The use of the fuel levy to fund the GFIP is promoted by some as a solution. Unfortunately the reality is different. A close examination of the amounts collected from fuel levy shows that the fuel levy will have to be substantially increased to pay for the GFIP.

The net fuel levy for the 2009/10 financial year amounted to approximately R22.03 billion. When compared to the R29,19 billion (2009/2010) direct allocations that were made for road infrastructure towards National, Provincial and Local (metropolitan) authorities, the fuel levy was R7.16 billion less than current road transport infrastructure expenditure – or stated differently – there is a shortfall of R7.16 billion in the amount collected from the fuel levy.

It is not National Treasury policy to ring-fence tax revenues. Ring-fencing brings about inefficiencies in government spending over time, as the lack of transparency means that spending agencies lose the accountability of the budget process for how effectively they apply the funds. The fuel levy revenue accrues to the national revenue fund and distributed through the normal budget process towards government expenditure. It should also be noted that the diesel fuel tax refund scheme which benefits our primary sectors and the sharing of fuel tax revenue with metro municipalities means that a large sum of the current fuel tax revenue pool is already committed. There is also pressure to share the fuel tax revenue further with other municipalities to compensate them for the revenue they lost with the abolition of the Regional Service Council (RSC) levies. Figure 1 below illustrates the current total Transport and Logistics budget allocation, vs the Roads Infrastructure allocation, vs the net fuel levy. In conclusion, the current fuel levy or tax is insufficient to cover existing road construction and maintenance budget allocations. In essence, the transport sector is

benefitting from the principle that all tax revenue collected is surrendered to the national revenue fund, since the allocations made through the single budget process towards transport far exceeds budget allocations towards roads alone."

Matters pertaining to this latter issue (utilisation or ring fencing of the fuel levy) were incorporated into the steering committee report based on information received from the National Treasury.

115 The Steering Committee report records that a separate work stream was established to consider an alternative for commuters in the wake of the imminent road tolling system on the Gauteng freeway system. A number of initiatives were highlighted to promote public transport including -

- **"GFIP - Tolling System**

Tolling system will promote the usage of public transport system as a mode of choice. This in turn will alleviate traffic congestion.

- **Rail Services**

Rail will eventually be seen as the backbone of public transport as it constitutes a true mass transit system that has the capacity to move large volumes of people between geographical locations within the province. Two systems in Gauteng currently commanding this space is Rapid rail (Gautrain) and Commuter rail (PRASA). There has been a noticeable upgrading of rail infrastructure recently. The short term plan is to improve safety and reliability.

- **Bus Systems**

Buses are key elements of public transport in an urbanised setting. The short term plan will be to extend BRT and to increase Gautrain Feeder Bus services. There are further areas of concern regarding scheduling reliability and timeousness which need to be assessed.

- **Taxi Industry**

There is an urgency to integrate the taxi industry into the Integrated Public Network as well as in the broader transport transformation programme.

- **Long Term Intervention Planning**

Promotion of Public Transport as a the Transport Mode of Choice

Ensure Integration of Public Transport Modes

Provision of Public Transport and Passenger Information

Fare Integration and Single Ticketing"

116 A detailed analysis of available public private transport investments including :

116.1 investments in bus transport;

116.2 taxi projects;

116.3 integration of the Gautrain with other public transport services,

is also conducted and detailed in the Steering Committee report.

117 It is recorded in this regard that -

"The Steering Committee has recognised the need for a holistic approach to the GFIP and therefore the public transport transformation workstream will continue as a longer term workstream to assist in the identified interventions."

118 The report then traverses, in some detail the public participation process in regard to which it is recorded inter alia :

"PUBLIC PARTICIPATION PROCESS

As a response to the public outcry, the Department reopened the public participation process for the GFIP. Members of the public were invited to make inputs.

In addition to this, a structured engagement process with affected stakeholders was also implemented. The engagements took place on 24 March, 04, 05 and 06 April 2011.

Public Engagement Format

The following presentations were delivered:

SANRAL

The main focus of the SANRAL presentation was to outline the objective behind the open road tolling initiative.

Key issues discussed:

- *There is a serious funding backlog and many roads have reached the end of their design life.*
- *Insufficient funds available from Fiscus to address backlog - there is an overall budget deficit.*
- *Delayed maintenance and expansion expenditure give rise to exponential deterioration of road network*
- *In order to implement large infrastructure projects such as GFIP, user pay principle can be applied and be used to re-pay loans, as well as pay for future operation and maintenance of these roads*
- *Toll tariff tariffs and discounts were discussed eg:*
 - *e-tag registered light vehicle -49,5c/km,*
 - *light vehicle with no e-tag-66c/km- no discount applicable,*
 - *motorcycle – 40c/km*
 - *Time of day discounts (travelling off peak)*
 - *Frequent user discounts*
 - *Public operator discounts*

Public Transport

Various initiatives to promote public transport were highlighted:

- ***Tolling System***

Tolling system will promote the usage of public transport system as a mode of choice.

This in turn will alleviate traffic congestion.

- ***Improve Rail Services***

Rail service should be seen as the backbone of public transport as it is a mass mover."

119 The inaugural session of the public participation process was with business organisations, led by Business Unity South Africa (BUSA). The business organisations who participated included :

119.1 BUSA;

119.2 the Road Freight Association;

119.3 SAVRALA;

119.4 the retail motor industry;

119.5 SATSA, Afriforum and the Johannesburg Chamber of Business; and

119.6 the South African Local Government Association;

119.7 the Automobile Association;

119.8 the South African Road Federation.

120 Each of these business organisations :

120.1 raised concerns;

120.2 indicated whether they supported the user pay principle and open road tolling;

120.3 suggested solutions or advanced proposals.

121 There were a number of presentations from political parties and organised labour including :

121.1 the Democratic Alliance;

121.2 Afriforum/Solidarity;

121.3 the South African Communist Party;

121.4 Freedom Front Plus;

121.5 the ANC Youth League; and

121.6 COSATU.

Each of these parties indicated whether they supported e-tolling or not and similarly advanced suggestions and proposals as to the "way forward".

122 In addition to e-mails and telefaxes from members of the public, there were presentations from public transport operators and municipalities including -

122.1 the South African Bus Owners Association;

122.2 the National Taxi Alliance;

122.3 Mamelodi Commuter Forum;

122.4 South African Commuters Organisation;

122.5 the Ekurhuleni Metropolitan Metropolitan Municipality.

123 The concluding points flowing from these presentations are recorded in the Steering Committee report as follows :

"CONCLUDING POINTS

- *ALL presentations highlighted the need for far better transparency of the process followed and the costs involved. The Steering Committee needs to respond to this. The costs in question are specifically on:*
 - *The construction costs per kilometer of the GFIP as whole*
 - *The cost of the tariff, as well as the factors considered in the determination of the tariff*
- *The establishment of an Economic Regulator is key to resolving future disputes related to tariffs.*
- *The use of the Fuel Levy, by increasing and ring-fencing contributions for roads was prominent in all presentations. This issue needs further exploration, and the National Treasury needs to be more vocal and clear on why this cannot happen. (Same principle for the vehicle licencing fees)*
- *A discussion on the levying of a VAT charge on the toll tariffs needs to take place. The perception is that this is a “tax on tax”, and prejudices the consumer.*
- *The impact of Open Road Tolling on municipal road infrastructure also needs to be adequately addressed and costed.*
- *The knock on effect of these costs, as well as other cost increases being introduced (Electricity, Transnet Pipeline, Municipal Rates and Taxes) needs to be studied in detail, to understand the true impact to our economy and the consumers. This study would need to be wider than the transport sector, to*

provide a more global, integrated view of the cost of doing business and living in South Africa.

- *The National and Gauteng Planning Commissions need to be much more involved or lead processes that have such wide implications on the economy and on job creation specifically*
- *More meaningful, transparent and regular consultations must be in place between transport stakeholders and Government.*
- *The improvement of Public Transport, to provide a real alternative for travelling."*

124 The responses to the points raised by the public are detailed in the Steering Committee report and are summarised more fully below :

"6. RESPONSES TO POINTS RAISED BY THE PUBLIC

Ringfencing of transport infrastructure funding from the National Fiscus (Fuel Levy, Licencing Fees)

It is not National Treasury policy to ring-fence tax revenues. Ring-fencing brings about inefficiencies in government spending over time, as the lack of transparency means that spending agencies lose the accountability of the budget process for how effectively they apply the funds. Revenue from the transport sector, such as from fuel levies are collected as normal taxes and accrues to the national revenue fund. To ensure transparency and accountability all revenue collected is surrendered to the national revenue fund as provided by the Constitution. All allocations are managed through a single budget process which determines the division of revenue and sectoral

allocations. Funds are only earmarked for are the skills levy and the Road Accident Fund (RAF) which acts as a limited liability insurance.

It should also be noted that the diesel fuel tax refund scheme which benefits our primary sectors and the sharing of fuel tax revenue with metro municipalities means that a large sum of the current fuel tax revenue pool is already committed.

The net fuel levy for the 2009/10 financial year amounted to approximately R22.03 billion (row 12 Table 4). When compared to the R29,19 billion (2009/2010) direct allocations that were made for road infrastructure towards National, Provincial and Local (metropolitan) authorities, the fuel levy was R7.16 billion less than current road transport infrastructure expenditure – or stated differently – there is a shortfall of R7.16 billion in the amount collected from the fuel levy.

There is also pressure to share the fuel tax revenue further with other municipalities to compensate them for the revenue they lost with the abolition of the Regional Service Council (RSC) levies. The figure below illustrates the current total Transport and Logistics budget allocation, vs the Roads Infrastructure allocation, vs the net fuel levy. In conclusion, the current fuel levy or tax is insufficient to cover existing road construction and maintenance budget allocations. In essence, the transport sector is benefitting from the principle that all tax revenue collected is surrendered to the national revenue fund, since the allocations made through the single budget process towards transport far exceeds budget allocations towards roads alone.

Fuel levy funds should be allocated to all transport related activities e.g. public transport, rail transport, roads infrastructure etc. At the moment, South Africa is experiencing a large shortfall in terms of budget allocations towards the existing road network. This shortfall in terms of maintenance alone is reflected in the table below. It shows the backlog for road maintenance that amounts to R149 billion, based on

the condition of the road network in South Africa. It is noted this is only taking into account the funds required for strengthening the paved network (due to increased loads) and re-gravelling the gravel network. It is also based on the latest available data which in some instances is four years old.

To provide basic service levels the state is able to provide public goods through the fiscus, this will equate to the standard of roads such as the R101 and R55 between Pretoria and Johannesburg. Current revenue levels do not provide sufficient funds to provide equitably for higher levels of service. The “user-pay” principle allows for higher standard of services to be provided such as the N3 to Durban, the N1 to Musina, the N4 to Maputo and the N4 to Botswana. The “user pay” principle is equitable in that those who enjoy the benefit pay for it and reflects the value to the individual road user; while those who do not receive the benefit do not contribute to that particular road.

It is clear that the current fuel levy is insufficient to cover existing budget allocations towards road infrastructure. It is far from sufficient to meet the budget allocations to the larger transport industry in total. Furthermore, there is an estimated R149 billion backlog in maintenance towards the existing road network in South Africa.

Introduction of Provincial Fuel Levy

The implementation of a provincial fuel levy is administratively burdensome (raised not nationally but from individual filling stations) and it would not be equitable if it is considered as a financing mechanism for the GFIP. If such a levy is introduced, it means that every motorist that purchases fuel in Gauteng would be liable for the payment of the levy from which they might not derive any benefits. Essentially, motorists who do not use the toll-roads would be subsidizing those that benefit directly from the use of toll-roads, which

some may consider to be unfair. Some road users and especially the road freight industry may also elect to refuel vehicles outside the borders of Gauteng.

Toll fees (User pay principle)

Road toll fees constitute user charges that aim to recover the costs of road infrastructure. Users of toll roads receive the benefit of this road infrastructure in exchange for the payment of toll fees that reflect the value to the individual road user. Unlike a user charge, a tax does not confer a direct benefit for the payment made.

The toll fees or the road user charge is calculated based on the cost of providing, maintaining and refurbishing that specific road. These toll fees should be less than the benefits such as reduced travel times and vehicle operating costs that a user is experiencing when using the toll road. The costs of providing road infrastructure have to be recovered from either specific road user beneficiaries or the general taxpaying public at large. Toll fees promote economic efficiency as well as improving accountability and transparency. In contrast, in the absence of tolls, road costs would have to be borne by all taxpayers, irrespective of the extent to which they derive individual benefits from specific road infrastructure expansion and maintenance projects. Unlike a user charge, a tax does not confer a direct benefit for the payment made.

The costs for the GFIP implementation (Phase 1), inclusive of the tolling system and intelligent transport systems (ITS), will amount to approximately R 19,5 billion (VAT Excl). It is clear from the above information that apart from the many other social and infrastructure demands for additional budget allocations, including the existing backlog on the strengthening and re-gravelling programme of the South African road network – (estimate R149 billion) compels us to find other sources of funding for the much needed improvements.

Furthermore, the GFIP has been funded through borrowings from the capital markets. These loans have to be re-paid by SANRAL through the tolls collected. If the loans are not paid through toll fees, the loans will have to be paid by National Treasury by rising taxes or reducing the allocations to other sectors – are not prudent for the National Treasury to implement.

VAT charges on toll fees

The toll fees constitute a private transaction between the road user and SANRAL and are therefore liable to Value-Added Tax (VAT). Considering that a user charge is not a tax, the levying of VAT on toll fees cannot be referred to as a tax-on-tax. The exemption of toll fees from VAT would create a wrong precedence and can therefore not be considered by National Treasury. Companies can deduct both VAT and the cost of tolling from income tax.

Financing of GFIP

The cost of road works and the implementation of Intelligent Transport Systems (ITS) for the implementation of the current phase of the GFIP amounts to approximately R17,4 billion (VAT Excl). The key issue is how to finance the rehabilitation, upgrading, maintenance, operations and new freeways for the GFIP.

The GFIP is funded using capital and money market loans that are being procured to fund the initial capital costs as well as the interest upon the initial capital costs, bearing in mind that the initial capital works took place over several years.

In the case of the GFIP financial model, it is predicted that the loans will be repaid in the year before the major rehabilitation work that has to be undertaken that scheduled after 20 years of operation.

Since the current financial model only makes provision for the repayment of the capital costs associated with the initial capital works and does not make provision for the capital costs of any additional road capacity to be created, either on the existing GFIP routes or in the GFIP corridors, it is reasonable to assume that the toll revenue will, amongst other applications, be applied to provide additional road capacity after the repayment of the loans for the initial capital works.

Details of SANRAL's Domestic Medium Term Note (DMTN) Programme
(Annexure : SANRAL DMTN Programme)

SANRAL sells (issues) bonds to investors in the capital market at monthly bond auctions. This provides SANRAL with the required funding to build, operate and maintain toll roads. The interest rate that SANRAL has to pay on these bonds is determined in the capital market. Bonds trade in the market similar to shares on the stock exchange, and prices and interest rates fluctuate up and down all the time.

At these bond auctions, investors bid in relation to interest rates of Government bonds and their sentiment towards risks in the market. These investors are mostly anonymous and ownership changes over time as bonds are traded in the secondary market.

Unlike a home loan, interest is paid every six months and the principal sum is repaid at the maturity of the bond. SANRAL has sold bonds with maturities that vary from two years to 25 years, from 2013 to 2035. When a bond matures, it has to be refinanced by selling new bonds to investors for another fixed period. The average interest rate that SANRAL pays on all its debt is slightly lower than 10%.

SANRAL has a guarantee from National Treasury for a total debt of R37.91 billion, R6 billion for SZ bonds and R31.91 billion for HWAY

bonds. A total of R5.5 billion SZ bonds have been issued and R9.7 billion HWAY bonds. In addition to this SANRAL may issue a total of R15 billion unguaranteed bonds, the NRA bonds, of which R10.5 billion have been issued. Both the guaranteed and the unguaranteed bonds are of various tenors (term to maturity) with different coupon interest rates as well as some inflation linked bonds, where the repayment grows with CPI. All details regarding SANRAL bonds are available from the Johannesburg Stock Exchange (JSE).

Tariff Determination and Tolling Strategy

The objectives in developing the tolling strategy were:

Equitability - *users paying a level of toll that commensurate with the distance they travel on the freeway system.*

Affordability - *the traffic using the freeway system is commuter and/or daily business related.*

Traffic Attraction – *optimise traffic attraction to the toll roads, thereby limiting additional traffic being loaded onto the secondary road network.*

Efficiency *from a cost/toll revenue income point of view.*

The approach for tariff determination that was adopted for the GFIP, was to determine the tariff levels at which there would not be traffic diversion to alternative roads in respect of those freeway sections to which capacity would be added. It was found that, if the above-mentioned approach is adopted, traffic attraction to most of the upgraded freeway sections would still be achieved at light vehicle discounted tariff levels of 50c/km (non discounted in March 2007 values).

The nature of this road network is such that a conventional toll collection system (toll gates) is not appropriate to install. Therefore, an electronic toll collection (ETC) system is installed which will not impact on traffic flow. Gauteng's e-toll will be operating as an Open Road Tolling (ORT) system comprising a fully electronic toll collection system that does not require vehicles to slow down or stop to conclude a toll transaction. As there are no physical toll booths, overhead gantries are fitted with the toll collection equipment that will recognise the vehicle identifier (electronic transponder (e-tag) in a vehicle and /or the vehicle number plate), toll will be deducted from a user's registered e-toll account associated with the vehicle identifier and the user will be able to travel without any disruption.

The toll system will enable fully integrated electronic toll collection on all toll roads in South Africa, and will be able to do central clearing of toll transactions, thereby enabling a road user to set up a single toll account with the central clearing house, that will allow the account holder of a specific vehicle to make payment at any toll plaza where electronic toll collection is offered, through a single account. In other countries where electronic toll collection has been implemented, road users are required to set up toll accounts with each toll authority or concessionaire that offers electronic toll collection.

Various toll systems were investigated during the development phase of the project. A closed toll system, would have resulted in the construction of gantries (toll points) at every on- and off ramp, at every interchange which would have resulted in an increase in construction and operational costs, thereby increasing the toll tariff to such an extent that the cost to implement a closed toll system would have outweighed the benefit, resulting in an increase of the required toll tariff. The type of toll system, introduced in GFIP, is referred to as a directional toll system, where only one direction of the route is tolled and the toll points are situated approximately 10km apart. The directional toll system, in this instance, is the most equitable for the road user.

Tolls are raised per gantry. Each time a vehicle pass underneath a gantry, toll is charged. The cost per gantry is determined by the kilometre distance which the toll point/gantry represents. However, since this is not a closed system, in some instance road users might travel on the tolled route, but exit the system, before passing a gantry (toll point), which would mean a 'free ride'. But, on the return trip, road user might pass a gantry (toll point) for which they will be charged, thus balancing the cost. Some road users might enter the system just a short distance, before a gantry (toll point) and the full gantry (toll point) cost would apply, even though he/she did not travel the whole section of road. Road users may also enter the road network and exiting it, without going through a tolling point at all. "

125 The Steering Committee report then traverses the impact on the Gauteng economy in response to the Afriforum and RFA report compiled by economists.co.za. I quote at some length from the Steering Committee report in this regard for ease of reading as it deals with *inter alia* the overall costs of tolling and the impact on *inter alia* the costs of living -

"The RFA/Afriforum report acknowledges that the freeway upgrades were necessary and desirable but then does not address the situation that would have emerged if the freeways had not been upgraded. This would have resulted in increased costs to transporting goods in Gauteng and as a result increased costs in both South Africa and the SADC region. This is a key omission from the report which makes the rest of the findings one sided and unbalanced.

The report states that the GFIP will increase the cost of living in Gauteng. Any investment of any nature does cost more and that cost has to be paid off. The more important issue is that without GFIP the

cost of freight would also have increased as a result of increased congestion and increased maintenance costs. It has been shown that for most of the freeway network the cost of travelling, including the cost of moving freight, goes up by less with a tolled and upgraded freeway network than simply leaving the freeway network as it is and only doing routine maintenance. The opportunity to create long term sustainable jobs will be compromised if the negative impact of congestion on economic growth opportunities is not addressed.

The traffic estimates showed that by 2011 parts of the freeway network would have been at full capacity for the morning and afternoon peaks. More specifically these freeways are:

- *Most of the N1 between Proefplaas and Grasmere;*
- *Parts of the R21 between Flying Saucer and the N12;*
- *Most of the N3 from the Buccleuch I/C to the M2 Geldenhuis I/C;*
- *Parts of the N14 from Jan Smuts to Hendrick Potgieter;*
- *Parts of the N12 from Diepkloof to Kingsway.*

By 2015 most of these full capacities extend into the daytime off peak period as well. This type of gridlock would have put enormous pressure on the cost of business travel, including the cost of moving freight by road.

Impacts on the Cost of Living

There are a number of issues relating to impacts on the cost of living. These are that taxes appear to have been ignored; the relative cost of not upgrading and upgrading and tolling has not been considered;

overall consumption at different income levels has not been considered.

Tolls are tax deductible

The estimates on the impact on the cost of living do not appear to have taken into account that companies can deduct both VAT and the cost of tolling from income tax. The consequence of this is that their estimates of impacts on the price of consumer goods are overestimated by 37% (R100 less VAT is R87.72. This then adjusted for company tax of 28% means that only R63.16 of a R100 toll is paid by the freight industry). Therefore if the price of bread is set to rise by between 1.2% and 2% because of tolling then after allowing for taxes that can be deduced that the price of bread will only rise by between 0.8% and 1.3%. This means that if the price of bread was R10 a loaf the price it would rise to between R10.08 and R10.13.

Relative Costs

As mentioned before, the report states that the GFIP will increase the cost of living in Gauteng. Any investment of any nature does cost more and that cost has to be paid off. The more important issue is that without GFIP the cost of freight would also have increased as a result of increased congestion and increased maintenance costs. In order to illustrate this issue the cost of a journey from Pretoria to Isando and from Isando to Soweto has been measured. This has been done for the years 2011 without the upgrade and without tolling and with the upgrade and without tolling (in other words the current situation). It is then done for the year 2020 for the situation where the roads had simply been left with only routine maintenance without being tolled and the situation with the current GFIP with tolls. This has been done for class 2 and class 3 vehicles. The following findings are made:

In 2011:

- *For a class 2 vehicle the cost of the journey in the morning peak traffic would have been R1,685 without the freeway network upgrade and is R1,487 with the upgrade. This is a R198 difference which is 12% lower with the upgrade than without the upgrade.*
- *For a class 3 vehicle the cost of the journey in the morning peak traffic would have been R2,312 without the freeway network upgrade and is R2,048 with the upgrade. This is a R263 difference which is 11% lower with the upgrade than without the upgrade.*
- *The consequence of this is that the upgrade has reduced the cost of moving freight by between 11% and 12%.*
- *Therefore if tolling is set to increase the price of bread by between 1.2% and 2% but the upgrade has already reduced the price of bread by between 11% and 12% then the price of bread would actually cost between 9.8% and 10% less than it did before the upgrade and tolling, a saving that should be passed onto clients/consumers.*
- *These journeys are for the morning peak. If the daytime off peak or afternoon peak journeys are considered then the 12% and 11% savings for class 2 and class 3 vehicles change to 12% and 12% respectively for the daytime off peak journeys and 13% and 12% for the afternoon peak journeys. Both these journeys represent an even greater saving than for the morning peak.*

In 2015:

- *For a class 2 vehicle the cost of the journey in the morning peak would have been R1,767 without the freeway network upgrade and would have been R1,665 with the upgrade and with the journey tolled. This is a R102 difference which is 6% lower with the tolled upgrade than without the upgrade.*
- *For a class 3 vehicle the cost of the journey would have been R2,416 without the freeway network upgrade and would have been R2,307 with the upgrade and with the journey tolled. This is a R109 difference which is 5% lower with the upgrade and tolled than without the upgrade.*
- *The consequence of this is that if the price of bread is set to increase by between 1.2% and 2% then without upgrading and tolling the price of bread in 2015 would have been between 6% and 8% higher.*
- *These journeys are for the morning peak. If the daytime off peak or afternoon peak journeys are considered then the 6% and 5% savings for class 2 and class 3 vehicles change to 7% and 5% respectively for the daytime off peak journeys and 10% and 8% for the afternoon peak journeys. Both these journeys represent an even greater saving than for the morning peak.*

Overall Consumption Patterns

The RFA/AFRIFORUM report focuses on the price of bread in order to demonstrate that poor people will be adversely affected by tolling. It will be recognised that while poorer people do have a larger share of food in their overall consumption they also consume other things. A more scientific approach would have been to have looked at the overall

spending patterns of people at different income levels rather than just their consumption of food.

This analysis was done for freight being moved from north Pretoria to Isando and then from Isando to Soweto. The analysis was done for the situation before the freeway upgrades and ignored all the benefits from the upgrades. It simply assumed that the non-upgraded freeways were tolled. It was found that households with incomes less than R24 365 would face cost of living increases of 0.15%. This is the equivalent of 15 cents for each R100 spent on consumer goods. Households with incomes between R24 365 and R55 159 would face cost of living increases of 0.14%. Households with incomes in excess of R55 160 would have cost of living increases of 0.13% due to the increased cost of consumer goods. Pensioners would face cost of living increases of 0.14%.

Overall Cost of Tolling

The report makes an estimate that the cost of GFIP will be the equivalent of a 2% increase in personal income tax. The economic study performed by the Graduate School of Business of the University of Cape Town and Arup made a different estimate of likely toll tariff burden on people falling into living standard measure (LSM) 7 to 10. This category has been used because it is people in this category who are more likely to own private vehicles and use them on the GFIP network. In Gauteng LSM 7 to 10 constitute 90.2% of total household income. As a consequence, the toll tariff burden on this group of people is expected to be in the region of 0.48% in 2011. If they pay approximately 25% of their income as tax then the 2% increase in income tax is correct. To put this in perspective for every R1 000 such a person earns they will spend R4.80 on tolls. To further put this into perspective the RFA/Afriforum report does not appear to have taken any benefits into account. The benefits include lower cost of

maintenance and less congestion than would have been the case if the freeways had not been upgraded.

Construction Costs (Response to Afriforum & RFA report compiled by economists.co.za)

The Road Freight Association (RFA)/Afriforum report that was conducted by economists.co.za report indicated the construction cost of the GFIP to be “extremely high” and possibly “100% to 228%” higher than that of equivalent international projects.

Based on the information for this report, and without considering many other features of GFIP, the construction cost of GFIP is between 4% and 565% lower than comparable projects in the USA. This conclusion is supported by the statement in the WSDOT study that indicated that the cost per lane mile in urban areas (high number of interchanges and structures) is more than \$10 m (2004 \$). If this figure is converted to Rand value per lane kilometre in 2011 Rand, it amounts to R43m, more than double the R20,5 million calculated for the GFIP.

It is therefore concluded that the high costs for the GFIP as is reflected in the Economists.co.za report prepared for Afriforum and the RFA is erroneous and misleading.

Comparison of GFIP toll tariffs with International Toll Tariffs

In comparing the GFIP toll tariffs with those elsewhere in the world, it was considered important to focus upon projects which either opened during the last 10 years or in respect of which major construction took place during the last 10 years. The rationale for this is to ensure a degree of comparability with the Gauteng Freeway Improvement Project in the sense that the toll tariffs had been set to be borne by road users in relatively recent time periods. Some American toll roads that were originally built 40-70 years ago are being tolled purely to

cover the maintenance of the toll road and, therefore, their toll tariffs would not necessarily be comparable.

The table below indicates the tag light vehicle toll tariffs per kilometre for a number of such toll facilities in Australia, Chile, Spain and the USA. All projects with major new or upgraded construction works after 2000 for which information could be derived from their web-sites were included. The toll tariffs per kilometre are indicated in South African Rand in two ways, namely if the actual exchange rate in April 2011 is used and if the exchange rate based on the Big Mac Index is used. The Big Mac Index considers the Rand to be undervalued and indicates the “correct” Rand : US Dollar exchange rate to be R4,95 = \$1 US.

The important conclusions that may be drawn from the table above are as follows:

- If it is considered that no recent projects randomly encountered on the web-sites by the analyst were discarded, the major conclusion is that, even if the very high value of the Rand in the Big Mac Index is used, the previously announced GFIP toll tag tariff of 49,5c per km compares well with international tariffs. It should also be considered that the GFIP offers a range of additional discounts that were not factored into the comparison.*
- If the GFIP light vehicle toll tariff per km is compared with those in Santiago, Chile which is considered to be very comparable to South Africa, it is concluded that the tag toll tariffs per kilometre are comparing very closely (if compared on the basis of the Big Mac Index).*

Economic Regulation of Toll Tariffs

SANRAL is an agency of the Department of Transport and responsible for the management, maintenance, operations, upgrading and expansion of the national road network of 16 170 kms. Currently, about 19% of this network is tolled. Toll tariffs are increased annually, based on the average monthly CPI of the preceding year. The Department of Transport acts as regulator of all new toll road approvals, new toll tariff and discount structures and the annual adjustments in toll tariffs on the basis as discussed above. The Minister of Transport is responsible for the approval of the above, based on a recommendation from the SANRAL Board.

Predicted Impact of the GFIP on Alternative Routes (Municipal and Provincial Roads)

Basis of Evaluation

In order to evaluate the impact of the GFIP on the alternative road network, traffic volumes were extracted from the traffic model that was developed for the GFIP project. As the project will be completed in 2011, the first modelled design year thereafter, being 2015, was used for evaluation purposes. Therefore, the following model outputs were derived:

- *2015 Base Network – i.e. before the Gauteng Freeway Improvement Scheme.*
- *2015 Upgraded and tolled network.*

For each of these design year scenarios, the traffic volumes represented during the following time periods were obtained from the traffic models:

- *Morning peak hour, representing the AM peak period*

- *Mid-day hour, representing the average hour between the AM and PM peak periods*
- *Afternoon peak hour, representing the PM peak period*
- *Night hour, representing an average hour between the PM and AM peak periods*
- *Weekend hour, representing an average hour between the Friday night and Sunday night periods.*

Evaluation of differences in predicted alternative road network traffic with and without GFIP

The impact of the GFIP, which involves the expansion and tolling of the existing SANRAL freeway network in Gauteng, can be determined by comparing the “Do-Nothing” case and the GFIP road network. The GFIP project will be completed in 2011, therefore the first model design year thereafter was used for comparative purposes, since by this time traffic patterns would have balanced out, in that motorists would be familiar with the freeway network and alternative routes. Based on the results of the above comparison, the following is highlighted:

- *The tolled freeway network offers additional capacity (compared to the Do-Nothing scenario) which is utilised during the main peak periods, being the AM, PM and to a lesser extent, the Mid-day period between the AM and PM peaks.*
- *At night and during the weekends, traffic increases on the alternative “free” routes, however when dispersed over the alternative roads, these increases are relatively small. It should also be taken into consideration that the traffic model does not*

consider the so-called motorway bonus which is the value of the additional comfort, convenience and safety offered by a freeway and which leads to additional attraction to the motorway for other purposes than road user cost savings. The motorway bonus does not take into account security during night-time travel which will tend to increase the selection of freeways which are lit, requires no stopping at traffic signals and will have improved incident management systems, supported by Intelligent Transport Systems as well as a law enforcement unit .

- *In terms of the overall alternative Provincial and Metropolitan road network, there should be a reduction of $\pm 10\%$ in travelled distance and in excess of 20% reduction in travel time on a daily basis as a result of the GFIP project.*
- *Comparing traffic volumes on key roads in the Provincial and Metropolitan road network, there is a daily reduction in traffic of between 5%-8% and a daily reduction of approximately 6% in heavy vehicle traffic. This should have the effect of extending the maintenance and expansion programmes for these roads and resulting in significant savings for the Provincial and Metropolitan*

Future Network Expansion (Phase II and III)

It is inevitable that traffic volumes on the Gauteng road network will continue to grow as a result of the economic growth in the province. In addition to the upgrading of the existing freeway system in Gauteng, SANRAL is, therefore, also foreseeing essential future network expansions in terms of upgrading other existing freeways and constructing new freeways in the province. The growing demand will also be addressed by means of developments in the public transport system in the province.

Platinum Toll Road (N4) Example

In 2003, the Platinum Toll Road was opened for operations. Part of the project comprised the upgrading of the N1 between the N4 (Proefplaas Interchange) and Zambesi Interchange in the Pretoria North area. Furthermore, a new section of the N4 was constructed in an east-west direction, linking the N1 with Brits. The project introduced tolling on an upgraded freeway in an urban area of Gauteng. The average daily traffic volume on this section of the N1, prior to the commencement of construction activities, was 67 600 vehicles per day in 2002. At the time, the N1 had two lanes per direction and reached capacity in peak hours, resulting in extremely poor levels of service. After completion of the upgrading of the freeway (one additional lane per direction), toll operations commenced in 2003. The average daily traffic after commencement of toll operations dropped to 50100. A year later (2005), the average daily traffic reached 68 000, and in 2007, before the economic recession, traffic volumes reached 79 000 per day. This represents an increase in traffic volumes from before the upgrading of the freeway commenced, until 2007, of 16,8%, or 11400 vehicles per day. The traffic analysis for the GFIP indicates similar patterns, namely that the additional capacity added to the freeway network allows room for traffic growth to take place. This growth in traffic volumes would have taken place on the alternative/secondary roads, if this capacity was not created on the freeway network. Alternatively, if the alternative route network is also congested, no or very limited traffic growth will be possible, which will reflect in reduced economic opportunities for that specific area.

Monitoring Traffic Diversion

In order to determine the actual traffic diversion, attraction and growth patterns, SANRAL is implementing a comprehensive traffic monitoring

programme that will monitor traffic on alternative routes after the commencement of toll operations on the GFIP."

126 Against this background, it is simply not correct for the applicants to contend that the Steering Committee did not take into account the comments of or concerns raised by members of the public. It is plain that the Steering Committee heard, listened, and understood what was put before it.

127 There were ongoing presentations that were made following finalisation of the Steering Committee report. By way of example, on 12 September 2011 Alex van Niekerk ("Van Niekerk"), a representative of SANRAL, delivered a report titled :

"Sustainable Mobility

GFIP and Future deployment of ETC and ITS Systems"

A copy of that presentation is attached marked "**NA13**".

128 The extracts from that presentation below are directly relevant to the issues ignored in the founding affidavit but which reflect the in depth analysis and reasoned approach that was undertaken by SANRAL as part and parcel of its decision to implement tolling -

"Sustainable Mobility

- *A number of criteria will determine the ability to achieve sustainable mobility:*

- *Integrated planning*
- *Cooperation between different spheres of government*
- *Cooperation between different government departments and agencies*
- *Partnerships between public and private entities*
- *Sustainable/sufficient funding for infrastructure provision, operations and maintenance*

USA Example

- *Historically in the USA - bulk of interstate road network funded through fuel levy*
- *Estimated maintenance backlog for this network is in excess of \$1,3 trillion*
- *Two national commissions established by the U.S. Congress recommended replacing fuel taxes with a distance based system of user fees*

Criteria Used

- *Evaluated Fuel Levy and MBUF in terms of following Criteria:*
 - *Efficiency*
 - *Equity*

- *Revenue Adequacy & Sustainability*
- *Environmental Sustainability*
- *Feasibility*

1. Efficiency

- *Fuel taxes does not cover the cost imposed by each user on the road system*
- *Leads to inefficient overuse – perceived by user to be for free, coming at no cost, resulting in congestion*
- *Can therefore result in over supply of road capacity, since it is “free” to use*
- *Effect on Roadway Congestion:*
 - *Cost on society higher when using congested vs. uncongested roads*
 - *Increased emissions – increased environmental costs*
 - *Does not allow for differential pricing, thereby not discouraging users to travel outside peak*
- *Effect on Mode Shift:*
 - *Fuel taxes unrelated to congestion – US experience is that although there is high levels of congestion – experience little use of public transit*

- *(Road pricing result in shift of truck transport to rail transport)*
- *(Truck tolling in Germany resulted in approximately 20% reduction in empty truck trips)*
- *Inefficient land use – “cheap” cost of travelling resulted in urban sprawl*

2. Equity

- *Motor Fuel Taxes as users fees:*
 - *Improvement in fuel efficiency*
 - *1975 – 5,6 km/l*
 - *2008 – 8,7 km/l*
 - *2030 – 12,3 km/l (15 – 17 km/l for light vehicles)*
 - *Target set for cars in 2016 : 17 km/l for cars and 13 km/l for light trucks*
 - *Alternative fuels:*
 - *Hybrids and electric vehicles is a “significant violation of the user pay principle”*
- *Full cost recovery of direct costs:*
 - *Under recovery in terms of road construction and maintenance needs*

- *Extra amount paid by heavy vehicles for fuel taxes does not make up for added amount of wear and tear*
- *Cars and light trucks are subsidising heavier trucks*

3. Revenue Adequacy

- *Fuel taxes:*
 - *US : approximately 91c/l*
 - *Canada: approximately R2,40/l*
 - *Netherlands: approximately R10,30/l*
- *In US, estimated that revenues raised by all levels of government is only one third of what is required to maintain and expand highway and transit systems*
- *Greater fuel efficiency, alternative fuels and new vehicle technologies reduced revenue from fuel levy*
- *Fuel levy did not increase in relation to construction inflation*
- *Fuel taxes are inadequate and unsustainable going forward*

4. Environmental Sustainability

- *Fuel taxes weakly adhere to the polluters-pay principle*
- *It is a blunt tool in promoting environmental sustainability*
- *Fuel taxes provide some incentive for the use of less-polluting fuels, however in US, the effect is marginal*

5. Feasibility

- *Fuel taxes from a political and administrative feasibility perspective fare relatively well*
- *However, states and federal governments have difficulty raising fuel taxes since it raise a political liability*
- *Ensures driver privacy*
- *Implementation, operation and enforcement costs are relatively low*

Report Conclusions

- *Fuel taxes not sustainable*
- *MBUF's have a significant advantage over fuel taxes when evaluated under efficiency, equity and revenue adequacy and sustainability criteria*
- *Fuel taxes outperform MBUF's under administrative feasibility principle*
- *Recommend the combined use of fuel taxes and MBUF's*
- *A technology solution is required to address administrative feasibility*

Sustainable Mobility in South Africa

- *Without sustainable mobility, sustainable economic growth will not be achieved*
- *Sustainable mobility relies on sufficient & effective infrastructure (road, rail, electricity, communication)*
- *South Africa's road infrastructure has a critical role to play, both in urban and rural areas*
- *Roads play important role in providing connectivity between origins and destinations that allows people, goods and services to be moved from one to the other*

Reality Conclusions

- *Vehicle ownership will continue to grow – economic empowerment*
- *If current development patterns is allowed – urban sprawl will continue*
- *Sprawl results in very high PT operational cost as well as infrastructure provision*
- *Maintenance backlog on road maintenance*
- *No dedicated fuel levy*
- *Apart from tolling, no alternative funding options than budgetary allocations for road infrastructure*
- *Can not afford to do nothing"*

129 There has been an 80% increase in the number of registered vehicles since 1994. At present there are 180 registered cars per 1 000 population. Saturation levels are at 450 per thousand. A household survey conducted in 2003 indicated that the average household income at which a car is purchased in South Africa is R3 000 (2003 Rand, R5 000 – 2012).

130 There is a massive maintenance backlog in South Africa. It is recorded in this regard in "**NA13**" -

"Maintenance Backlog

- *Approximately R149 billion road maintenance backlog*
- *(Based on actual condition data for only 37% of the network and some data as old as 4 years for some authorities)*
- *The above backlog excludes backlogs related to periodic resurfacing of the network, upgrade of gravel roads to surfaced standard, addition of lanes to alleviate congestion and construction of new roads.*
- *Apart from roads, there are various other infrastructure maintenance backlogs – rail, water, electricity, sewage, etc."*

131 Much has been made by the applicants of the imposition of a fuel levy. In regard to this issue the following is recorded in "**NA13**" -

- *"In 1987, ring fenced road levy was abolished*

- *Revenue from the transport sector, such as from fuel levies are collected as normal taxes and accrues to the national revenue fund.*
- *To ensure transparency and accountability all revenue collected is surrendered to the national revenue fund as provided by the Constitution. "*

132 Urban sprawl is a topic repeatedly addressed in the documents attached to this affidavit. Van Niekerk addressed this issue in "**NA13**" as follows -

"Urban Sprawl

- *Low population density in metropolitan areas, compared with international figures*
- *Distortion in land use development as a result of past political policy*
- *Urban edge keeps expanding*
- *Longer distances between home and work is travelled*
- *More expensive to provide efficient public transport*
- *Provision of road infrastructure (Class 1, 2 and 3 roads) did not keep up with growth in vehicle ownership and urban sprawl*
- *Average PT trip length in Tshwane 3* London*
- *Bus and Metrorail subsidies – R7b per annum "*

133 Gauteng congestion is specifically addressed in "**NA13**" -

"Gauteng – Congestion

- *The recent commuter pain survey by IBM ranked the emotional and economic toll of commuting in each city into a pain index.*
- *The daily commute in Johannesburg has been ranked one of the world's worst*
- *Various economic studies indicated the negative impact of congestion on sustainable economic growth and job creation"*

134 Broadly speaking SANRAL's analysis has shown that electronic tolling results in -

134.1 efficiency;

134.2 equity;

134.3 revenue adequacy;

134.4 environmental sustainability;

134.5 feasibility.

135 Van Niekerk addresses each of these conclusions in his presentation ("**NA13**") as follows -

"1. Efficiency

- *ETC covers the cost imposed by each user on the road system*
- *As a result of road pricing, use is coming at a cost, resulting in less congestion*
- *ETC allows for differential pricing, discouraging users to travel outside peak hours*
- *Road pricing encourage the use of public transport either by mode shift, or the use of public transport at discounted toll tariffs*
- *New routes inside urban edge – road pricing discourage sprawl*

2. Equity

- *User pay (Less than 3rd of vehicle population use Gauteng freeways), not cross subsidised*
- *Users pay in accordance with distance travelled (use)*
- *Users pay in accordance with consumption of infrastructure – different vehicle classes*

3. Revenue Adequacy

- *Will be dependant on implementation cost of future phases of GFIP*

- *Impact of greater fuel efficiency, alternative fuels and new vehicle technologies does not impact on revenue*
- *Tolling provides a sustainable revenue stream*

4. Environmental Sustainability

- *In line with principles of using clean energy (not based on fuel sales)*
- *Encourage a shift outside peak hour use (higher emissions)*
- *Encourage Travel Demand Management (TDM)*
- *Open road tolling is environmentally friendly – does not require vehicles to stop*

5. Feasibility

- *ORT system developed for SANRAL – one of the most advanced systems (full interoperability, central clearing)*
- *As result of system design, low additional implementation cost, mostly infrastructure and lane equipment*
- *Increased operational efficiency due to higher transaction volumes"*

136 The presentation concludes as follows -

"Conclusion

- *"Future GFIP phases, implemented by means of the user pay system will be required to achieve sustainable mobility*
- *Is part of the transport solution for the movement of people*
- *Is essential for the movement services and goods*
- *ORT provides a mechanism to implement this infrastructure and also promote the objectives of transport efficiency, equitability and environmental sustainability "*

137 Interaction with the public and various bodies continued during this period. Attached hereto marked "**NA14**" is a letter addressed to the fourth applicant, SANCU on 9 February 2012. It is recorded in "**NA14**" inter alia -

- "2 *SANRAL notes your concerns regarding what you refer to as the "costly" process relating to the operating of the e-toll system and wishes to address this concern. The system developed by SANRAL is based on international best practice and SANRAL is of the view that this system is an efficient and effective way in which to collect toll. SANRAL conducted extensive research before any decision was taken to implement the proposed system SANRAL is further of the view that the "user-pay" principle is the optimal and most reasonable principle to adopt, since tolls are paid by the users of the toll roads and not by all road users including those who may reside in other provinces and who do not use the Gauteng toll roads.*
- 3 *It should be noted that tolls are a mechanism to raise additional funding to cover a shortfall in available funding to enable SANRAL to implement much required road*

infrastructure projects such as the Gauteng Freeway Improvement Project (GFIP). SANRAL is not opposed to other available sources of funding for road infrastructure, but is implementing a basket of funding options to ensure that South Africa has sufficient road infrastructure to accommodate sustainable economic growth and job creation.

4 The user pays principle, which you indicate you do not oppose, cannot only operate on the basis of fuel levies which relate to fuel sales, as opposed to the use of a specified road. A Province, such as Gauteng, has wider challenges in terms of finding sustainable and integrated transport solutions. These challenges include:

4.1 the doubling of vehicle ownership from 1994 to 2012. As a result, severe congestion is experienced on Gauteng roads and it appears that the trend of increased vehicle ownership will continue;

4.2 the distortion in land use development as a result of past political policy and an ever expanding urban edge. The perception exists that roads servicing this ever expanding edge will be provided for "free". As a result, longer distances between home and work are travelled. It also becomes more expensive to provide efficient public transport. The provision and maintenance of these roads are expensive and need to be funded;

4.3 the fact that based on 37% of data available for South Africa's road network (approximately 606 000 km) there is a R149 billion backlog with respect to maintenance on provincial and national roads;

- 4.4 *the fact that the use of public transport as opposed to private vehicles should be promoted;*
- 4.5 *the fact that the optimal use of vehicles through increased vehicle occupancy should be encouraged;*
- 4.6 *the optimisation in the way in which infrastructure is used. Users should be incentivised, through the cost of travelling, to rather use roads outside peak hours, due to congestion (and the high cost of providing additional infrastructure to resolve this congestion).*
- 5 *It is therefore important to have a real understanding of the benefits of the Gauteng Freeway Improvement Project. Its main benefit will be to reduce congestion. By reducing congestion the freeway improvement scheme will oil the wheels of the Gauteng economy; and the Gauteng economy is the big 'engine room' of job creation in South Africa. Of course the financial cost to users will be higher with tolling than without it, but the following should also be considered:*
- 5.1 *With tolling, the freeways will remain in a relatively free-flow condition for much longer than if the roads were funded entirely from Government and made free at the point of use.*
- 5.2 *With tolling, businesses in Gauteng will be able to undertake many more freight distribution trips per week than in a congested scenario. Over the years, the additional business done will far exceed the extra costs paid for almost all firms.*

- 5.3 *With tolling, commuters will get to work quicker and in a less stressed condition than without tolling. If this is true for private car users it will be even more true for public transport vehicle users because they have much reduced, or zero, tolls.*
- 5.4 *With tolling, all employees will be able to access a wider range of potential employment opportunities within a given commuting time. And employers will be able to attract employees from a wider catchment area and hence have the chance of improved quality of staff. With this more efficient deployment of labour, both firms and individuals will progressively be better off than now.*

The current 'free at the point of use' system comes at a very high economic cost. 'Free' roads breed congestion; 'free' roads slow up freight delivery, 'free' roads get people to work late; 'free' roads reduce economic growth, and they slow employment creation.

- 6 *Direct user pricing (tolling) is an effective mechanism to offset the cost of providing improved infrastructure against the benefit for each user. It also assists in preventing urban sprawl, reducing the carbon footprint of individuals, promoting public transport usage and ride sharing. In addition, tolls collected are ring fenced for purposes of the maintenance, upgrade and operations of toll roads. This ensures that the toll roads are maintained in good condition. The cost of collection of compliant toll transaction (meaning a road user is registered and has an e-toll account) is less than 10% of toll charges. There will be an increased cost during the initial ramp up period for setting up accounts, distributing the bulk*

of the toll tags, and improving general compliance of toll payments. International experience demonstrates that high levels of compliancy can be obtained.

- 7 *In South Africa, taxes generated through the fuel levy are not sufficient to address infrastructure requirements. An equal amount collected through fuel taxes is already distributed back to road authorities via budget allocations from the fiscus. However, these funds are insufficient to address all the maintenance backlogs and additional road infrastructure requirements. Similar maintenance and expansion requirements exist for water, electricity, sewage rail and harbour infrastructure.*
- 8 *As part of the Steering Committee investigations in 2011, the option of a provincial fuel levy was investigated. The cost of collection of a provincial fuel levy will be at least 10% of total collection. Provincial fuels levies can also be avoided particularly by freight companies.*
- 9 *The challenge relating to sufficient funding for road infrastructure is not specific to South Africa, Internationally, from developed to developing countries, the same challenges are experienced, The cost of materials (bitumen, fuel, cement, etc) increased above consumer price indices., The relative revenue from fuel levies (if applied) did not keep up with infrastructure needs, mainly because of a decline of fuel sales per vehicle due to increased fuel efficiency as well as hybrid and alternative fuel vehicles, and insufficient annual increases in the levy itself*
- 10 *As you have raised the issue of fraud and cloning, which SANRAL acknowledge are currently issues faced by the South*

African vehicle industry, SANRAL takes the opportunity to address these concerns within the context of electronic tolling and the e-toll system which will apply to Gauteng's toll roads and which constitute the GFIP. SANRAL is of the view that the use of e-tags will in fact assist and deal with so-called cloned or fraudulent licence plates. This is because the e-tag is the method initially used to identify the vehicle and the e-tag (if this option is that chosen by the user to identify the vehicle) cross references the number plate of the vehicle registered with SANRAL. The use of both identifying methods (both e-tag and licence plate) and by further identifying the vehicle itself (which will take place by virtue of the vehicle being photographed) will greatly assist in preventing fraudulent transactions. Information is therefore available to assist in identifying vehicles and preventing fraud. The mere copying of a licence plate will not result in a user becoming liable for another party's toll charges. E-Tolling and the systems implemented will, greatly assist in preventing fraud and in particular the cloning of number plates. SANRAL intends to work with the South African Police Services in order to address and combat the scourge of cloned or fraudulent number plates. The technology being utilised by SANRAL in respect of Open Road Tolling will greatly assist in this regard."

138 Against this background and evidence of the processes followed and what was considered at each step by SANRAL and the Minister of Transport, it is plain the material allegations relied on by the applicants are devoid of any merit. On the strength of what is set out above, it is clear that the review application under Part B has no reasonable prospects of success. This is also borne out by what I set out below in this answering affidavit.

RESPONSE TO MAPHOROMA'S AFFIDAVIT, TABAKIN'S AFFIDAVIT, OSRIN'S AFFIDAVIT, LEATSWE'S AFFIDAVIT AS WELL AS THE ASSERTIONS ADVANCED ON BEHALF OF THE THIRD APPLICANT

139 Much of what is stated in these affidavits has been substantively addressed in the GFIP steering committee report, annexure "**NA12**" hereto, and in the remaining documents to which reference has been made above and no useful for purpose will be served in reiterating what is stated previously in this regard as amplified by the documents that are attached hereto.

140 Each of the individuals who have deposed to affidavits in support of the relief sought in this application have failed to fully appreciate the numerous benefits (as highlighted above) of the GFIP.

141 I do not, for a moment, suggest that there will not be a cost which will be incurred by all users of the proposed road toll network including these individuals/members of organizations should they resolve to "use" the proposed road toll network.

142 Whilst there has been an outcry in relation to tolling of the proposed toll network, that outcry must be considered objectively and in the context of what is perceived to be an additional cost to an economically distressed society. What has become evident to me through the process encapsulated in the Steering Committee report ("**NA12**") is the fact that the public outcry has not paid adequate attention to the myriad material benefits which have and will

continue to flow to the public through the GFIP. They are detailed in the Steering Committee report ("**NA12**") and amplified in the remaining documents attached to this affidavit.

143 Although the impression sought to be created by the applicants is one of unanimous opposition on the part of the South African public, to the imposition of tolls on the proposed toll road network, that assertion warrants further consideration in the context and against the background of what is stated in the founding affidavit.

144 Dealing with each of the applicants in turn, the factual position which emerges is not one where the applicants can assert or have established that they represent the majority of South Africans who will be affected by the imposition of tolls on the proposed toll road network. This assertion is amplified more fully below.

145 OUTA is a "voluntary association" that has only recently been formed. As is stated in the founding affidavit :

"The organization came into being on or about 12 March and launched its website (www.oua.co.za) on 15 March 2012."

146 Although OUTA asserts a wide membership, there is no evidence which has been adduced supporting the assertion that all -

- 146.1 twenty-two member companies of SAVRALA which conduct business in the vehicle rental and leasing industry; and
- 146.2 740 companies represented by the South African Tourist Service Association ("SATSA") operating in the inbound tourism industry; and
- 146.3 7 500 members of the retail motor industries of South Africa ("RMI") operating in over fourteen sectors in the retail motor and related industries,

support this application.

147 In fact, I would be most surprised if each of these organizations who are members of OUTA and all their member companies/members unanimously support the steps taken by OUTA, ostensibly "in the public interest" in opposing the tolling of Gauteng's freeways. I have little doubt that those members have not been fully appraised of the direct benefits that will flow to each of them through the GFIP as has been demonstrated above and is amplified below

148 The Automobile Association of South Africa ostensibly supports OUTA. I note that it is stated that the opposition to tolling amongst AA members is overwhelming. That having been said, it is implicit in that statement that not all members support the AA's stance.

149 As a general category OUTA also claims to represent -

149.1 ninety-four businesses; and

149.2 1 831 individuals who have registered as supporters of OUTA since the launch of this website.

150 The individual members of OUTA who have furnished affidavits have clearly not appreciated the benefits that flow to them from the GFIP.

151 The second applicant is SAVRALA. It is asserted that SAVRALA represents twenty-two member companies that conduct business in the vehicle rental and leasing industry. To assert that the members of SAVRALA will suffer material financial and administrative prejudice is deliberately misleading and rejected. In fact, systems are already far advanced for real time access to the charges which will be levied in respect of members of SAVRALA's vehicles and, more disconcerting is the fact that SAVRALA has failed to disclose that certain of its members have been working extremely closely with SANRAL to ensure that their systems are fully integrated with the system which the GFIP intends utilizing.

152 QASA, the third applicant, is an important and valued organization, providing a much needed service to people with disabilities and mobility impairment. The 2000 Gauteng based members of QASA are indeed in an untenable

position and their concerns may well be capable of being addressed incisively as appears more fully from what is set out below.

153 This then constitutes the entities who have launched this application. There are 10.1 million people who live in the province of Gauteng; and approximately 1 million vehicles who utilize the proposed toll network each day. The applicants themselves state -

"The Minister of Transport in his announcement of GFIP in 2008, gave the figure of 180 000 commuters on the Ben Schoeman portion of the highway running between Johannesburg and Pretoria every day" (paragraph 203.6, pages 194 to 195).

"The traffic and toll feasibility report contained in the record as addendum D suggests that the figure is much higher than this. Paragraph 4 of the expanded report, an excerpt which I attach hereto marked "FA48", indicates that (on 2006 figures) there are 40 000 road users on the stretch of road referred to by the Minister in the peak hour of the morning peak period alone and that there are 219 323 road users on the proposed toll road network (excluding the R21) in the same period" (paragraph 203,7, page 195)

154 The true position is, in fact, that the majority of motorists will obey the law and travel on the proposed toll road network each day and pay the required tolls. When this is measured against the applicants whose authority to represent the entire membership is not proven, and is, in fact, disputed, opposition to GFIP is insignificant.

155 During 2009 a GFIP Market Survey Study was conducted to collect information on the profile of the then current highway users and potential toll users. The sampling technique involved the recording of vehicle registration numbers on 13 strategic locations along the GFIP Network. There were 27 300 interviews conducted from which a representative sample was selected.

156 The results of that survey including –

156.1 time periods used for the study;

156.2 sample size;

156.3 the information captured in the market survey,

are all embodied in the document attached hereto marked "**NA15**".

157 It is recorded in paragraph 4 of annexure "**NA15**" –

"The market survey provided data on the average trip length on the GFIP network, as well as trip frequencies, which was used to develop a histogram on the estimated monthly toll per user. The histogram below shows the estimated monthly toll per light vehicle user driving with an e-tag (based on current toll tariffs and discounts)".

"Based on the histogram, 41% of potential users will pay R100 or less per month, while 35,5% users will pay between R100 and R250 per month. 6.3% of users will pay the maximum monthly toll of R550. The model also shows that the weighted average toll is 26 cent per kilometre for light vehicles".

"During the construction of the toll system, vehicle data from gantries already in operation, was used to verify the above histogram. The data was collected over a period of 30 days, where 30 or more gantries were operational on each day".

"It is evident from the gantry data that there might be even more lower paying users than original estimated. The gantry data shows that 62.0% (vs 41.0%) of users are likely to pay R100 or less per month. Furthermore, 25.6% (vs 35,5%) users will pay between R100 and R250 per month, and only 0.7% (vs 6.3%) of users will pay the maximum monthly toll of R550".

158 I might mention that there are already several hundred thousand e-tags in circulation which demonstrates a significant acceptance of the GFIP and an intention to utilize the proposed toll network and enjoy the benefits flowing therefrom by the vast majority of road users who currently use the proposed toll road network.

159 Although this has been traversed above, I highlight, in so far as each of Messrs Tabakin and Osrin are concerned, the following -

159.1 neither has provided details of the precise routes they are required to travel in the course and scope of their employment and I am unable to comment precisely on the actual costs which each of these individuals will incur pursuant to their utilization of the proposed toll road toll network;

159.2 there are a number of factors which will ameliorate if not entirely extinguish the financial effect of the imposition of tolls. Depending on whether or not these two individuals operate through companies, they can deduct both the VAT charge and the cost of tolling from income tax and/or the cost of tolling from income tax. The consequence of this is that by their estimate of the impact of tolling, they have potentially over estimated such impact by 37% (R100 less VAT is R87,72. This is then adjusted for company tax of 28% which means that only R63,16 of R100 toll will be required to be paid).

160 In so far as the distance travelled by each of Tabakin and Osrin is concerned.

160.1 Tabakin states :

"My travelling requires me to cover a distance of some 400 to 500 kilometres visiting current and potential customers. My

mileage amounts in total to between some kilometres each month" (paragraph 16, page 341).

160.2 Osrin states :

"... I travel widely in Gauteng and as far afield as Midrand; Roodeport, Krugersdorp; Alberton and Pretoria in addition to local work found in and around the city and suburbs of Johannesburg." (paragraph 5, page 345)

161 What each of Tabakin and Osrin ignore is that -

161.1 neither is obliged to use the proposed toll network to ply their trade;

161.2 by using the proposed road toll network they will be able to :

161.2.1 call on additional current and potential customers;

161.2.2 increase the number of customers upon whom they are able to call and the number of calls each day.

162 I doubt that the profits generated in respect of a single order secured by Tabakin or a single job by Wayne's Plumbing is less than R550 which would more than cover the additional cost per vehicle per month which utilizing the proposed toll network will result in each of Tabakin and Osrin generating. This does not, however, mean that the total monthly cost which Osrin and Tabakin will incur per vehicle which utilises the proposed toll road network will

aggregate to R550 per month. I refer to what is set out above in this regard. A further issue for consideration is that should Osrin and Tabakin choose freeways on the proposed toll road network to travel on they are doing so for one reason – to get to their destination faster, recognizing that each values time. If this were not the case, each could make use of the supporting road network.

163 Moreover, both Tabakin and Osrin ignore -

163.1 the massive saving on petrol;

163.2 reduced vehicle wear and tear;

163.3 reduced maintenance costs,

all of which have been fully particularized above and which are ignored by each of them in order to bolster the assertions which they advance.

164 In so far as Ms Maphoroma is concerned, having regard to what is stated in her affidavit, I have determined that :

164.1 she is not required to utilize the proposed toll network on her route each day;

164.2 were she to utilize the proposed toll road network with a registered e-tag to travel each week day from Leondale to the Johannesburg CBD, it is assumed that she will enter the freeway network at Leondale Interchange on the N3 and exit the freeway network at the Geldenhuys Interchange between the N1 and M2. This section of the N3 was known for severe congestion, especially at the confluence of the N3 and N12 freeways. This section of freeway was substantially upgraded, including the interchanges that will be used by Ms Maphoroma. The Elands Interchange between the N3 and N12 saw the introduction of a new 400m long switch ramp that allows traffic from the N3 to cross over traffic coming from the N12, and flow directly to the M2. Additional lanes were added along the N3 to increase road capacity;

164.3 the toll calculated for Ms Maphoroma for using this road section for 22 return trips per month, all in peak hours, amounts to R273.24 (VAT incl.) per month. However, if Ms Maphoroma obtains an e-tag (at no cost) and registers an e-tag toll account, she will receive an e-tag discount of R131.91, and her monthly toll will amount to R141.33 (VAT incl.);

164.4 as Ms Maphoroma that she leaves home at 05h00 to drop her daughter at school, she may also qualify for a further time of day discount (if she obtains an e-tag (at no cost) and registers an e-tag toll account), resulting in a monthly toll of R127.67 (VAT incl.);

164.5 in respect of Mr Maphoroma: assuming that he travels in peak hours from the Leondale Interchange to the New Road Interchange daily, being twenty two return trips per month, then his monthly toll amounts to R901.56 (VAT incl.) but with an e-tag discount, this amount drops to R447.09 (VAT incl.).

165 As demonstrated above, Ms Maphoroma has substantially overestimated her expenditure on toll fees and has ignored the substantial financial benefits which she will enjoy through fuel and vehicle maintenance cost savings. Most importantly, she overlooks the value of her time which she will enjoy with her family through being able to leave home later and arrive back earlier.

166 In so far as Tshidi Leatswe is concerned she advises that -

166.1 she resides in Boksburg; and

166.2 she is employed by a company located in Fricker Road, Illovo, Gauteng.

167 Ms Leatswe states in her affidavit :

"The estimated cost to me of e-tolling, if it is introduced and given the distance that I drive each day, will be in the region of R500 each month. " (paragraph 6, page 365)

- 168 In fact, Ms Leatswe need not utilize the proposed toll network to travel from Boksburg to Illovo.
- 169 If Ms Leatswe is travelling on a daily basis from Boksburg to the Illovo, it is assumed that she will enter the freeway network at the N12/R21 interchange on the N12 and exit the freeway network at the Modderfontein Interchange on the N3. This section of the N12 and N3 was known for severe congestion, especially at the confluence of the N3/N12 Gilloolys interchange. This section of freeway was substantially upgraded. Most significantly is the introduction of a directional ramp (fly-over) at the Gilloolys interchange. Additional lanes were added along the N3 to increase road capacity.
- 170 The estimated toll calculated for Ms Leatswe for using this road section for 22 return trips per month, all in peak hours, amounts to R379,06 (VAT incl.) per month. However, if Ms Leatswe obtains an e-tag (at no cost) and registers an e-tag toll account, she will receive an e-tag discount of R182,99, and her monthly toll will amount to R196,07 (VAT incl).
- 171 Ms Leatswe's assumption of her estimated monthly toll cost is over stated. She also ignored the substantial financial benefits which she will enjoy through fuel and vehicle maintenance cost savings. Most importantly, she overlooks the value of her time which she will enjoy with her family through being able to leave home later and arrive back earlier.

172 On 23 March 2012 the first applicant published a press release, a copy of which is attached hereto marked "**NA16**", recording therein inter alia :

"We sincerely believe the funding of our road infrastructure will best be conducted through a hybrid model which incorporates the National Treasury as well as the fuel levy, vehicle licence fees and long distance toll roads, the latter three being the best application of a user pay mechanism in this regard. "

173 Unfortunately, what the first applicant overlooks is the fact that discharging the debt incurred in relation to the GFIP is not a national obligation. Regardless of how this is justified it would be grossly iniquitous were all South Africans through an increase in petrol prices, to be required to fund this massive GFIP infrastructural costs which has been incurred. The applicants are aware of and have accordingly disingenuously overlooked the following difficulties and realities when proposing the implementation of a national fuel levy:

173.1 the GFIP is not the only roads project to be financed by means of the user pay principle. In fact, it was estimated that if all future toll projects, including the maintenance and expansion of these projects should be funded by means of an increase in the fuel levy, an additional 80c to R1 per litre will be required over a period of approximately thirty years. The inflationary impact of such an increase will be substantial particularly in the context of the current global down-turn, inflation targeting, current increases to the petrol price and future anticipated oil price increases. A report from an economist will be provided as part of the response to Part B of the application.

- 173.2 the public participation process to introduce an increase in the fuel price on a per project basis will be extensive and is not defined;
- 173.3 there is not a general acceptance of a fuel levy. COSATU has already indicated that they are opposed to the fuel levy option;
- 173.4 numerous third parties who or which utilize fuel would have to pay the levy notwithstanding the fact that such fuel is not utilized on any roads including for example farmers and individuals who utilize generators. The list in this regard is endless as are the difficulties which arise in pursuing this course of action as opposed to that which has been adopted;
- 173.5 the diminishing revenue from a fuel levy per vehicle due to improved fuel efficiencies is not addressed; and
- 173.6 the iniquity which will arise through users who will not contribute at all due to the introduction of alternative fuel vehicles (battery operated) is not addressed at all;
- 174 Should the applicants assert that there should be a "local" ring fenced fuel levy applied in Gauteng only gives rise to further inequities which demonstrates the competing interests which SANRAL has had to balance in

determining the model which should be adopted. A ring fenced levy would be iniquitous for a number of reasons including :

- 174.1 the fact that a fuel levy, if applied regionally, will result in a disproportionate cost being borne by the residents of one province notwithstanding the fact that the economic power of Gauteng benefits the county as a whole;
- 174.2 the collection cost of a regional fuel levy will be higher than a national fuel levy;
- 174.3 all individuals based in Gauteng will be obliged to pay this "tax" notwithstanding the fact that :-
 - 174.3.1 some Gauteng residents does not utilize the proposed toll network at all;
 - 174.3.2 the majority of Gauteng vehicle kilometers are not travelled on the toll network. In fact, the following figures apply to the use of the rest of the road network in Gauteng. In terms of the number of vehicles in Gauteng that use the road network, and in particular the GFIP freeway network, the following statistics have been derived from extensive traffic modelling conducted for the GFIP -

174.3.2.1 there are over 4 million licensed motor vehicles in Gauteng;

174.3.2.2 there are approximately 997 000 vehicle trips that use all of Gauteng's roads during an average morning peak hour. This includes multi-purpose trips (i.e. a trip from home to school and from school to work being two trips);

174.3.2.3 the estimated distance of travel by all vehicles on the Gauteng road network during the average morning peak hour is 19.5 million vehicle-kilometres;

174.3.2.4 the estimated distance travelled on the GFIP freeways is 1.67 million vehicle-kilometres during the average morning peak hour representing approximately 8% of the total distance travelled on the Gauteng road network.

175 More importantly, and as has been shown in relation to the background on the declaration of tolls and the process of reasoning and analysis that was undertaken by and on behalf of SANRAL, the complaints that are raised in the affidavits dealt with above are not complaints that justify the setting aside of the process to declare the roads in the GFIP as toll roads.

176 In so far as concerns these complaints, therefore, they do not found the basis for a reviewable irregularity and, more importantly, do not sustain the grounds

of review contained in the material allegations. Without thereby wanting to seem indifferent to the complaints that have been raised, these issues were considered by SANRAL in the exercise of its discretion, but the overwhelming benefits to be gained through tolling and upgrading the GFIP roads outweighed the disadvantages to people in the position of these deponents.

177 In this regard, the cost of the GFIP was always going to have to be borne somewhere and this cost would always have had onerous effects to a greater or lesser degree on some people. SANRAL considered these potential hardships and, in a reasoned and rational way, elected to implement tolling as a funding mechanism. The hardship caused to some individuals does not detract from the fact that this decision—which is a policy decision, informed by all of the factors enumerated above and in the various reports—is a valid and lawful administrative decision taken by SANRAL together with all spheres of government.

178 In the circumstances, I deny that there is anything contained in these affidavits under reply that forms the basis for the review application in Part B of the Notice of Motion or for the interim interdict application contained in Part A thereof.

179 I attach hereto marked "**NA17**" the first respondent's 2012 MTEF budget submission. This submission was prepared in support of the financial requirements of SANRAL for the 2012 financial year.

180 The document, "**NA17**", is reasonably prolix and I endeavour below to summarise, for the benefit of the above Honourable Court, the salient aspects thereof to demonstrate the activities of SANRAL are influenced by various medium to long term trends.

181 It is recorded in the introduction to this document (page 2) -

"Introduction

The various activities as performed by the South African National Roads Agency Ltd (SANRAL) is influenced by various medium to long term trends. For purposes of this submission these trends and budget requirements have been grouped as follow:

- *General Trends: This group of trends refer to general trends observed on the South African road network, with specific focus on the roads under SANRAL jurisdiction. These trends are largely influenced by monies available to spend on the road network.*
- *Financial Trends: This group of trends refer to financial trends observed with regard to the non-toll national road network under SANRAL jurisdiction, and general construction industry trends. For most of these trends SANRAL has no direct control over the outcome.*
- *SANRAL MTEF Budget Requirements: This section discusses various MTEF Budget Requirement Scenarios to highlight the funding needs of the primary network, and put into perspective the current allocations.*

The outcome for the above trends and requirements are presented herein."

182 Under the sub topic general trends the network length is particularized. Figure 1 details the national road network link from 2000 to 2013 and indicates an exponential increase in "the network length under SANRAL jurisdiction".

183 Remarking on figure 1 (page 3) the following is recorded :

- *"Since the inception date of SANRAL on 1st April 1998, the network length trend observed is positive, indicating the continuous expansion of the network under SANRAL's jurisdiction with network increasing from 6,800 km to it current level of 16,170 km – an increase of 137 %.*
- *The estimate total proclaimed road network in South Africa is a minimum of 606,978 km (153,719 km surfaced and 453,259 km gravel), the current network (16,170 km) of SANRAL represents 2.7 % of the total and 10.5 % of surfaced network of South Africa.*
- *The 3,120 km Toll network represents 19% of SANRAL network, 0.5 % of the total and 2.0 % of the surfaced network of South Africa.*
- *Status of current discussions indicates the transfer of 4,170 km of the remainder of the primary network in the Free State and Northern Cape provinces within 2011.*
- *The total length (centre line kilometre) of the Strategic and Primary Network is 32,883 km."*

184 Pavement age is a term used to describe the age of the road pavement. It is recorded on page 5 of annexure "**NA17**" :

"The pavement age refers to the age of the road pavement since newly constructed or structurally strengthened. The typical pavement structural design life period used during the design of a flexible road pavement is 20 years, assuming that all required maintenance (Opex) is done during this period. At the end of a pavement's structural life one will need to perform strengthening works (Capex) that aim to restore or improve the structural integrity of the pavement."

185 In remarking on this topic it is recorded :

- *"Since the inception date of SANRAL on 1st April 1998, the pavement age trend observed is negative, with the length of network older than its original 20 year design life increasing from 3,500 km to 13,955 km currently – an increase of 298 %.*
- *Currently 76 % of the network under SANRAL jurisdiction is older than its 20-year theoretical design life.*
- *To address the above negative trend, major investments into structural strengthening/improvement (Capex) works is required.*
- *The Investment into strengthening/improvement works by SANRAL since 2006 has resulted in the rate of increase of pavement older than its 20-year theoretical design life levelling off. "*

186 The presentation under the topic general trends then moves to discuss traffic distribution. It is recorded in this regard (page 6 of "**NA17**") :

"Traffic distribution refers to the percentage of the network for which the average annual daily traffic is within a defined range of vehicles per day. For the roads under SANRAL jurisdiction this is obtained from actual traffic data as measured with our network of over 800 strategically located traffic monitoring stations."

187 The remarks on this topic are as follows -

- *"Since the inception date of SANRAL, the network length carrying less than 5,000 vehicles per day has increased from 5,906 km to 12,508 km currently – an increase of 88 %. This is important from the fact that experienced has shown that it is not feasible to toll a road carrying less than 5,000 vehicles per day, as a result these sections are totally reliant on funding from treasury for their maintenance.*
- *Since the inception date of SANRAL, the network length carrying more than 50,000 vehicles per day has increased from 1,104 km to 2,064 km currently – an increase of 186 %.*
- *The 3 nodes i.e. (Gauteng, Pietermaritzburg to Durban and Cape Town) experiencing congestion related pressures are also clearly evident in Figure 6."*

188 The next topic traversed in "**NA17**" is vehicle kilometer travel -

"Vehicle kilometre travel refers to the percentage of all vehicle kilometres that are travelled on the SANRAL road network in relation to the total network. For the roads under SANRAL jurisdiction the vehicle kilometre travelled is obtained from actual traffic data as measured with our network of over 800 strategically located traffic monitoring stations. For the whole network the vehicle kilometre travelled has to be

estimated based on total fuel sales in South Africa, and assuming average distance travelled per litre of fuel/diesel of 8.7 km/l for light vehicles and 3.5 km/l for trucks."

189 The remarks pertaining to vehicle kilometer travel are -

- *"Although current SANRAL network of 16,170km only represents 2.6% of the 606,000 km confirmed network, it carries 29.8% of the annual vehicle kilometres driven in South Africa.*
- *Currently more than 70% of the long distance road freight in South Africa is transported on the SANRAL road network – once again an indication of the strategic importance of the national road network.*
- *The 3 nodes i.e. (Gauteng, Pietermaritzburg to Durban and Cape Town) experiencing congestion related pressures are also clearly evident in Figure 6."*

190 Table 1 on page 10 of annexure "**NA17**" lists the remaining structural life of carriage way measured in kilometers. The remarks on this topic are as follows :

- *"As noticed the length of the network that had remaining structural life of 5 years or less, was 4,356 km (28%) of the network in 2006, compared to 3,278 km (18%) of the network in 2011. A reduction of 1,078 km (10%). This is the direct result of SANRAL ability to investment in strengthening/improvements in recent years due to increased allocations from treasury, our various toll road projects as well as our continued focus on preventative maintenance.*

- *As noticed the length of the network that had remaining structural life of 10 years or more, was 7,653 km (50%) of the network in 2008, compared to 12,044 km (66%) of the network in 2011.*
- *As noticed 91% of the network with structural life less than 5 years is non-toll roads. The toll roads with a life less than 10 years is due to sections on the R30 and N17 roads that was proclaimed on as toll roads during 2006/07. Most of these sections are currently under construction and most of strengthening / improvements works will be complete during 2011/12.*
- *As noticed when comparing Figure 6 and Figure 9 most of the roads with structural life of less than 5 years are on portions of the network that carry less than 5,000 vehicles per day – making them totally dependent on funding from National Treasury for their strengthening requirements."*

191 Road work and visual condition are two concepts which are explained in some detail on pages 12 to 16 of annexure "**NA17**".

192 Economic indicators and the bitumen price are also addressed in this document. The bitumen price trend is particularly important as it is used in all flexible road construction and obtained during the crude oil refining process.

193 The concept of budget kilometer is described as follows -

"The budget kilometer trend refers to the amount of non-toll budget available per km of non-toll road that needs to be maintained."

194 In remarking on the budget available per kilometer of non-toll road that needs to be maintained the following is recorded :

- *"Non-toll budget allocation for SANRAL increased from R652 million (R1,291 million in 2011R) to R8,651 million in 2011/12 – an increase of 570% in 2011R terms.*
- *When however considering the budget kilometre trend, that incorporates the impact of the incorporation of the remainder of the primary network, the allocation increased from R266,772/km (2011R) for 1998/99 to R662,958/km for 2011/12 – an increase of 149%.*
- *As noticed current budget kilometre levels are also way below peak allocations during the 1970's and mid 1980's when most national road network construction occurred.*
- *With the addition of the additional network from Free State and Northern Cape, the future MTEF allocations currently allocated do indicate a levelling off, should more province decide to transfer roads the impact will be even more dramatic.*
- *To strengthen the portion of the non-toll network with less than 5 years of actual life will require allocations from the National Treasury since toll funding is not an option for most of them due to traffic levels of less than 5,000 vehicles per day. "*

195 It is recorded on page 27 of annexure "**NA17**"

- *"As seen the current MTEF allocated budget is totally insufficient to enable SANRAL to also address the identified expansion requirements of the network that is currently planned to occur through toll financing.*

- *Should implementation of expansion projects through Toll financing no longer be possible within South Africa, then SANRAL will require an additional allocation of R8,96bn per year for the next 7 years from MTEF to address the currently planned Toll expansion projects. "*

196 This issue is amplified on page 28 in which it is recorded :

- *"The current projected MTEF allocations will enable SANRAL to address the basic budget requirements required to sustain the network, and address the strengthening backlog but not expansion requirements of the network.*
- *To address the basic requirements, strengthening backlog as well as expansion requirement SANRAL will require minimum of R19,2 billion in 2012/13 and thereafter for 7 years, should the option of toll funding no longer be available."*

197 The issue of maintenance of the road network is a matter that has been touched on above. This issue is dealt with incisively on page 29 to 30 of annexure "**NA17**" in regard to which it is recorded :

"The Road performance depends on what, when, and how maintenance is performed. Roads deteriorate over time due primarily to traffic and environmental influences (i.e. weather, Ultra Violet Radiation, overloading etc.). For these reasons roads have to be maintained throughout their design life to ensure that they deliver the performance envisaged. The timing of this maintenance is crucial, and if not optimally performed the consequences can be disastrous as illustrated in Figure 25.

Remarks:

- **Ideal Maintenance:** *If maintenance is performed as and when required based on technical assessments of the road, at this stage there will be no visible signs of distress on the road for the road user, and it might even seem to him that limited resources are not effectively being utilised. The typical cost of maintenance at this stage is R X per km.*
- **Maintenance Delayed 3-5 Years:** *If the maintenance is not performed when required based on technical assessments, and the road is allowed to deteriorate for a further 3-5 years, as illustrated in Figure 25 visible signs of distress might become apparent to the road user, and thus the need for maintenance will be more acceptable to her. The typical cost of maintenance at this stage is now R 6 X per km for the same road. In other words, to repair this road will now be 6 times more expensive compared to 3-5 years ago when the maintenance was actually required. With limited budgets this also implies that for every 1 kilometre of poor road that needs to be maintained at this level, 6 kilometre of good road cannot be maintained, resulting in these good roads further deteriorating with associated increase in future maintenance requirements.*
- **Maintenance Delayed 5-8 Years:** *If the maintenance is not performed when required based on technical assessments, and the road is allowed to deteriorate for a further 5-8 years, as illustrated in Figure 25, the levels of distress will severely be affecting the road user. The typical cost of maintenance at this stage is now R 18 X per km for the same road. In other words, to repair this road will now be 18 times more expensive compared to 5-8 years ago when the maintenance was actually required. With limited budgets this also implies that for every 1*

kilometre of very poor road that needs to be maintained at this level, 18 kilometre of good road cannot be maintained, resulting in these good roads further deteriorating with associated increase in future maintenance requirements.

The economic costs of the above delayed maintenance actions are borne primarily by road users as seen in Figure 26. Far from saving money, cutting back on road maintenance increases the cost of road transport and raises the net costs to the economy as a whole. Thus, postponing road maintenance results in a significant financial penalty, which currently is unfortunately the reality for the SANRAL network.

- The costs for travelling on roads in good condition is in-line with the typical costs as reported by Automobile Association (AA) for Toll Class 1 and Road Freight Association for Toll Class 2 to 4.*
- The road user's costs nearly doubles when going from good to very poor road for all vehicle classes.*
- On a good road one will be able to travel typically 100km in 1 hour, as the condition deteriorates, this decreases to about 20 to 30 km only and the impact on costs is obvious.*
- The worst roads currently under SANRAL jurisdiction do contain short portions with IRI levels in the order of 8 to 10 m/km.*

To illustrate the economic impact of improving a road in very poor condition to good condition, typical example was analysed using Highway Development and Management Tools (HDM-4), originally developed by World Bank in 1968, and currently maintained and disseminated worldwide by the World Road Association (PIARC). The analysis results in Table 5 summarises the cost and benefits (Savings

in VOC) for one kilometre of road at various average daily traffic levels (AADT). Vehicle Operating Costs (VOC) includes savings in fuel, oil, tires, depreciation, accidents and time.

- As expected the benefits generated is directly related to the traffic level on the road section, as well as the condition of the road section before the maintenance, in this example we used a road section in very poor condition.*
- Since road user costs represents more than 90% of total transportation costs, it is logical why the benefits generated for every rand spend by SANRAL can be so substantial, resulting in savings generated equal to the increase SANRAL expenditure for roads with more than 10,000 vehicles occurring within less than 1 year.*
- Looking at the benefits generated, it is also obvious why SANRAL would direct its funding towards maintaining highly trafficked roads first, and then only to lesser traffic roads. Should budget levels not be sufficient it is also obvious why lower trafficked roads cannot be strengthened, as currently the scenario with the SANRAL network."*

198 I now provide a seriatem reply to the allegations in the founding affidavit. Any allegation in the founding affidavit which is not specifically addressed in this affidavit is denied.

SERIATIM REPLY TO ALLEGATIONS CONTAINED IN THE FOUNDING AFFIDAVIT

199 Ad paragraph 1

The contents of this paragraph are admitted.

200 Ad paragraph 2

The contents of this paragraph are admitted subject to the facts that –

200.1 the second respondent only came into existence on 12 March 2012 but "the general manager" has, on his own version, been involved in the issues concerning the declaration of roads in Gauteng as toll roads since 2008;

200.2 no action was taken by the "general manager" in any other capacity, in relation to legal action, to prevent the declaration of these roads as toll roads as he now purports to do on behalf of the respondents.

201 Ad paragraph 3

The contents of this paragraph are denied in so far as no evidence has been produced by the deponent that he is indeed entitled to represent all of the applicants and their members in this matter.

202 Ad paragraphs 4 and 5

For the reasons set out above, the contents of these paragraphs are denied.

203 Ad paragraph 6

The contents of this paragraph are admitted.

204 Ad paragraphs 7 and 8

204.1 The contents of these paragraphs are admitted but I refer the above Honourable Court to the minutes of the meeting referred to at page 303 of the papers. These minutes purport to be the minutes of the meeting of the second respondent held on 12 March 2012. The minutes record that the meeting was convened "to form a voluntary Association 'OUTA' in respect to the decision of the Government of the Republic of South Africa to proceed with the e-tolling of the Gauteng freeway improvement project ...". In so far as the aforementioned record of the meeting deals with the e-tolling, then the meeting itself did not authorise the imposition of a review based on the decision to declare certain of the roads in Gauteng as toll roads.

204.2 Whilst SANRAL does not have any intention of disputing the standing of the second respondent to bring legal action, it is clear that the mandate that is held by the deponent to the founding affidavit is not

authorised by the second applicant or, in fact, by any of the applicants to these proceedings. Neither is there any evidence that such a mandate permits the institution of urgent legal proceedings where there is no basis in law for urgency.

204.3 The action taken by OUTA does, however, make sense in relation to the fact that the applicants would not be interested in attacking only or overturning exclusively decisions made in 2008 on the basis that the time to take that action has clearly expired.

205 **Ad paragraphs 9 and 10**

The contents of these paragraphs are admitted.

206 **Ad paragraphs 11 and 12**

The contents of these paragraphs are admitted but QASA has no power to institute legal proceedings based on the contents of its constitution, which appears at annexure "**FA3**" to the founding affidavit. Accordingly I deny that QASA has *locus standi* to claim the relief which is claimed on its behalf in the Notice of Motion.

207 Ad paragraphs 13 and 14

The contents of these paragraphs are admitted other than, as stated above, SANCU, does not have the capacity to institute legal proceedings based on the contents of its constitution, which appears at annexure "FA4" to the founding affidavit. Accordingly I deny that SANCU has *locus standi* to claim the relief which is claimed on its behalf in the Notice of Motion.

208 Ad paragraph 15

The contents of this paragraph are admitted.

209 Ad paragraphs 16 to 23

The contents of these paragraphs are admitted.

210 Ad paragraphs 24 to 25

In relation to the contents of these paragraphs correctly reflecting the Notice of Motion, the contents of these paragraphs are admitted.

211 Ad paragraph 26

Toll is payable on the toll roads in question from a date and time determined by the Minister and which will be specified in the Government Gazette in

which the toll tariffs are made known. The Minister has indicated that tolling will commence on 30 April 2012.

212 Ad paragraphs 27 to 28.5

The contents of these paragraphs are admitted in so far as they reflect accurately the contents of the Notice of Motion.

213 Ad paragraphs 29 to 29.5

213.1 The contents of these paragraphs are admitted but only in so far as they summarise the basis upon which the applicants seek relief in this application. The allegations contained in these paragraphs are not admitted in so far as they constitute or should be construed as constituting valid grounds upon which to obtain the relief sought by the applicants. These issues are dealt with elsewhere in this answering affidavit and as they arise in terms of the founding affidavit.

213.2 Without derogating from what is set out above, whilst certain of the grounds referred to in the abovementioned paragraphs are dealt with in the founding affidavit, the grounds dealt with in paragraphs 29.2.5, 29.2.6, 29.2.8 and 29.2.9 are absent from the founding affidavit and are accordingly denied at this point in the answering affidavit.

214 **Ad paragraphs 30 to 41**

214.1 For the reasons set out above, it is denied that OUTA has the requisite authority to bring this application.

214.2 In addition, the references to the Automobile Association of South Africa are without any foundation in the founding affidavit. There is no evidence in the founding affidavit that the Automobile Association of South Africa "has also formally associated itself with OUTA and supports the present application."

214.3 I deny, in any event, that the alleged attitude of the AA in this regard has the effect of putting the AA before this Court—either as an applicant or at all.

215 **Ad paragraphs 42 to 42.4**

215.1 For the reasons stated above in relation to the tender made to the persons who signed the affidavits referred to in annexures "**FA5**" to "**FA8**" in the founding affidavit to make application to obtain exemption from the payment of toll, the complaints set out in these affidavits are addressed by the exemption provisions that are to be applied to these individuals.

215.2 I have dealt with the contents of these affidavits in detail above and do not intend to repeat my answers here but reiterate these answers for purposes of answering these paragraphs.

216 Ad paragraphs 43 to 43.4

For the reasons stated above, the contents of these paragraphs are denied.

217 Ad paragraphs 44 to 46.3

217.1 The contents of these paragraphs are admitted other than for the allegations concerning any material financial and administrative prejudice to be suffered by SAVRALA or any one or more of its members. The primary basis upon which allegations containing the "material financial and administrative prejudice" to be suffered by SAVRALA or its members are incorrect is that SAVRALA and its members will be entitled to receive substantial discounts in respect of the payment of tolls by the use of e-tags and due to the frequency of the use of the toll system. Certainly, if not all of these discounts will inure to the benefit of the SAVRALA members as the discounts attach to the vehicle which has an e-tag and which belongs to the members and not to the user or the person who rents or leases the vehicle.

- 217.2 With regard to the liability to pay toll, this is determined by legislation, in this case the Act and does not attach to the system adopted by the first respondent and as alleged by the applicants.
- 217.3 Interaction with SAVRALA concerning the payment of tolls began in 2008 during a question and answer session between SANRAL and “civil society stakeholders” of which SAVRALA was one. The question and answer session was held on 7 July 2008 – approximately three months after the notices attached to the Notice of Motion were published.
- 217.4 During the question and answer session, SAVRALA was represented by Val Van den Bergh.
- 217.5 At the time of the session the very issues that are raised in the founding affidavit were raised by Van be Berg and dealt with by SANRAL including the possible tariff, which was then quoted as being 50c/km before discounts. A copy of the notes taken by SANRAL at the meeting, which have been referred to above, are attached marked "NA9" .
- 217.6 SAVRALA has had since that time to deal with issues concerning how it will apply administrative processes and costs, alternatively, how its members will deal with administrative processes and costs in relation

to the use of rented vehicles in Gauteng and that use the tolling system.

217.7 In fact, other motor vehicle rental companies have taken steps to implement the administrative processes required. In this regard, negotiations between SANRAL and Europcar Chauffeur Services, a division of Imperial Group (Proprietary) Limited, Europcar, a division of Imperial Group (Proprietary) Limited, Europcar Van Rental, a division of Imperial Group (Proprietary) Limited and Tempest Car Hire, a division of Imperial Group (Proprietary) Limited have all signed memoranda of understanding, in or about 1 December 2011, with SANRAL relating to the installation of e-tags and the payment of toll fees. Copies of these memoranda are attached marked "**NA18**" to "**NA21**", respectively.

217.8 All of the entities referred to above are members of SAVRALA.

217.9 Apart from the members listed above, SANRAL has been in ongoing working-group meetings with the following SAVRALA members for purposes of reaching agreement on the technical and operational integration of SANRAL's toll system and their respective software systems: AVIS, Budget, Hertz, Europcar/Tempest, Thrifty Car Rental and First Care Rental. These discussions are not conditional on nor subject to the outcome of this litigation.

218 Ad paragraphs 47 to 55

218.1 For the reasons stated above, the members of QASA are in a position to make application, where necessary, for an exemption from the payment of toll.

218.2 Accordingly, the allegations set out in the abovementioned paragraphs are addressed by the ability of members of QASA to accept the tender and make application, in due course, to obtain an exemption from the payment of tolls. However, my failure to address particularly the allegations contained in the abovementioned paragraphs should not be construed as an admission of these allegations.

219 Ad paragraphs 56 to 58.2

For the reasons stated above, it is denied that SANCU has the requisite *locus standi* to bring this application.

220 Ad paragraph 59

The contents of this paragraph are noted although it is not known what is meant by the term "modern tolling of roads".

221 Ad paragraph 60

The contents of this paragraph are denied in so far as there is no toll road between George and Cape Town although there is a toll road situated at Titsikamma between Plettenberg Bay and Port Elizabeth to Humansdorp.

222 Ad paragraph 61

The contents of this paragraph are admitted.

223 Ad paragraph 62

The contents of this paragraph are admitted.

224 Ad paragraph 63

The contents of this paragraph are denied in relation to the categorization of "rural" or "long haul" tolling. No such distinction exists for purposes of the applicable legislation relating to the payment of tolls in South Africa. It is not known what the purpose of this categorisation is but its efficacy and relevance to this application are denied.

225 **Ad paragraph 64**

The contents of this paragraph are admitted on the basis both of the reference to the date of February 2011 as well as the introduction of the declaration of roads as toll roads in Gauteng in 2008 are correct.

226 **Ad paragraphs 65 and 66**

The contents of these paragraphs are denied in so far as urban toll roads have existed for more than twenty years. There are many examples of toll roads in South Africa that are located in urban areas and where commuter traffic makes use of these roads on a daily basis. These roads include sections of the N1 and N4 Platinum Toll Road in Pretoria, the N3 Marianhill toll plaza between Durban and Pietermaritzburg and the N17 toll route traversing the East Rand in Gauteng.

227 **Ad paragraph 67**

227.1 The application of the process of tolling over the roads concerned was set out in notices already published in 2008. The roads concerned, fundamentally, required upgrading due to the volume of traffic historically using these roads. This emerges clearly from the report attached to the founding affidavit as annexure “**FA12**” and the report, from which extracts are selected in the founding affidavit as annexure “**FA37**”.

227.2 The issue is not that these roads were selected to be tolled but rather that these roads were selected to be upgraded due to traffic volumes and the impact these roads have on the economy as well as from a socio-economic point of view.

227.3 In order to finance the upgrade and continued maintenance of these roads, tolling was decided as the most appropriate means to achieve these economic realities on the basis set out above.

228 Ad paragraphs 68 and 69

The contents of these paragraphs are admitted other than to state that long distance urban travelling is not universally supported due to its obvious disadvantages: congestion and environmental degradation, which occur as a result of increased congestion and vehicle use. Therefore, one of the tools that has been used internationally in other urban centres, to deal with congestion and the environmental consequences, is the application of a toll. The application of a toll operates to contain long-distance commuting and shift the mindset of the otherwise commuting public to the use of alternative public transport modalities.

229 Ad paragraphs 70 to 72

229.1 The contents of these paragraphs are denied in so far as road users are not captive. There are indeed alternative routes that are available to road users. The GFIP only constitutes approximately less than 1% of the total road network in Gauteng.

229.2 In fact, the following figures apply to the use of the rest of the road network in Gauteng. In terms of the number of vehicles in Gauteng that use the road network, and in particular the GFIP freeway network, the following statistics are known to me based on extensive traffic modelling conducted specifically for the GFIP –

229.2.1 there are over four million licensed motor vehicles in Gauteng;

229.2.2 there are approximately 997 000 vehicle trips that use all of Gauteng's roads during an average morning peak hour. This includes multi-purpose trips, being a trip from home to school and from school to work, which amounts to two trips;

229.2.3 the estimated distance of travel by all vehicles on the Gauteng road network during the average morning peak hour is 19.5 million vehicle-kilometres;

- 229.2.4 the estimated distance travelled on the GFIP freeways is 1.67 million vehicle-kilometres during the average morning peak hour representing approximately 8% of the total distance travelled on the Gauteng road network.
- 229.3 Approximately 50% of commuter trips takes place each day by means of public transport, being bus and taxi and rail. It is important to note that these services that are road-based may qualify to be exempted from the payment of toll.
- 229.4 Road based transport is not the only mode of transport that is used in Gauteng. There are alternative transport systems in Gauteng including the rail network, which transports tens of thousands of commuters everyday.
- 229.5 There is also no evidence presented by the applicants that alternative routes will become more congested due to the application of a tolling system on the routes identified in this matter. In this regard, whilst vehicle ownership has doubled since 1994, the available space on the roads did not. Studies conducted for the GFIP clearly showed that the implementation of this project as a toll project, provides relief to the supporting road network.
- 229.6 Fundamentally, the application of a toll levying system does not mean that roads that are not tolled become more congested:

- 229.6.1 in so far as the value of time, from a commuter's point of view, presents tolling routes as a better alternative to non-tolled routes due to the fact that the tolled routes;
- 229.6.2 are able to cope with larger loads of traffic, which makes commuting more time-effective and the delivery of goods more efficient;
- 229.6.3 results in reduced vehicle operating costs inclusive of vehicle maintenance and fuel savings. In this regard, the AA, in an article a copy of which is attached marked "**NA22**", uses the following results to demonstrate the impact of congestion on the Ben Schoeman freeway on fuel consumption: for a 1600cc vehicle travelling between Pretoria and Johannesburg there are a 122 minutes additional driving time per day, which amounts to an additional forty driving hours per month. The engine operates for longer times, which results in the consumption of 1,5ℓ per hour when idling. The AA estimated that an additional 705ℓ fuel are wasted per annum, in idling, resulting in the cost of R4 935 – calculated at R7 per litre. These costs exclude lost working time, frustration and accidents. The article also deals with the issue of vehicle wear and tear;

229.6.4 have no intersections such as traffic lights and stop streets that require stopping;

229.6.5 they are environmentally friendly, due to less congestion and consequently lower emissions entering the atmosphere; and

229.6.6 more productive in so far as travellers are able to reach their destinations in a far more expeditious manner.

229.7 The applicants clearly acknowledge that the use of the freeway network has clear advantages over the use of alternative routes such as the R55, R101 and R515. This acknowledgment demonstrates that the applicants have an understanding of the value of time as a concept in traffic management.

229.8 The applicants also acknowledge that the abovementioned roads require upgrading and the necessary funding to effect the upgrading of these roads, which is lacking in general so as to contribute to the maintenance and upgrading of road infrastructure in the country.

230 **Ad paragraphs 73 and 74**

230.1 Long haul road users pay tolls on other roads all of which are payable prior to their entry into Gauteng and onto the GFIP.

- 230.2 There is no evidence contained in the application that the additional approximately fifty to eighty kilometers through the GFIP, out of a possible 400 kilometers to 1 000 kilometers long haul trip, will force long haul users off the freeways in Gauteng.
- 230.3 Economic studies conducted by SANRAL in 2008 and updated in 2010 indicate the benefits to long haul road users in so far as the improved roads allow for more effective use of larger vehicles. In this regard, I refer you to the article entitled "An Economic Analysis of the Gauteng Freeway Improvement Scheme" by Barry Standish of the Graduate School of Business of the University of Cape Town in association with Antony Boting of Strategic Economic Solutions and Andrew Marsai of Arup Consulting.
- 230.4 There is also no evidence produced in the founding affidavit that road users would not be inclined to use alternative routes or other modes of transportation either for themselves or the delivery of goods. It cannot be assumed that simply because the application of a toll has been identified on certain roads in Gauteng, that all road users would not use options available to them as alternative routes.
- 230.5 In fact, all existing road usage by hauliers shows that they clearly prefer using the national road network and even in instances where sections of these roads are toll roads. I refer you to a report entitled "Sixth State of Logistics Survey for South Africa – 2009" conducted by

the Council for Scientific and Industrial Research at the behest of Imperial Logistics. This report states that: "The results obtained from the comparison indicate that the maintenance and repair costs of a truck increase as the condition of the road on which the truck is travelling deteriorates. When moving from a good condition road to a bad condition one, increases in vehicle maintenance and repair costs of approximately 121% can potentially be experienced. In addition, the increase in truck repair and maintenance costs due to deteriorating road conditions, can potentially lead to an estimated increase of around 10% in the total logistics costs of a company. Other costs that can potentially be attributed to deteriorating road quality are increased vehicle operating costs, increase fuel consumption, increase cargo damages and ultimately increased vehicle design and manufacturing."

231 Ad paragraphs 75 and 76

231.1 The issue of public transport is not one with which the levying of tolls should be confused: the existence of a public transport system is not a prerequisite to whether or not a toll system is to be applied over a particular road network.

231.2 SANRAL is the agency responsible for the provision and maintenance of road infrastructure and not public transport services. In this regard, SANRAL fully supports public transport initiatives and from the outset of the tolling process provided a minimum of a 75% discount for public

transport vehicles operating on the GFIP toll network. There will now be a full exemption for public transport users.

231.3 The very issue of the use of the road network by commuters in Gauteng indicates the need to maintain and upgrade the road infrastructure. The bulk of public transport in Gauteng is road based and requires additional road space to be created.

231.4 Whilst there is no evidence in the founding affidavit to support the statement that "public transport remains hopelessly inadequate as a viable alternative option to a very high proportion of residential and business road users within Gauteng", the statement concerning the high number of road users acknowledges the very reason why roads in Gauteng were upgraded and why a toll system is now to be applied.

231.5 In addition, it is not that public transport is "hopelessly inadequate", which is not accepted as a fact, but that the applicants underestimate its use in Gauteng due to the fact that the majority of road users in Gauteng own motor vehicles themselves, which are preferred above other modes of transport.

232 Ad paragraph 77

For the reasons set out above, the contents of this paragraph are admitted.

233 Ad paragraph 78

The contents of this paragraph are admitted in relation to the development of an integrated rapid public transport but, for the reasons stated above, the impact of a public transport system or the need to maintain toll roads is irrelevant.

234 Ad paragraphs 79 to 83

The contents of these paragraphs are admitted. It should be noted that electronic toll collection, and the specific technology that has been installed, were introduced in 2003 on the N1/N4 Platinum Toll Road. The same technology is to be used for the GFIP.

235 Ad paragraph 84

In relation to the application of an open road tolling system, this toll levying system was selected and is to be applied on the basis of the geographic area over which the tolling system is to operate, the number of users in the tolling system and the nature of the use of the road network - all of which were based on the fact that it is not desirable and not environmentally friendly to impose a tolling system where one would require motorists in Gauteng to stop at a gated toll plaza and make payment of a toll. Such a system will simply defeat the objects of increasing the ability of commuters to make use of free flowing roads throughout the province. Simply, on the facts of the matter,

open road tolling was selected as it is and remains the most viable and reasonable option for consideration by SANRAL and the Minister of Transport for purposes of the payment of tolls in Gauteng on the current network.

236 Ad paragraph 85

The contents of this paragraph are noted.

237 Ad paragraphs 86 to 94

237.1 The contents of these paragraphs are admitted - including the involvement of the Minister of Transport in the application of a toll road scheme in Gauteng since 2005.

237.2 In addition, the following aspects of the chronology set out in these paragraphs that are not indicated –

237.2.1 the then Minister of Transport, Mr Jeffrey Radebe required a working group to be established in 2005, following the presentation of the proposed GFIP;

237.2.2 the working group consisted of representatives of the Department of Transport, the Gauteng Provincial Government, the Tshwane, Johannesburg and Ekurhuleni Metropolitan Councils, district municipalities and SANRAL;

237.2.3 the working group produced a report entitled "Gauteng Transport Integration Process: Proposal for Gauteng Freeway Improvement Scheme", dated September 2006, which is dealt with above in greater detail;

237.2.4 the members of this working group presented the contents of this report to their various decision makers;

237.2.5 at both the presentations made to the Cabinet in July 2007 and the Gauteng Legislature in August 2007, it was shown that it may very well be that the toll that would be applicable would be 50 cents per kilometre. The presentation to cabinet, which has been referred to above, is attached marked "**NA8**".

238 Ad paragraphs 95 to 98

The contents of these paragraphs are admitted.

239 Ad paragraphs 99 to 99.5

The contents of these paragraphs are admitted and the attention of the above Honourable Court is drawn to the dates in respect of which articles appeared - in 2007.

240 Ad paragraphs 100 to 101

The contents of these paragraphs are admitted and the attention of the above Honourable Court is, once again, drawn to the dates in respect of which these documents were published - in 2008.

241 Ad paragraphs 102 to 102.5

241.1 The application of the record of proceedings in the matter, referred to in paragraph 102.1 to these proceedings, is curious in so far as I know of no connection between HMKL 3 Investments (Proprietary) Limited ("HMKL") and any one or more of the applicants. No explanation as to the manner or process in which the record was provided to the applicants by HMKL is set out in the answering affidavit.

241.2 Unfortunately, it would appear that the provision of the record in such circumstances occurred irregularly and is indicative of a relationship that exists between the applicants and HMKL that arouses suspicion.

241.3 However, in so far as such a relationship does exist, I advise that the institution of legal proceedings by HMKL against SANRAL occurred in 2010. The facts of the matter are set out in the various court processes and affidavits filed by HMKL were also available then to the applicants, on the basis of their relationship, since 2010.

241.4 Certainly, the record of the proceedings was only delivered within the last two months but the primary issues in dispute were certainly available to the applicants since 2010 - on their own version.

241.5 Once again, the facts that are pertinent to this application, for purposes of now justifying its institution and the requests for interdicts, could easily have been made much earlier and indeed should have been made much earlier based on the information available to the applicants from HMKL.

241.6 In any event, without a proper explanation as to how the applicants obtained the record from HMKL, the contents of the affidavit, in so far as they rely on the contents of the record in the HMKL matter, should be struck from these proceedings. An application to this effect will be brought formally at the hearing of this application.

242 Ad paragraph 103

The contents of this paragraph are admitted.

243 Ad paragraph 104

The contents of this paragraph are admitted and the attention of the above Honourable Court is drawn to the time periods referred to in this paragraph.

244 Ad paragraph 105

The contents of this paragraph are admitted other than to state that the period referred to in this paragraph was not a minimum period but simply a period stated in terms of the applicable legislation. Any representation made beyond the period would certainly have been considered by SANRAL.

245 Ad paragraph 106

The contents of this paragraph are noted.

246 Ad paragraph 107

246.1 The contents of this paragraph are admitted. There is nothing in the application to indicate that the number of representations received by SANRAL was insufficient. There is also no indication that a certain number of applications received or a certain number of replies would be sufficient or insufficient. What is apparent is that the issue of declaring roads as toll roads in Gauteng was certainly a matter of great public discussion, debate and interaction in 2007.

246.2 Of the written representations that were received none was from any of the applicants or their members notwithstanding the fact that other than for the first applicant, the balance of the applicants were in existence at the time and were present in Gauteng during the period in respect of

which the advertisements were published in the press concerning the declaration of roads as toll roads – a fact that is evident from the annexures attached to the founding affidavit, more particularly, those appearing at "**FA19**" to "**FA23**" and "**FA28** to "**FA30**".

246.3 In relation to the application of a petition, obviously the interaction of the public on the issue of tolling was heated and various remarks and debates were occurring within the public sphere concerning tolling but all of this occurred in 2007 – five years ago.

247 **Ad paragraph 108**

The contents of this paragraph are denied. All letters were answered individually by SANRAL. Where issues raised by the public were similar, a similar response was provided.

248 **Ad paragraph 109**

The contents of this paragraph are admitted and, once again, the attention of the above Honourable Court is drawn to the dates in respect of the documents contained in Addendum A.

249 **Ad paragraph 110**

- 249.1 The contents of this paragraph are denied as there is nothing but a bald allegation in this paragraph - it is simply not appropriate for me to address such a bald allegation. There is no basis upon which the applicants are able to contend that SANRAL "did not properly consider the representations of the public or public authorities".
- 249.2 All of the representations received by SANRAL were read and attended to and, where necessary, appropriate changes were effected to the documents in respect of which commentary was delivered.
- 249.3 Following the responses supplied by SANRAL, SANRAL did not receive any follow-up correspondence from those making representations.
- 249.4 The main issues raised by the public as well as the mitigation measures were included in the Intent to Toll Report to the then Minister of Transport and the record of the complete submissions and the responses provided was forwarded to the Minister of Transport as an annexure to the aforementioned report.

250 Ad paragraphs 111 to 114

In relation to the application of the timeframes with which these paragraphs deal, the contents of these paragraphs are admitted. However, this does not assist the applicants in so far as the timeframes with which they are dealing commence on, at least, 28 March 2008. Once again, the applicants simply fail to address the time that lapses between the publication of annexures "A1" to "A6" to the Notice of Motion and the institution of these proceedings.

251 Ad paragraphs 115 to 118

The relevance of these paragraphs to this matter is unknown. Other than to state that the R21 was transferred from the Province of Gauteng to SANRAL, there was nothing curious about the transfer as the inclusion of the R21 into the toll network was required due to the volume of traffic on the R21 and the fact that this route was in a poor condition and required to be rehabilitated and upgraded since it represents a significant connection to the OR Tambo International Airport from Pretoria and the East Rand.

252 Ad paragraphs 119 and 120

The contents of these paragraphs are admitted but once again the applicants have taken no action within the requisite timeframes bearing in mind the dates in respect of the annexures referred to in these paragraphs, being annexures "FA27" to "FA30".

253 Ad paragraph 121

A copy of the notice referred to in this paragraph is attached marked "**NA4**".

254 Ad paragraphs 122 to 129

The contents of these paragraphs are admitted but the relevance of these paragraphs to the relief sought in the Notice of Motion is unclear.

255 Ad paragraphs 130 to 145

255.1 The deponent states that a media release was issued on 9 May 2008 but does not explain why there was not then an immediate reaction by one or more of the applicants or their members for purposes of dealing with the relief now sought in the Notice of Motion.

255.2 Unfortunately, the delay that exists between the facts of this matter arising and in respect of which action should have been taken by the applicants and the institution of these proceedings is fatal to the continuation of these proceedings pursuant to the provisions of the PAJA. Further argument in this regard shall be addressed at the hearing of this application.

255.3 In so far as the balance of the allegations contained in these paragraphs are concerned, the contents of these paragraphs are admitted.

256 **Ad paragraphs 146 to 151**

256.1 The contents of these paragraphs are admitted in relation to when, in the applicant's view, there was a "public outcry" in respect of the application of a tolling system in Gauteng. The difficulty with these allegations is that on the applicants' own version the "public outcry" started in February 2011. The "public outcry", also on the applicants' version, appears to be very well-informed of the particular issues concerning the tolling system to be applied in Gauteng.

256.2 The one issue that is not provided by the applicants is why the applicants or their members, either individually or jointly, did not bring this action then or at least within the 180 days of 4 February 2011, being the date of annexure "**FA35**" to the founding affidavit. The delay simply remains unexplained but is indeed fatal to the continuation of this application by the applicants.

257 Ad paragraph 152

257.1 The contents of this paragraph are admitted in so far as the quotation is an accurate quotation of the statements made by the Minister of Transport.

257.2 The one issue that does arise in relation to the statements made is that the review that was being referred to was about the amount of the tolls, i.e. the actual amount to be levied and not the process of tolling per se. Nothing in the statement indicated that the process of tolling, being the declaration of the roads in the annexures to the Notice of Motion, would be revised or revoked.

257.3 The state of affairs concerning the application of a toll system in Gauteng thus remained consistent and has been in place officially since 2008. Certainly, debates continue about the amount of the toll to be levied on the road system but these debates have also occurred since 2008 and will continue until such time as a notice is published concerning the amounts to be charged. Irrespective, the statement referred to in paragraph 152 may not be used as an excuse for the fundamentally late delivery of this application.

258 Ad paragraph 153

The contents of this paragraph are admitted.

259 Ad paragraphs 154 to 156

I have no knowledge of Mr Corcoran's movements during this time and am unable to admit these allegations.

260 Ad paragraph 157

260.1 The contents of this paragraph are admitted but, once again, I refer the above Honourable Court to the fact that the Steering Committee that was convened, was convened to "revisit the proposed tariff" not the process of tolling or the declaration of the roads referred to in the annexures to the Notice of Motion.

260.2 Nothing in the Steering Committee processes, to which reference is made, was designed to alter the course of the application of the declaration of roads in Gauteng as toll roads. The applicants have conveniently conflated the declaration of roads as toll roads and the payment of tolls in order to overcome, by a sleight of hand, the lateness of their application.

261 Ad paragraph 158

The contents of this paragraph are admitted.

262 Ad paragraph 159

I have no knowledge of the contents of this paragraph and defer to the affidavit delivered by the second respondent.

263 Ad paragraphs 160 and 161

The contents of these paragraphs are denied in so far as I have no knowledge of the contents of this paragraph and defer to the affidavit delivered by the second respondent.

264 Ad paragraphs 162 and 163

The contents of these paragraphs are denied in so far as I have no knowledge of the contents of this paragraph and defer to the affidavit delivered by the second respondent.

265 Ad paragraphs 164 to 165

I have no knowledge of the contents of this paragraph and defer to the affidavit delivered by the second respondent.

266 Ad paragraph 166

The contents of this paragraph are denied and I state that the Cabinet endorsed only the rates per kilometre, which is used to determine the tariffs to be determined by the Minister of Transport.

267 Ad paragraph 167

The contents of this paragraph are admitted but in so far as there was a decision made by the Cabinet that both the tolling system in Gauteng would proceed as well as the "revised toll tariffs" that would be applied, at that time, the applicants were then, at the latest, in a position to institute these proceedings. They failed to do so and have not provided an adequate explanation as to why.

268 Ad paragraphs 168 to 170

I have no knowledge of the contents of this paragraph and defer to the affidavit delivered by the second respondent.

269 Ad paragraphs 171 to 174

The contents of these paragraphs are admitted but, once again, the issue that was to be discussed in any public forum was not the tolling system to be

applied in Gauteng but rather the tariffs that would be levied in the course of the application of this system.

270 Ad paragraphs 175 and 176

I have no knowledge of the contents of this paragraph and defer to the affidavit delivered by the third respondent.

271 Ad paragraph 177

The contents of this paragraph are admitted.

272 Ad paragraphs 178 and 179

The contents of these paragraphs are admitted.

273 Ad paragraphs 180 to 184

273.1 The contents of these paragraphs are admitted other than to deny that the presentations made were unproductive or that the SANRAL board was disinterested in what was being said.

273.2 Presentations were made by a number of organisations none of who indicated that their efforts were unproductive or that the board was

disinterested in them. The organisations and presentations are concerned are as follows –

273.2.1 SAVRALA;

273.2.2 SANCU;

273.2.3 The South African Road Freight Association;

273.2.4 The Democratic Alliance; and

273.2.5 The Freedom Front Plus.

274 Ad paragraphs 185 to 186

274.1 There is nothing contained in any statement made by any of the respondents that the process of tolling in Gauteng would not continue.

274.2 Certainly, the application of the various toll tariffs would be subject to further debate and decision-making within the powers of the various respondents to whom such a power is vested in law. Therefore, the classification or characterisation of "hopes been kept alive", in relation to media statements being made concerning toll tariffs, to justify the timing within which this application was brought, is without substance and accordingly denied.

274.3 In fact, following the announcement by the Minister of Transport of a delay in the implementation of a levying of tolls, Government came to the assistance of the paying e-toll public by increasing the e-tag tariff discount from 30% to 48,3%, resulting in an e-tag tariff for light vehicles of 30c per km. The monthly tariff for light vehicles was also capped at R550 for e-tag users and significant amendments were made to the time of day discounts for heavy vehicles. Therefore, it is denied that the hearings and further debate led to nothing.

274.4 There were many occasions prior to the institution of these proceedings on which the applicants should have instituted the proceedings and the characterisation of the delay in instituting the proceedings, based on media statements by the Minister of Finance and the Minister of Transport, is simply not good enough and certainly not a basis for the urgency that the applicants contend that these proceedings possess. The remaining allegations contained in these paragraphs are denied.

275 Ad paragraphs 188 to 193

The contents of these paragraphs are admitted in relation to –

275.1 the quotations cited being correctly quoted;

275.2 that the tariffs have not yet been published and that currently no toll amount is being levied from any person in Gauteng.

276 Ad paragraph 194

276.1 In so far as Section 27 vests the Minister of Transport with the power to approve a toll road or the declaration of a particular road as a toll road, the levying and collecting of a toll on a specified portion of a toll road is an issue to be decided separately by the Minister of Transport.

276.2 The respondents have conflated the two issues in this paragraph of declaring a road to be a toll road and the determination of a toll fee.

276.3 The issue in this paragraph is one of legal argument and will be addressed at the hearing of this application.

276.4 The remaining allegations contained in this paragraph are denied.

277 Ad paragraph 195

In so far as paragraph 195 is an accurate reflection of section 27 of the Act, the contents are admitted.

278 Ad paragraph 196

The contents of this paragraph are admitted.

279 Ad paragraph 197

The contents of this paragraph constitute legal argument and should not be included in the affidavit. However, in so far as the allegations concerned constitute an interpretation of the section concerned, legal argument will be addressed on this issue at the hearing of the application.

280 Ad paragraph 198

The contents of this paragraph constitute legal argument and are denied. It is inappropriate for me to address legal argument in the answering affidavit. Accordingly, legal argument will be addressed on this issue at the hearing of the application.

281 Ad paragraph 199

The contents of this paragraph constitute legal argument and are denied. It is inappropriate for me to address legal argument in the answering affidavit. Accordingly, legal argument will be addressed on this issue at the hearing of the application.

282 Ad paragraph 200

The contents of this paragraph are denied for the reasons set out below in relation to the paragraphs in which the applicants endeavour to deal with the arguments supporting the contents of this paragraph.

283 Ad paragraph 201

The contents of this paragraph are admitted,

284 Ad paragraph 202

For the reasons set out below, the contents of this paragraph are denied.

285 Ad paragraph 202.1

285.1 Whilst the allegation is made that the notices do not contain sufficient information, the precise nature of the information is not described in this paragraph.

285.2 The requirements of section 27(4) require SANRAL to provide the requisite amount of information to allow for the issue in question to be dealt with and that is identified in section 27(4), being the declaration of a road as a toll road.

285.3 The declaration of a road as a roll road is a different procedure to the determination of a toll in respect of that particular piece of road. Therefore, in so far as it is contended that the notices concerned and to which reference is made in this paragraph “were inherently defective” because they did not detail the costs of the toll, this contention is incorrect and inconsistent with the provisions of section 27(4).

285.4 The reason that the notices do not mention “whatsoever ... a likely quantum of the tariff of the notices” is because the provisions of section 27 do not require or permit such information to be included in the notices. This is apparent from a plain reading of the wording of section 27(4).

285.5 Accordingly, the contents of this paragraph are denied.

286 Ad paragraph 202.2

For the reasons set out above, the contents of this paragraph are denied.

287 Ad paragraph 202.3

The contents of this paragraph are admitted.

288 Ad paragraph 202.4

For the reasons set out above, the “critical information” referred to did not need to be included in the notices. Accordingly, the contents of this paragraph are denied.

289 Ad paragraph 202.5

The defects to which reference is made are simply not defects and cannot be fatal to the notices. Accordingly, the contents of this paragraph are denied.

290 Ad paragraphs 202.6 and 202.7

In relation to the strict legal requirements, which will be addressed in argument before the above Honourable Court at the hearing of this application, as stated above, applicable to the contents of the notices, the notices did not need to contain the information pertaining to the amounts to be levied as a toll fee. The notices were only required to deal with information pertaining to the declaration of a particular piece of road as a toll road. This distinction is lost on the applicants. Accordingly, the contents of these paragraphs are denied.

291 **Ad paragraph 202.8**

The issue with which Mr Van Rooyen becomes confused is the conflation of the financial consequences of a toll road with the declaration of a road as a toll road. Mr Van Rooyen's statements are more appositely directed to the intentions expressed by the Minister of Transport in a soon to be published notice concerning the application of toll tariffs in respect of the toll roads in question. The application of Mr Van Rooyen's statement to the issue at hand is incorrect and accordingly the contents of the paragraph are denied. SANRAL responded to Mr Van Rooyen, a copy of which is attached marked "NA23".

292 **Ad paragraphs 203 to 203.10**

292.1 These paragraphs contain legal argument concerning the interpretation of the word "generally" as it appears in section 27(4)(a) of the Act. Accordingly, legal argument will be addressed to the above Honourable Court at the hearing of the application in respect of the argument presented in these paragraphs, the contents of which are denied.

292.2 Without derogating from the generality from what is stated above, there is no basis upon which the publication of notices concerning the intent to declare certain portions of the roads in Gauteng as toll roads were not generally published as the meaning of this word is generally understood.

- 292.3 The publication of the notices dealing with the intent to declare roads as toll roads in Gauteng was a pervasive process as is evident from the number and degree of annexures attached to the founding affidavit and the media attention reflected in annexure "**NA2**".
- 292.4 Accordingly, it cannot be contended by the applicants, on the one hand, that insufficient notice was provided about the intent to declare certain roads as toll roads, and on the other hand, that insufficient notice was provided due to the extent, on its own version, of the "the public outcry" on which its application for condonation, in particular, and its application, in general, are founded.
- 292.5 In addition to what is set out above, the applicants do not detail what steps SANRAL should have taken to publish notices of the intent to declare roads as to toll roads "in a manner *proportionate* to the vast size and impact of the project on the public". (emphasis added)
- 292.6 In any event, the publication of notices in newspapers throughout the province as well as the degree of correspondence entered into between SANRAL and interested and affected parties since 2007 is sufficient for purposes of the process contemplated in section 27 of the Act, which is the process with which these paragraphs are concerned.
- 292.7 Accordingly, the contents of these paragraphs are denied.

293 Ad paragraphs 204 to 204.6

293.1 The principal allegations made in these paragraphs are fundamentally that SANRAL was obliged to treat certain interested groups separately and specially to other interested groups due to an apparent difference in the interests held by certain persons over interests held by other persons.

293.2 This distinction—and the allegation that is made on the strength of it—is preposterous. The obligations imposed by section 27 on SANRAL are that SANRAL is required to notify the public and not identify, by some unknown means, which is not stipulated in the founding affidavit, certain groups or persons, who have special interests. In any event, such a system is, on its face, simply discriminatory and would offend against the Constitution.

293.3 There is no allegation in the founding affidavit that SAVRALA should have been treated differently due to the fact that its members “are particularly sensitive to this system”.

293.4 The notice provided by SANRAL was, indeed, on SAVRALA’s own version, sufficient in light of the degree to which SAVRALA interacted with SANRAL in relation to the provisions dealt with in section 27. In any event, particular notices to particular interested groups are not

sanctioned by section 27 of the Act. Therefore, any attempt by SANRAL to notify persons selectively would be *ultra vires* the Act and the subsequent notice would be defective on that basis alone.

293.5 For the reasons set out above, the contents of these paragraphs are denied.

294 Ad paragraphs 205 to 205.7

294.1 The primary complaint in these paragraphs is that the period for notice was disproportionate to the gravity of the scheme.

294.2 This relationship is a difficult one to fathom as the Act does not impose upon SANRAL an obligation to figure what notice period would indeed be applicable based on a perceived impact of a particular scheme on the public. There is no indication in these paragraphs how one would determine such a process or time period or even what the formula would be that would be reasonable for circumstances of the nature described in these paragraphs.

294.3 SANRAL adhered to the requirements of the legislation and the powers imposed upon it by the legislation concerned. There is no basis to argue now that because SANRAL adhered to its legal obligations, the gravity of the scheme required it to deviate from those legal obligations and impose a period other than that required by the Act.

294.4 Accordingly, for the reasons set out above, the contents of these paragraphs are denied.

294.5 In relation to the issue of tolling, the application of a tolling process has been in the public domain since June 2006 when SANRAL presented to a number of interested and affected parties how the process of recovering amounts spent on the GFIP would be recovered.

294.6 The interaction between SANRAL and the parties referred to in paragraph 205.3 was sufficiently adequate as none of those parties have complained about the degree of notice provided or the interaction between each of them and SANRAL.

294.7 There has not been a “brick walled response” in relation to the manner in which both –

294.7.1 the roads in question were declared to be toll roads; and

294.7.2 the application of a toll fee in respect of the use of the roads in question,

have occurred.

- 294.8 In relation to the application of a tolling system, the scheme, as is stated by the applicants, is unique. Accordingly, the imposition of toll fees is also unique but is indeed the most equitable manner of recovering the costs associated with the construction and implementation of the tolling system as well as the maintenance of the roads over the short and long terms.
- 294.9 The feasibility studies conducted in relation to the application of a tolling system indicate that such a system is indeed a reasonable system with which to recover the costs expended by SANRAL in respect of the construction and maintenance of such a system. The legal obligations on SANRAL are to impose a reasonable and rationally comprehensive system and that is what it has done based on the studies concerned.
- 294.10 There is no basis upon which to argue that either SANRAL or the Minister of Transport has imposed a system that is so unreasonable or so irrational so as to be faulted on the basis that it is illegal.
- 294.11 Simply because a financial requirement is placed upon an individual does not mean that the mere imposition of such a financial requirement is either unreasonable or irrational. The implementation of financial burdens on road users is an international phenomenon and is applied in the most liberal democracies.

294.12 The application of toll fees is not without exemption and is not applied without some degree of sensitivity for various categories of persons including those who may have financial circumstances that would require different treatment.

294.13 Additional legal argument will be addressed at the hearing of this application in respect of the issues referred to above.

294.14 The remaining allegations contained in these paragraphs are denied as if specifically traversed.

295 Ad paragraph 206

For the reasons set out above, the contents of this paragraph are denied.

296 Ad paragraphs 207 to 212

296.1 The imposition of a tolling system is one that is complained of generally by the applicants. Whilst the applicants make a great deal of the prejudice to be suffered by each of them, which is denied, the issue is one that rests on the stark basis that the applicants and their members do not wish to make payment for the tolling system, alternatively, the payment should be effected by some implied or hidden cost set out in a fuel levy or some other indirect tax, which, for some or another reason, will be more palatable to the motorist.

- 296.2 The difficulty with this argument is that, in one way or another, the South African consumer or the motorists in Gauteng will have to make payment for the upgrades and improvements that have occurred on the road infrastructure in the province.
- 296.3 The recovery of these costs is inevitable and as governments across the world perform such infrastructure tasks, they recover the concomitant expenses from the tax paying public. This particular process though is not disputed by the applicants.
- 296.4 What the applicants simply dispute is that tolling is the wrong way of recovering the costs. However, no where in the founding affidavit is it stated precisely why this process is the wrong way to recover the costs.
- 296.5 There is also no evidence in the founding affidavit that the manner in which the selection of this particular funding model occurred was illegal, unreasonable or unconstitutional. For these reasons alone, the contents of these paragraphs are denied.
- 296.6 In relation to the application of the principles referred to in these paragraphs to the decision to apply a tolling system, which is also dealt with below in greater detail, these allegations are also denied as if specifically traversed.

297 Ad paragraph 213

297.1 One needs to draw a distinction between open road tolling system and tolling. It is my understanding, based on the allegations contained in the founding affidavit, that the objection is against paying tolls, not necessarily open road tolling.

297.2 In the report dated June 2006, quoted above, various options were in fact considered in addition to tolling.

297.3 Therefore, it was never inevitable “that the toll collection mechanism would be open road tolling”.

297.4 Accordingly, the allegations contained in this paragraph are denied.

298 Ad paragraphs 214 and 215

The contents of these paragraphs are admitted. However, it should be noted that there are very large conventional toll plazas, with toll booms and booths, which exist in other countries on roads with similar traffic volumes. The evolution of electronic toll technology allows for the implementation of more effective systems such as the system implemented in Gauteng. This trend is taking place internationally and many of the conventional toll plazas are

converting or have already been converted into open road tolling due to its obvious traffic flow and environmental advantages.

299 **Ad paragraph 216**

For the reasons stated above, the contents of this paragraph are denied.

300 **Ad paragraph 217**

The contents of this paragraph are denied in so far as the generalisation that open road tolling is extremely expensive is not supported by any evidence.

301 **Ad paragraph 218**

For the reason stated above and the contents of the September 2006 report, referred to above, the contents of this paragraph are denied.

302 **Ad paragraph 219**

302.1 Whilst the actual costs of open road tolling were not known as at the time that the network was to be declared as a toll road, the feasibility studies that were conducted and required by section 27 were estimated and included in the toll financial model.

302.2 The real costs only became known once the tender processes were concluded and the total costs determined once the project was implemented.

302.3 At no time, however, was the Minister of Transport placed under any incorrect apprehension relating to the costs concerned both estimated and final and the process followed in order to ensure that these costs were taken into account correctly.

302.4 There is also no evidence to show that the Minister of Transport did not apply his mind correctly to the information supplied to him in relation to the information set out in the application in terms of section 27 of the Act by SANRAL to the Minister of Transport.

303 Ad paragraphs 220 to 232

303.1 The record to which reference is made, subject to what is stated above about striking matters relating to this record out of the answering affidavit, does contain information that belongs to and is referred to in section 27 of the Act.

303.2 In relation of the cost of the collection and enforcement of e-tolling, these costs are provided as part of the report but are ancillary to the statutory matters and issues with which section 27 is concerned in relation to the declaration of roads as toll roads. Therefore, the

economic feasibility report, to which reference is made in paragraph 220 does only “refer ... to the cost of setting up e-tolling infrastructure”. This is not a startling omission when one has regard to the expressed provisions of section 27 of the Act.

303.3 Consequent criticism in these paragraphs concerning the economic feasibility report are simply misplaced in relation to the attack that is launched against this report and information, which remains premised on section 27 of the Act. For this reason alone, the criticisms are misconceived and are denied.

303.4 In relation to annexure “**FA51**”, the GIFP Steering Committee Report is selectively quoted. In this regard, I refer you to the full report attached to this affidavit and the extracts from that report that are quoted above.

303.5 The contents of paragraphs 223, 224, 225 and 226 are correct and admitted.

303.6 In relation to the actual figures applicable to the costs of an open road tolling system in Gauteng, I advise that these costs will not be known until the entire scheme is implemented and tolls are collected.

303.7 The remaining allegations, not dealt with above, and contained in these paragraphs are denied.

304 Ad paragraphs 233 to 237

I have no knowledge of the contents of these paragraphs and defer to the affidavit delivered by the second respondent.

305 Ad paragraphs 238 to 242

305.1 The figures contained in these paragraphs are correct but the assumptions are flawed in so far as the figures cited are those that are estimated based on a public non-compliance in excess of 60%. Therefore, if the majority of road users simply do not pay toll, due civil disobedience or otherwise, the costs of operating and maintaining the toll road system will be higher. However, if the vast majority of road users decide to pay toll fees, then the figures will change and the amounts concerned to operate and maintain the system will be lower.

305.2 The allegations contained in these paragraphs are premised on assumptions that are incorrect and relate to civil disobedience, in respect of the lawful requirement to pay toll, being successful. This is untenable as no person is permitted to advocate taking the law into his or her own hands.

305.3 For the reasons set out above, the allegations contained in these paragraphs are denied.

305.4 The cost of collecting a compliant toll transaction, that is where a person liable for toll pays toll in accordance with the requirements of legislation, is in the order of 15 cents in the Rand. This cannot be viewed, on any basis, as being unreasonable. It is readily accepted that the cost of collecting toll from persons who are determined to break the law, is a lot higher.

306 Ad paragraphs 243 to 246

306.1 These paragraphs contain the argument relating to a fuel levy and that payment for the open tolling system should be effected by some unidentified ring-fenced addition to the fuel levy through a thing called a “ring-fence fuel levy increase”. In this regard, the applicants contend that “[t]his option entails no cost of collection at all”.

306.2 The difficulty, however, remains that there are costs of collecting such a ring-fenced amount in so far as the issue becomes one not of collection of costs but rather the costs of fuel itself.

306.3 The issue is not one of how to collect costs but rather that the costs must be paid. In this regard, the decision taken to impose the cost collection mechanisms of a toll within the framework of road users in Gauteng is directly proportional to the effect of the tolling system on those road users.

306.4 In addition, the increase in the costs of fuel as a result of the imposition of a ring-fenced fuel levy would have dire effects on the economy and cause further difficulties in relation not only to the costs of operating the open toll system but inflation generally. The reason for this is that the GFIP is but one of many public infrastructure projects that SANRAL, in particular, and the State, in general, has to complete. It is not feasible nor Constitutional for SANRAL to add to the fuel levy for every public infrastructure project that needs to be funded due to a lack of funds from the fiscus. Such a system will eventually mean that fuel costs would become prohibitively high along with other goods that must be transported by road and air.

306.5 There is no basis set out in the founding affidavit as to why “a ring-fenced fuel levy increase” is “favoured by many interested parties” in relation to the overall economic effects of such an increase on South Africans.

306.6 SANRAL and the Minister of Transport considered options available to them for purposes of collecting the costs of the open road toll system. There is nothing about the decision making process that was followed that indicates that it was unreasonable, unlawful or unconstitutional and none of the bases for such contentions are set out in the founding affidavit. Accordingly, the contents of these paragraphs are denied as if specifically traversed.

307 Ad paragraphs 247 and 248

307.1 For the reasons set out above, the steps taken by SANRAL and the Minister of Transport do not, in any way whatsoever, contravene duties imposed upon each of them in terms of the Public Financial Management Act No. 1 of 1999. In effect, the steps taken by SANRAL and the Minister of Transport, in relation to the cost associated with open tolling, are effective and appropriate, and do not indicate an irresponsibility in relation to the recovery of these costs by the Republic of South Africa in relation to its obligations to its creditors.

307.2 For the reasons set out above, the contents of these paragraphs are denied.

308 Ad paragraph 249

For the reasons set out above, the contents of this paragraph are denied.

309 Ad paragraphs 250 to 268

309.1 The contents of these paragraphs concern an assumption based on an article that appears at annexure "**FA54**" of the founding affidavit. This article states that due to the number of users on the roads, it is not possible to process the number of transactions that will occur.

- 309.2 It is simply not feasible to substantiate a legal position with reference to assumptions contained in a newspaper article. There is no basis otherwise than the article referred to at annexure "FA54" for the deductions contained in paragraph 257. There is accordingly simply no basis to accept that these deductions are a reflection of a reality, are true, or are even realistic.
- 309.3 Aspects concerning the processing of transactions as well as the number of items in the postal system have been taken into account by SANRAL. At no point in the process that SANRAL undertook, has any indication been provided by any entity, whether public or private, that the processing of the transactions concerned or the processing of the postal items in question is not possible.
- 309.4 The assumptions made by the applicants are perhaps best demonstrated by their unfounded allegation that "840 000 invoices would need to be sent by mail to road users per month". The legislation applicable to tolling does not require SANRAL to post invoices. There is also no legislation which requires the posting of invoices. The legal requirements are that a person responsible for toll will make payment either, (i) in the manner agreed with SANRAL, if they elect to register with SANRAL and their invoices will be made available to them in the manner agreed, often by e-mail; or (ii) at a place determined by SANRAL and which place will be made known in the *Government Gazette*, should they elect not to register with SANRAL. The payment

of tolls will need to be made within seven days of the liability arising and not upon receipt of invoices.

309.5 No evidence is provided for any of the allegations contained in these paragraphs in the founding affidavit other than for the article that is contained at annexure “**FA54**”:

309.5.1 none of the authors of the article have filed confirmatory affidavits confirming the research conducted to support the article or even that the article is correct;

309.5.2 there is no affidavit from the post office indicating that it will be unable to deal with the issues presented by the open tolling system. Therefore allegations relating to the post office and the postal system are denied as being entirely without basis or foundation.

309.6 In relation to the issuing of summonses and legal notices, the current process for conducting these activities exists throughout the country in relation to road traffic users. The application of these principles to the e-tolling system is similar and there are therefore no anticipated logistical difficulties that will cause the system to become impractical. Once again, the simple lack of evidence in this regard renders the allegations contained in these paragraphs without merit and they are denied.

310 Ad paragraphs 269 to 275

310.1 The allegations concerning “material deficiencies” are also without any evidence.

310.2 In relation to the allegation that the system “is unable to cater for the charging of road users who are not the owners of the vehicles they drive”, this is simply untrue. The Act and not the system utilised determines the liability for tolls.

310.3 The recovery of fines for road traffic offences committed by the drivers of rented vehicles payable by the drivers of the rented vehicles is analogous to the recovery of tolls incurred by the drivers of those vehicles. Accordingly, the vehicle renting and leasing industry dealt with the issue of the imposition of road penalties and fines and there is no reason why such a similar process should not be adopted in relation to the recovery of tolls incurred by those drivers whilst using a rented vehicle. Certainly, these difficulties are not explained by the deponent in the founding affidavit.

310.4 In respect of “cloned vehicle licensed plates”, e-tags are designed to avoid the problems of cloned licensed plates. The toll system records the e-tag number together with the vehicle front and back number plates when passing underneath a toll gantry. By means of this

system, a secure transaction may be logged. The user will be informed if the e-tag and the number plate do not correspond in terms of the data held by SANRAL. There is a solution offered by SANRAL to make this transaction secure. It will be the decision of SAVRALA members to fit e-tags to their vehicles or use the vehicle license number identification process. The use of cloned vehicle licensed plates is not an issue that relates to e-tolling. This is an issue of crime that continues, on the applicant's own version, irrespective of the status of toll roads throughout the country. The system implemented by SANRAL will contribute to solving the issue of cloned number plates being used in the GFIP system.

310.5 In any event, SANRAL has offered a solution to SAVRALA that its databases be integrated with those of SANRAL in respect of the toll levying system in order to integrate and co-ordinate activities between the two organisations to deal with any aspects that arises as a result of the use of fraudulent number plates on motor vehicles.

310.6 In relation to the use of vehicles without the owners consent or the use of cloned number plates, the current system allows the owners of such vehicles to make representations to SANRAL concerning the use of vehicles on an unauthorised or criminal basis and for the owner to avoid paying whatever fees were incurred through such unlawful or unauthorised use. There is therefore no prejudice visited on the

owners of vehicles as contended for by the applicants and allegations in this regard are denied.

310.7 Lastly, anyone who makes use of an e-tag for payment of e-tolls is able to achieve 48% discount on the toll costs due to the discount associated with the use of the e-tag. The vehicle rental company, as the owner of the vehicle and the account holder may decide to use these revenues from the e-tag discount or any other discounts to cover other administrative costs. It will be entirely up to the individual vehicle rental companies as to whether or not they will pass on the discounts to which they are entitled to their clients or if they will use them to defray overheads.

310.8 The remaining allegations in these paragraphs, not dealt with above, are denied.

311 Ad paragraphs 276 to 279.9

311.1 I have already dealt with the issues concerning the record in the matter concerning HMKL. Once again, I reiterate that this record has not come into the possession of the applicants lawfully and the use of the record is not appropriate in these proceedings.

311.2 The contents of the paragraphs upon which reliance is placed in this record should be struck from the founding affidavit.

311.3 However, in relation to the use of the record, in so far as the above Honourable Court is not inclined to strike the paragraphs, then the answer to the issues raised by the record which are described as “the series of additional review grounds which serve to be vitiate SANRAL’s decision to declare the proposed road network as a toll road” are as follows –

311.3.1 these grounds are not additional grounds but grounds already traversed in the founding affidavit. Therefore, the grounds contained in paragraphs 277 and 278, which deal with the application of the fuel levy, have already been dealt with previously in the founding affidavit. In fact, paragraphs 278.1 to 278.12 deal with the fuel levy again. Paragraphs 278.13 and 278.14 deal with the knowledge of the Minister of Transport in relation to the costs of the e-tolling system – an issue that is already dealt with in the founding affidavit. The answers to the grounds of review advanced in these paragraphs, which answers have been stated above are to be read as answering these paragraphs;

311.3.2 in relation to the so-called “third ground of review” in paragraphs 279 to 279.9, these deal with the representations made by members of the public, and is a ground that is already dealt with in the founding affidavit;

311.3.3 in relation to matters contained in the aforementioned paragraphs, the primary complaint is that SANRAL did not take into account the representations made by members of the public due to the fact that it replied to the representations received using a proforma response. However, the existence of responses, acknowledging receipt of a representation, does not, in any way whatsoever, indicate that the representation concerned was not taken into account by SANRAL. The assumption that SANRAL use a proforma response is denied. To state that these replies, even if perceived to be a proforma reply somehow indicates a failure by SANRAL to take into account the representation received is ill-conceived in law and is denied;

311.3.4 in relation to the contents of paragraph 279.4, I refer to the Steering Committee report referred to above in relation to the need for the GFIP project;

311.3.5 in relation to the knowledge of the Minister of Transport, I have no knowledge of the contents of these paragraphs and defer to the affidavit delivered by the second respondent;

311.3.6 in relation to the report referred to in annexure “**FA59**” to the founding affidavit, the report does deal with issues concerning

viable alternatives as discussed in paragraph 279.8. The one aspect that is not quoted in paragraph 279.1 is that “[t]he study concluded that ‘the success of an ungraded freeway system where toll fees are charged, is largely dependant on a range of factors such as the availability of reliable, safe, and practical public transport system in place. *Notwithstanding this, and notwithstanding the fact that an upgraded system carries with it certain positive social impacts, the major obstacle in this regard will be the ability to change public attitudes away from mainly relying on private car uses on the freeway system towards public transport and other alternatives. If this is achieved certain social benefits could be derived in respect of journey experience, macro-economic benefits and job creation as well as the safety and security of travellers on an upgraded freeway system*’”. (emphasis added);

311.3.7

for the reasons set out above, it is clear that all of the alternatives were considered, that SANRAL was aware of all the factors to be taken into account in relation to the implementation of both the declaration of roads as toll roads and a toll system. The arguments contained in these paragraphs are simply specious and make use of selected quotations and assumptions that are based on public hysteria and emotional editorial;

311.3.8 the allegations contained in these paragraphs are denied as if specifically traversed.

312 Ad paragraphs 280 to 280.4

I have no knowledge of the contents of these paragraphs and defer to the affidavit delivered by the second respondent.

313 Ad paragraphs 282 to 283

The contents of these paragraphs are admitted.

314 Ad paragraph 284

The contents of this paragraph are admitted.

315 Ad paragraph 285

The contents of this paragraph are denied on the basis that I have no knowledge of the contents of this paragraph and defer to the affidavit delivered by the second respondent.

316 Ad paragraph 286

For the reasons stated above, although the contents of this paragraph are denied, in so far as the applicants wish to contest any aspect of the process followed by SANRAL in respect of NEMA, it should do so by virtue of an appeal – a process that has not be used by anyone or more of the applicants or anyone or more of the members of the applicants. This omission remains unexplained in the founding affidavit.

317 Ad paragraphs 287 to 288

The contents of these paragraphs are admitted in relation to the accuracy of these paragraphs in respect of the particular authorisations concerned.

318 Ad paragraph 289

The contents of this paragraph are admitted.

319 Ad paragraph 290

The contents of this paragraph are admitted.

320 Ad paragraphs 291 to 293

320.1 The issue concerning notices in respect of the proposed activities referred to are notices that apply to the construction of roads. The road, in each instance, required to be upgraded and construction activities are therefore required. Legal argument will be addressed at the hearing of this application.

320.2 Without derogating from what is set out above, in relation to the provisions of Regulation 56(6), quoted in paragraph 293, the “potential interested and affected parties” can only be those persons who are directly affected by the construction activities of a particular part of the road, i.e. adjoining property owners. This is certainly the case pertaining to HMKL – a decision of which the applicants are intimately aware.

320.3 The environmental authorisations concerned refer to the issue of only the construction of roads and not the levying of tolls. Nowhere in the environmental legislation enacted in this country, more particularly, NEMA, is the activity of levying a toll, i.e. the imposition of an obligation to make payment of a toll, an activity that requires any environmental assessment whatsoever.

320.4 The difficulty faced by the applicants is that, as with the notices concerning the declaration of roads as toll roads, the environmental

authorisations pertain to activities other than the obligation to pay toll, being the activity of constructing roads wider than four meters and the activities identified in the applicable regulations relating to the construction in the one in ten year floodline, the dredging, excavating, infilling, removing or moving of rock, soil or sand in a stream or wetland, the above-ground storage of a dangerous good, the construction of masts. The inclusion of the environmental authorisations in this matter is ill conceived and, for the reasons stated above, without any foundation or basis in law.

320.5 The contents of these paragraphs other than paragraph 293, are denied as if specifically traversed.

321 Ad paragraphs 294 and 295

For the reasons stated above, the contents of these paragraphs are denied.

322 Ad paragraph 296

For the reasons stated above, the contents of this paragraph are denied and legal argument will be advanced in this regard at the hearing of this application.

323 Ad paragraph 297

In light of what is set out above, obtaining additional relevant environmental authorisations is a fruitless exercise. In relation to any environmental authorisations required by the applicants, these are tendered but, as stated above, are entirely irrelevant to these proceedings. Accordingly, the contents of this paragraph are denied as if specifically traversed.

324 Ad paragraphs 298 to 298.2

The contents of these paragraphs are admitted.

325 Ad paragraph 299

325.1 It is not known what the applicants' legal representatives did in relation to SANRAL's website and these allegations are denied but the balance of the allegations contained in this paragraph are admitted.

325.2 In relation to any documents that the applicant contends that it is required to have possession of and in relation to basic assessment reports or environmental authorisations, these documents are tendered but their relevance to the issues in respect of the levying of a toll are denied.

326 Ad paragraph 300

326.1 In relation to the contents of the basic assessment report attached to the founding affidavit, as stated above, the basic assessment report does not apply to how tolls are levied. It applies to the construction of road infrastructure.

326.2 The applicants continue to fail to point out where in the environmental legislation cited a requirement exists for any assessment report whatsoever to be conducted in relation to the levying of a toll, or the determination of the toll concerned. In this regard, references to the socio economic impacts of an activity is not a reference to the payment of an amount pursuant to the conducting of the activity for which the assessment is sought.

326.3 I am advised that this is a legal argument based on an interpretation of NEMA and accordingly further argument will be advanced at the hearing of this application.

327 Ad paragraphs 301 to 304

For the reasons stated above, the contents of these paragraphs are denied.

328 Ad paragraphs 305 to 305.4

The contents of these paragraphs are admitted.

329 Ad paragraphs 306 to 308

329.1 The applicants confuse two fundamental issues in these paragraphs: the costs of the proposed road upgrades and improvements and the manner in which costs are to be recuperated. Certainly, the inclusion of road upgrades would fall within the environmental authorisations sought and imposed by NEMA but the recoupment of those costs are not included within the confines of environmental authorisations required by NEMA. Therefore, in so far as these paragraphs are premised on this confusion, the contents of the paragraphs are denied.

329.2 Accordingly, the manner in which costs were to be recouped for purposes of applying the tolling system were not required to be considered by the Director-General or the Minister of Environmental Affairs and they did not apply their minds to those issues because they were not required to do so. Accordingly, the contents of these paragraphs, in so far as they require such an application of the minds of the Director-General and the Minister of Environmental Affairs, respectively, are denied.

330 Ad paragraphs 309 and 310

330.1 Once again, reference is made to the HMKL documents and application, this time a reference to the affidavits in the HMKL matter occurs and not only the record. It is not appropriate, I am advised, for the applicants in one matter to rely on the evidence in affidavits in another matter, more particularly, a matter that is yet to be heard by the above Honourable Court. For this reason alone, the contents of these paragraphs should be struck out of this affidavit and an application to this effect will be made at the hearing of this application.

330.2 In relation to the issues with which the paragraphs deal, the very point is made, as stated above, concerning the fact that environmental authorisations are not required for the levying of a toll.

330.3 In any event, the fact that the high water mark of the applicants' arguments on this issue of NEMA is the contention is made in paragraph 311 that "SANRAL is *wrong* when it contends that '...an environmental authorisation is not required for the declaration of the establishment of toll points because it has no impact on the environment'", is evident of the lack of support for the applicants' position in this regard.

330.4 The particular issue was not debated in the HMKL matter and, in any event, the issue is not the construction of a road, which is within the

authorisation, but the actual levying of a toll at a toll gantry. These are distinct activities and it is a distinction that would have been made had the HMKL matter preceded to argument before the above Honourable Court. Further argument in this regard shall be advanced at the hearing of this application.

331 Ad paragraphs 312 to 314.5

The contents of these paragraphs are denied in relation to the matters set out above in this affidavit.

332 Ad paragraphs 315 to 316

For the reasons stated above, NEMA is not applicable to the issues with which this application is concerned, being the levying of a toll and accordingly the contents of these paragraphs are denied. Further argument concerning the application of applicable legislation shall be advanced at the hearing of this application.

333 Ad paragraphs 317 to 319.6

333.1 These paragraphs concern the application of the Development Facilitation Act No. 67 of 1995 ("DFA") to land development, which the applicants contend includes "the road upgrades and improvements embarked upon by SANRAL as part of the GFIP."

333.2 In this regard, the DFA deals with the issue of "land development". The interpretation of the term "land development" does not include the development of national roads, which is dealt with by the Act, or the obligation to pay a toll.

333.3 Once again, for the reasons applicable and stated above in relation to the application of the provisions of NEMA, the DFA also falls short of applying to the construction and upgrading of the national roads concerned and the application of tolls. This is a legal argument based on an interpretation of "land development" and I am advised that it is inappropriate for me to include within this affidavit legal argument. Accordingly, the legal argument concerned will be advanced at the hearing of this application.

333.4 For the reasons stated above, the contents of these paragraphs are denied as if specifically traversed.

334 Ad paragraphs 320 to 322

For the reasons stated above, any aspect concerning the environmental authorisations that upsets the applicants should have been taken on appeal and not incorporated into this application. I have already traversed these facts and accordingly the contents of these paragraphs are also denied as if specifically traversed.

335 Ad paragraphs 323 to 326

335.1 I have spent a great deal of time on issues concerning why the applicants or the members of the applicants, whether jointly or severally, were able to bring these proceedings earlier than the time within which these proceedings were instituted.

335.2 There is no basis upon which condonation should be granted for the hearing of this application on the basis of any public interest or the interests of justice as no such grounds are advanced in the founding affidavit. I have attached to this affidavit a summary of all of the articles that have appeared in the media since 2006 concerning the construction of the toll roads and payment of toll fees as annexure "NA2". No one is able to express truthfully their ignorance in the past three to four years of the issues with which this application is now concerned.

335.3 Accordingly, the contents of these paragraphs are denied.

336 Ad paragraph 327

The contents of this paragraph are admitted.

337 Ad paragraph 328

The contents of this paragraph are admitted.

338 Ad paragraph 329

The contents of this paragraph are denied as no evidence has been placed before the above Honourable Court concerning the alleged powerlessness of any person who is an applicant or a member of an applicant in this matter "to bring an application for the reviewing and setting aside of the impugned declarations and approvals by the Minister".

339 Ad paragraph 330

In relation to the reiteration of matters in this paragraph concerning notice, I have already dealt with issues concerning notice and for these reasons, the contents of this paragraph are denied.

340 Ad paragraph 331

No evidence is being placed before this court that "even members of the public who saw the notices when they were published in 2008 would have been entirely ignorant of the impact that such declaration would have on them" in the founding affidavit and certainly this contradicts the extent of the

so-called "public outcry" also dealt with in the founding affidavit. For these reasons, the contents of this paragraph are denied.

341 Ad paragraph 332

The publication of the tariffs has not, as yet, occurred and the ultimate tariff that is to be applied will only be known in due course. The contents of this paragraph are, in any event, denied based on the amount of public notice to which reference is made in the founding affidavit in respect of the notices attached to the notice of motion.

342 Ad paragraphs 335 to 340

I have no knowledge of the contents of these paragraphs and defer to the affidavit delivered by the second respondent.

343 Ad paragraph 341

The contents of this paragraph are denied as the continuation of the debate concerning tolling did not cease in the media and, in any event, even if there was little to be heard about the tolling of the proposed toll road network, this has nothing to do with the legal obligations imposed upon the applicants to act expeditiously in relation to the institution of urgent proceedings.

344 Ad paragraph 342

The contents of this paragraph are admitted.

345 Ad paragraphs 343 to 345

I have no knowledge of the contents of these paragraphs and defer to the affidavit delivered by the second respondent.

346 Ad paragraphs 346 and 347

I have no knowledge of the contents of these paragraphs and defer to the affidavit delivered by the second respondent.

347 Ad paragraph 348

The contents of this paragraph are admitted.

348 Ad paragraphs 349 to 353

I have no knowledge of the contents of these paragraphs and defer to the affidavit delivered by the second respondent.

349 Ad paragraphs 354 and 355

The contents of these paragraphs are admitted.

350 Ad paragraphs 356 to 363

350.1 In these paragraphs, the OUTA endeavours to justify the failure to bring this application earlier on the basis of what it contends are contrary indications in the press concerning the effective date of tolling.

350.2 The issue is that, as stated above, this matter concerns the reviewing and setting aside of notices that were published in 2008 and not the interdicting of a toll paying system.

350.3 Certainly, there were indications in the press, at times contradictory, concerning when the payment of tolls were to commence but at no time did any one of the respondents state in the media or elsewhere that the declaration of toll roads would be revisited and perhaps not proceeded with on the basis that is set out and contended for by the applicants.

350.4 The contents of these paragraphs bring no relief to the applicants in relation to the lateness of the application based on the relief they seek in their notice of motion. Accordingly, there is simply no basis upon which the condonation should be granted or should be accepted as a justification for the lateness of this application bearing in mind not only as the application late but it is contended that it is urgent.

351 Ad paragraphs 364 to 370

351.1 This matter is certainly one of unprecedented public controversy and may be in the public interest. But in light of –

351.1.1 the issue concerning the declaration of toll roads arising in 2008;

351.1.2 the construction of toll gantries occurring throughout the province from 8 September 2009.;

351.1.3 the debate concerning tolling taking place in the press from as early as 2007 and which debate continues,

there still exists no justification in these paragraphs why the application is late or why, due to the lateness of the application, which the applicants admit, it should be condoned on the basis that tolling in Gauteng is a matter of public interest. This was always the case.

351.2 The public interest element of tolling has always remained a feature of this particular project and it cannot now be used as a basis to justify the lateness of the application.

351.3 For these reasons alone, the allegations contained in these paragraphs are denied as if specifically traversed.

352 Ad paragraph 371

The contents of this paragraph are denied since the then general manager of SAVRALA, Val van den Bergh, was invited to attend the stakeholder engagement session in July 2008 at the Irene Country Lodge. The precise engagement by Val van den Bergh in this session has been dealt with above in greater detail. Therefore, the allegations in this paragraph certainly do not assist with the application for condonation in so far as, on SAVRALA's version, it knew about the issues with which the notices attached to the Notice of Motion were concerned, in May 2009.

353 Ad paragraph 372

The contents of this paragraph are not within my knowledge and are denied.

354 Ad paragraph 373

The contents of this paragraph are admitted but, once again, they do not assist SAVRALA in relation to the application for condonation that is now sought.

355 Ad paragraphs 374 to 376

The contents of these paragraphs are admitted.

356 **Ad paragraph 377**

356.1 I am aware of Van den Bergh's concerns based on the note attached as annexure "**NA9**". Van den Bergh's concerns have not changed since 2008.

356.2 I consequently deny the contents of these paragraphs.

357 **Ad paragraph 378**

The contents of this paragraph are admitted.

358 **Ad paragraph 379**

In so far as an activity report is attached as annexure "**FA66**" to the affidavit, the founding affidavit, this allegation is admitted but the contents of the report are denied.

359 **Ad paragraph 380**

In relation to the existence of a confirmatory affidavit as annexure "**FA67**" to the founding affidavit, this allegation is admitted but the balance of the contents of this paragraph as well as the contents of Van den Bergh's affidavit are denied.

360 Ad paragraph 381

- 360.1 The issue here emerges in relation to a lack of action by SAVRALA and Van den Bergh during 2009. In relation to the concerns already felt or expressed by Van den Bergh, in paragraph 377, there already was a basis, on SAVRALA's version, for legal action.
- 360.2 The fact that "there were no further interactions of real significance until a meeting between the National Executive Committee of SAVRALA and Van Niekerk... on 25 May 2010" does not assist SAVRALA in justifying why it took no action until 2012.
- 360.3 Unfortunately, there simply is not a justification for the delay in the proceedings.
- 360.4 In any event, with the publication of notices in 2008 and the first interaction between SAVRALA and SANRAL in July 2008, the amount of time that passed between the first publication of the notices and the first interaction between these entities remains unexplained. SAVRALA had more than enough time within which to bring these proceedings or appeal and challenge the notices now attached to the notice of motion.

360.5 No justification whether in the preceding paragraphs or those dealt with below, on the basis of SAVRALA's plea for condonation, are able to justify the position that the proceedings are late and simply out of time.

360.6 The remaining allegations contained in this paragraph are denied.

361 Ad paragraphs 387 to 396

For the reasons stated above, the relevance of these paragraphs to the application for condonation is denied.

362 Ad paragraphs 397 to 400

For the reasons stated above, the relevance of these paragraphs to an application for condonation is denied. Certainly, interactions may have taken place between SAVRALA and SANRAL but these interactions do not, in any way, assist SAVRALA with justifying the lateness of this application.

363 Ad paragraphs 401 to 404

The contents of these paragraphs are admitted but, once again, the relevance of these paragraphs to an application for condonation is denied.

364 Ad paragraphs 405 to 407

364.1 In relation to representations made by SAVRALA, these representations are admitted. In this regard, the representations are detailed and clearly SAVRALA was aware of its position at the time that these presentations were made, which was, at least, during March 2011.

364.2 Still there is no explanation as to why there is a considerable delay - of one year - between the position in which SAVRALA finds itself at the time of the GFIP Steering Committee hearings and the institution of these proceedings.

364.3 In fact, the delay becomes even more inexcusable when one has regard to the contents of annexure "FA74" to the founding affidavit and the degree of detail contained in this presentation in respect of the issues that now also find themselves in the founding affidavit.

365 Ad paragraphs 408 to 412

365.1 Being "placed on its guard" is not, with respect, the test as to whether or not a matter is urgent in law. The issues with which these paragraphs are concerned may indeed constitute the position in which SAVRALA finds itself but do not excuse the lateness of the application that has now been instituted.

365.2 This application, as already stated, concerns the notice of intention to declare certain roads to be toll roads – a fact that existed in March 2008. Unfortunately, SAVRALA has indeed been supine and it cannot now contend that the morass of facts, meetings, representations and presentations contained in these paragraphs justify that its application should be condoned as being as late as it is.

366 Ad paragraphs 413 to 425.3

366.1 Similarly, to the position adopted by SAVRALA, QASA adopts the same position: the difficulty, however, is that, on QASA's own version, it became aware of the "public outcry" in February 2011, some fourteen months ago.

366.2 There is a concerted effort to justify, also through interactions with Government, why the application by QASA does not happen sooner than 20 March 2012. In fact, on the applicants' own version, QASA was already concerned about the issue of tolling on 23 February 2011, when annexure "**FA75**" was addressed by it to the Minister of Women, Children and People with Disabilities.

366.3 There is no distinction between QASA's tardiness and that of SAVRALA.

366.4 There is simply no basis in the explanation provided by QASA on which to allow for this application to be delivered so late or for the urgency to exist in the manner that it does.

366.5 Therefore, the contents of these paragraphs in so far as they endeavour to be relevant to an application for condonation are denied.

367 Ad paragraphs 426 to 429

For the reasons set out above, the contents of these paragraphs are denied.

368 Ad paragraph 430

The contents of this paragraph are admitted.

369 Ad paragraphs 431 to 431.4

The contents of these paragraphs are noted.

370 Ad paragraphs 432 to 441 (Reasonable apprehension of harm)

370.1 This application does not concern the payment of toll.

370.2 As stated above, this application concerns the reviewing and setting aside of declarations to declare certain roads to be toll roads.

370.3 Nothing in these paragraphs indicates the reasonable apprehension of harm in relation to the notices attached to the notice of motion. There is no reasonable apprehension of harm in respect of these notices on the case made out by the applicants in the notice of motion and the founding affidavit. Even if this is not the case, with exemption processes in place, there is no reasonable apprehension of harm by members of the applicants.

370.4 For these reasons alone, the contents of these paragraphs are denied.

371 Ad paragraphs 442 to 453 (Balance of convenience)

371.1 As stated above, an extraordinarily lengthy period of time has been taken by the applicants in bringing this application – bearing in mind the existence of the notices, attached to the notice of motion, already in 2008.

371.2 A great deal of time, money and expenditure has already occurred in relation to the establishment of the toll road structures and infrastructure in Gauteng. This amount is currently approximately R20 billion.

371.3 In relation to the economic consequences should SANRAL and the State not be in a position to proceed with the collection of tolls on the

GFIP, this issue has already been dealt with and the exposure of SANRAL and the State economically is significant. Further argument in this regard shall be addressed at the hearing of this application.

371.4 In relation to the issues dealt with in this section, the balance of convenience certainly favours the respondents if regard is had to the economic consequences of the construction and upgrading of roads and the imposition and construction of the e-toll collection system in Gauteng. For every month which tolling is delayed, beyond 30 April 2012, the first respondent will forego approximately R225 million of revenue. This amount will need to be found in order for the first respondent to service its obligations. Conversely and in respect of the applicants, these roads, although probably the most convenient after all the upgrade works undertaken by the first respondent, are most certainly not the only roads available to the applicants and their members. In addition and as I have addressed above, the applicants are at liberty to apply to SANRAL for an exemption from the payment of toll and which would apply to a category of road users. Any application in this regard will be addressed by SANRAL, in accordance with the requirements of administrative justice, and if appropriate the necessary exemption will be granted. For this reason, the contents of these paragraphs are denied as if specifically traversed.

372 Ad paragraph 454

The contents of this paragraph are denied for the reasons set out above.

373 Ad paragraph 455

The contents of this paragraph are admitted.

374 Ad paragraph 456

The contents of this paragraph are admitted.

375 Ad paragraphs 457 to 458

375.1 The allegations in paragraph 457 are denied. The terms and conditions address the contractual relationship between SANRAL and those road users who elect to register with SANRAL. They address, inter alia, terms and conditions relating to registration and payment of toll. They do not and do not purport to apply to users who elect not to register. As previously indicated registration with SANRAL and the acquiring of an e-tag are not requirements for the use of the GFIP toll roads.

375.2 Users who elect not to register with SANRAL will use the road and pay toll in accordance with the requirements of the SANRAL Act only and will not be subject to the terms and conditions.

375.3 In any event, and as addressed at the commencement of this affidavit and as is further apparent from the applicants affidavit, SANCU has referred its complaint against the terms and conditions to the National Consumer Commission. There is however no explanation offered by the applicant as to why the application before the National Consumer Commission or NCC has not been accelerated by the applicants. No answer is provided as to why it has been left to linger to the point that the applicants now wish to institute urgent proceedings before the above Honourable Court to preserve their rights before the NCC. SANCU have never indicated to SANRAL that they would approach the Courts to address their concerns in this regard.

375.4 The provisions of the terms and conditions highlighted in paragraph 458 have been quoted out of context and accordingly the allegations made in respect thereof are denied. In any event and for the reasons set out hereunder, it is not necessary for me to address all the allegations.

376 Ad paragraph 459

The contents of this paragraph are denied.

377 Ad paragraphs 460 to 462

The contents of these paragraphs are admitted.

378 Ad paragraph 463

In so far as the sections of the CPA have been correctly quoted, the contents of this paragraph are admitted. I however deny that the terms and conditions purported to exclude or hinder the consumer's right to take legal action or to exercise any other legal remedy or to restrict the evidence available to the consumer or to impose a burden of proof which should lie with SANRAL.

379 Ad paragraphs 464 to 488

379.1 SANRAL has given serious consideration to the issues raised by SANCU in its correspondence to SANRAL and which relates to the terms and conditions. SANCU's letter to SANRAL is FA78 to the founding affidavit of the applicant. This correspondence formed the basis of SANCU's complaint to the NCC. This complaint is FA81 to the founding affidavit of the applicant.

379.2 Although SANRAL remains of the view that the current terms and conditions do not offend, in any way, the requirements of the CPA and are consistent with the requirements of all legislation for, inter alia, the reasons set out in SANRAL's response (FA79 to the founding affidavit

of the applicant) to SANCU's correspondence at FA78, SANRAL has elected to prepare new terms and conditions in order to address the concerns raised.

379.3 In this way SANRAL would seek to avoid unnecessary debates relating to the terms and conditions when all concerns can be addressed by restating and amending the current terms and conditions.

379.4 The new terms and conditions will replace the current terms and conditions and will come into effect before tolling of the GFIP commences on 30 April 2012.

379.5 The new terms and conditions will apply to all persons who have already registered with SANRAL and all persons who elect to register with SANRAL in the future.

379.6 SANRAL has in its response to the NCC, with regard to the SANCU complaint and which response is attached marked "**NA24**", explained how the new terms and conditions will address the individual matters raised in the SANCU complaint. As will be appreciated from SANRAL's response, the new terms and conditions address and take into account all concerns raised.

379.7 SANRAL will provide the Court, at the hearing of this matter, with the new terms and conditions and which will have been completed by that

date. It will be noted that they will be materially different from the terms and conditions complained of by SANCU.

379.8 In conclusion I repeat that the relief sought by SANCU in this application and relating to the terms and conditions is inappropriate as they should, as they were obliged to do, have pursued this matter with the NCC. This is precisely what SANRAL have done.

379.9 It follows that the terms and conditions, in respect of which SANCU complains, will be of no force or effect on the commencement of tolling and therefore SANRAL, as the first respondent, will not levy and collect tolls on the basis of these terms and conditions. Further argument in this regard shall be addressed at the hearing of this application.

380 Ad paragraph 489 to 497

380.1 These paragraphs constitute a complaint before the NCC and the point of raising this complaint before the above Honourable Court when it is already before the NCC is incorrect.

380.2 SANRAL objects to having to deal with this complaint in this forum as well as before the NCC.

380.3 SANRAL has already addressed the manner in which it will deal with the terms and conditions.

380.4 SANRAL does not admit the contents of these paragraphs and does not purport to deal with them in relation to the existence of the complaint already before the NCC.

381 Ad paragraphs 498 to 506

381.1 The issues concerning urgency in this application have been dealt with above.

381.2 The application is simply not urgent based on the amount of time that has elapsed: the amount of time that has indeed elapsed in this matter between the publication of the notices attached to the notice of motion would easily have allowed the applicants to prepare an application timeously albeit that large amounts of documents were involved or that the HMKL record may not have been available at that time. Unfortunately, none of the facts raised in any of these paragraphs justifies the urgency that is now contended for by the applicants. The contents of these paragraphs are denied and further argument will be presented at the hearing of this application.

382 Ad paragraphs 507 to 509

The contents of these paragraphs are noted.

383 Ad paragraphs 510 to 510.2

The contents of these paragraphs are denied.

WHEREFORE the first respondent prays that the application be dismissed with costs.

I certify that this affidavit was signed and sworn to before me at [] on this the day of April 2012 by the deponent who acknowledged that he/she knew and understood the contents of this affidavit, had no objection to taking this oath, considered this oath to be binding on his/her conscience and uttered the following words: 'I swear that the contents of this affidavit are both true and correct, so help me God.'

NAZIR ALLI

COMMISSIONER OF OATHS

Name:

Address:

Capacity